

Punishment for Early Florida Primaries

Nelson v. Dean (4:07-cv-427) and Ausman v. Browning (4:07-cv-519) (Robert L. Hinkle, N.D. Fla.)

On November 20, 2007, six Florida voters filed in Leon County Circuit Court an action against Florida’s secretary of state challenging the state’s moving its presidential primaries to January 29, 2008, despite possible sanctions by the major political parties, which could weaken the effectiveness of Florida voters.¹ Nine days later, the secretary removed the case to federal court in the Northern District of Florida.²

The court assigned the case to Judge Stephan P. Mickle, but five days later the case was reassigned to Judge Robert L. Hinkle because it was related to a case already pending before Judge Hinkle.³ To avoid an opportunity for parties to file several cases and then select which case to pursue based on the judge assigned to it, the district enforces a policy of assigning related cases to judges assigned to the earliest filed case⁴

Judge Hinkle’s earlier case was filed on October 4, and it sought to curtail the Democratic Party’s sanctions against Florida for holding an early primary.⁵ In that action, Judge Hinkle granted the defendants summary judgment on December 5.⁶

The decision whether to adopt a schedule (at least if not wholly unreasonable) rests with the national party, not with a single state legislature or state party. The decision whether to seat delegates chosen outside the approved schedule also rests with the national party, not with the defiant state legislature or state party. . . .

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1. Notice of Removal, *Ausman v. Browning*, No. 4:07-cv-519 (N.D. Fla. Dec. 7, 2007), D.E. 1 (attaching state court complaint); see Michael C. Bender, *Suit Seeks to Roll Back Florida’s Primary Date*, Palm Beach Post, Nov. 21, 2007, at 4A; Mary Ellen Klas, *Lawsuit Seeks Later Florida Primary*, Miami Herald, Nov. 21, 2007, at B5.

2. Notice of Removal, *supra* note 1.

3. Reassignment Order, *id.* (Dec. 12, 2007), D.E. 5; see Notice of Similar Action, *id.* (Dec. 11, 2007), D.E. 3.

Tim Reagan interviewed Judge Hinkle for this report by telephone on October 10, 2012.

4. Interview with Hon. Robert L. Hinkle, Oct. 10, 2012.

5. Complaint, *Nelson v. Dean*, No. 4:07-cv-427 (N.D. Fla. Oct. 4, 2007) (naming three voters as plaintiffs); *Nelson v. Dean*, 528 F. Supp. 2d 1271, 1275 (N.D. Fla. 2007); see First Amended Complaint, *Nelson*, No. 4:07-cv-427 (N.D. Fla. Oct. 26, 2007), D.E. 5 (naming eight voters as plaintiffs); see also Lesley Clark & Beth Reinhard, *Nelson, Hastings Sue Their Party*, Miami Herald, Oct. 5, 2007, at B1; Abby Goodnough, *Senator Suing Own Party Over Discord on Florida*, N.Y. Times, Oct. 4, 2007, at A22; Larry Lipman, *Nelson, Hastings Sue Over Primary*, Palm Beach Post, Oct. 5, 2007, at 1A.

6. Minutes, *Nelson*, No. 4:07-cv-427 (N.D. Fla. Dec. 5, 2007), D.E. 29; see Lloyd Dunkelberger, *Judge Tosses Out Primary Lawsuit*, Sarasota Herald Trib., Dec. 6, 2007, at 1; Mary Ellen Klas, *Primary Date Suit Dismissed*, Miami Herald, Dec. 6, 2007, at B3; Jennifer Liberto, *Florida Democrats’ Suit Tossed*, St. Petersburg Times, Dec. 6, 2007, at 4B.

In the case at bar . . . , the national party has a First Amendment right to adopt delegate selection rules and to exclude delegates chosen in violation of those rules.⁷

On December 13, in the action against Florida challenging the primary date, the plaintiffs filed a motion for a preliminary injunction based on their state court motion for a temporary injunction,⁸ and a motion to expedite consideration.⁹ Judge Hinkle held a telephonic scheduling conference on December 19,¹⁰ after which he ordered completion of briefing on December 28.¹¹

At the end of a hearing on the injunction motion on January 3, 2008, Judge Hinkle denied the motion.¹² After the January primaries, Judge Hinkle stayed the case until after the 2008 general election.¹³

The Democratic Party decided on May 31, 2008, that votes for delegates from Florida and Michigan would be halved because of the states' holding their primary elections too early.¹⁴ Once Barack Obama had secured enough votes for the nomination, however, all delegates were seated with full votes.¹⁵

Middle District Action for Clarification

A Floridian had filed a federal declaratory action in the Middle District of Florida on August 30, 2007, seeking judicial clarification of the effect of votes in Florida's Democratic presidential primary election.¹⁶ Six days later, the plaintiff filed a motion for summary judgment: "a declaratory judgment determining whether the National party must accept and seat delegates elected by the State of Florida at its Presidential preference primary scheduled for January 29, 2008, regardless of National party rules and decisions to the contrary."¹⁷ Judge Richard A. Lazzara denied the motion as premature, especially because the defendant party had not yet been served.¹⁸ On October 5, Judge Lazzara dismissed the case, concluding that "it is a matter of foregone conclusion that this Court is not the appropriate entity to decide whether the Florida delegation to the Convention should be seated."¹⁹ On March 21, 2008, the court of

7. *Nelson*, 528 F. Supp. 2d at 1272, 1278.

8. Preliminary Injunction Motion, *Ausman*, No. 4:07-cv-519 (N.D. Fla. Dec. 13, 2007), D.E. 6 (attaching state court motion).

9. Expedition Motion, *id.* (Dec. 13, 2007), D.E. 8.

10. Minutes, *id.* (Dec. 19, 2007), D.E. 12.

11. Order, *id.* (Dec. 20, 2007), D.E. 13.

12. Order, *id.* (Jan. 8, 2008), D.E. 20; Minutes, *id.* (Jan. 3, 2008), D.E. 18.

13. Order, *id.* (Mar. 10, 2008), D.E. 35.

14. See Katharine Q. Seelye & Jeff Zeleny, *Democrats Approve Deal on Michigan and Florida*, N.Y. Times, June 1, 2008, at A1.

15. See DiMaio v. Democratic Nat'l Comm., 555 F.3d 1343, 1345 (11th Cir. 2009); Katharine Q. Seelye, *Obama Asks Panel to Restore Votes*, N.Y. Times, Aug. 4, 2008, at A12.

16. Complaint, DiMaio v. Democratic Nat'l Comm., No. 8:07-cv-1552 (M.D. Fla. Aug. 30, 2007), D.E. 1.

17. Summary Judgment Motion, *id.* (Sept. 5, 2007), D.E. 4.

18. Order, *id.* (Sept. 5, 2007), D.E. 5.

On September 26, 2007, Judge Lazzara denied a renewed motion for summary judgment while the defendants' motion to dismiss the action was pending. Order, *id.* (Sept. 26, 2007), D.E. 14.

19. Opinion, *id.* (Oct. 5, 2007), D.E. 18.

appeals affirmed Judge Lazzara's additional conclusion that the plaintiff lacked standing because he "never alleged that he actually voted, nor even so much as suggested that he intended to vote in the Florida Democratic Primary."²⁰

Unsuccessful Action for a New Election

On April 7, 2008, a primary election voter filed a federal complaint in the Northern District seeking a second Democratic presidential primary election in Florida to satisfy national party rules and avoid effective nullification of the January 29 Democratic election.²¹ On May 5, Florida's secretary of state notified the court that this new case was related to the other two cases over which Judge Hinkle presided.²² The court transferred the case from the Pensacola Division to Judge Hinkle in the Tallahassee Division.²³ On July 13, Judge Hinkle stayed this case as well until after the 2008 election.²⁴ "[T]he national parties may or may not take action at their national conventions that would moot or otherwise affect the plaintiff's claims as applicable to future elections. The prudent course is to wait until after the 2008 election to see whether there remains a controversy calling for judicial resolution."²⁵ Following the general election, the plaintiff voluntarily dismissed the action.²⁶

Middle District Actions to Seat and Count All Delegates

The plaintiff in Judge Lazzara's case filed another federal complaint in the Middle District's Tampa courthouse on April 8, 2008, against the Democratic National Committee seeking an injunction requiring the party to seat and count all delegates from Florida.²⁷ On April 15, Judge James S. Moody, Jr., transferred the case to Judge Lazzara.²⁸ A pro se action seeking to ensure that primary voters' votes had full effect, which had been filed on March 20 in the Jacksonville Division, was transferred to Judge Lazzara on May 15.²⁹ At a May 28 hearing, Judge Lazzara granted summary judgment to the party, relying in part on his resolution of the earlier declaratory action.³⁰ The court of appeals

20. DiMaio v. Democratic Nat'l Comm., 520 F.3d 1299, 1302 (11th Cir. 2008).

21. Complaint, *McCorvey v. Browning*, No. 3:08-cv-138 (N.D. Fla. Apr. 7, 2008), D.E. 1.

22. Notice, *id.* (May 5, 2008), D.E. 12.

23. Order, *McCorvey v. Browning*, No. 4:08-cv-218 (N.D. Fla. June 6, 2008), D.E. 23; Order, *id.* (May 9, 2008), D.E. 15; *see* Stipulation for Transfer, *id.* (May 5, 2008), D.E. 13.

24. Opinion, *id.* (July 13, 2008), D.E. 24.

25. *Id.* at 3.

26. Order, *id.* (Nov. 11, 2008), D.E. 26.

27. Complaint, *DiMaio v. Democratic Nat'l Comm.*, No. 8:08-cv-672 (M.D. Fla. Apr. 8, 2008), D.E. 1.

28. Amended Order, *id.* (Apr. 17, 2008), D.E. 5 (correcting Judge Lazzara's first name); Order, *id.* (Apr. 15, 2008), D.E. 4.

29. Order, *Bloom v. Democratic Nat'l Comm.*, No. 3:08-cv-284 (M.D. Fla. May 15, 2008), D.E. 14; Order, *DiMaio*, No. 8:08-cv-672 (M.D. Fla. May 8, 2008), D.E. 19; *see* Complaint, *Bloom*, No. 3:08-cv-284 (M.D. Fla. Mar. 20, 2008), D.E. 1.

30. Order, *DiMaio*, No. 8:08-cv-672 (M.D. Fla. May 28, 2008), D.E. 24; Transcript at 54, *DiMaio*, No. 8:08-cv-672 (M.D. Fla. May 28, 2008, filed Aug. 12, 2008), D.E. 34 ("If there's any resolution in this case, in my view, it lies in the political proves, not here."); Minutes, *id.* (May 28, 2008), D.E. 22.

dismissed an appeal as moot on January 30, 2009, after the presidential inauguration.³¹

Southern District Action to Seat and Count All Delegates

Three delegates filed a federal complaint against the Democratic National Committee in the Southern District of Florida on May 22, 2008, seeking an injunction requiring the party to seat and count all delegates selected as a result of the January 29 primary election.³² Following the party's decision to give the delegates votes,³³ the plaintiffs voluntarily dismissed the case.³⁴

Resolution of the First Case Against Florida

On October 5, 2009, Judge Hinkle dismissed the 2007 action against Florida.³⁵

The state statute setting the primary date remains in effect, but the national parties have not set the earliest date on which 2012 delegates can be selected. If there remains a conflict, it will be known in ample time to allow a federal court to address any issues that any person with standing may choose to present.

....

... Under the law of the circuit, an individual voter or candidate cannot challenge a state's insistence that a party participate in a primary that the party itself chooses not to challenge.³⁶

31. DiMaio v. Democratic Nat'l Comm., 555 F.3d 1343 (11th Cir. 2009).

32. Complaint, Geller v. Democratic Nat'l Comm., No. 0:08-cv-60774 (S.D. Fla. May 22, 2008), D.E. 1 [hereinafter *Geller Complaint*]; see Mary Ellen Klas & Breanne Gilpatrick, *DNC Is Sued Over Voting*, Miami Herald, May 23, 2008, at 1B.

On June 6, 2008, after the party's decision to give the delegates half votes, the plaintiff pledged to support Barack Obama withdrew from the case, leaving a delegate pledged to support Hilary Clinton and an unpledged super delegate. Docket Sheet, *Geller*, No. 0:08-cv-60774 (S.D. Fla. May 22, 2008) (D.E. 5); Motion, *id.* (June 6, 2008), D.E. 4; see *Geller Complaint*, *supra* note 32, at 2–4.

33. See Notice, *id.* (June 12, 2008), D.E. 7.

34. Order, *id.* (Aug. 15, 2008), D.E. 12.

35. Order, *Ausman v. Browning*, No. 4:07-cv-519 (N.D. Oct. 5, 2009), D.E. 65.

36. *Id.* at 3, 5.