Compliance with the Help America Vote Act for Provisional Ballots

Sandusky County Democratic Party v. Blackwell (3:04-cv-7582) and League of Women Voters of Ohio v. Blackwell (3:04-cv-7622) (James G. Carr, N.D. Ohio)

On September 27, 2004, five weeks in advance of the 2004 general election, the Democratic Parties of Ohio and Sandusky County filed a federal action in the Northern District of Ohio's Toledo courthouse complaining that a directive on provisional ballots by Ohio's secretary of state failed to adequately implement requirements of the Help America Vote Act (HAVA).[1] The plaintiffs sought a preliminary injunction.[2]

Judge James G. Carr drew the case; he was on vacation at the time.[3] Three days after the case was filed, Judge Carr held a telephone conference from Florida.[4] Judge Carr regards this case as a successful demonstration of presiding over a case remotely.[5] On the day after the teleconference, the plaintiffs filed an amended complaint adding three labor organizations as plaintiffs.[6]

One week after the case began, three voters sought to intervene as defendants to protect "a fair and orderly election process."[7] Judge Carr granted the motion.[8]

On October 5, ten voting rights organizations filed another federal action in the Toledo courthouse challenging the same directive as was challenged in the first action and also challenging a directive that would require first-time voters who registered by mail to cast provisional ballots if they do not have proper identification at the polls on election day.[9] On the following day, the plaintiffs filed a

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1. Complaint, Sandusky Cnty. Democratic Party v. Blackwell, No. 3:04-cv-7582 (N.D. Ohio Sept. 27, 2004), D.E. 1; Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 570 (6th Cir. 2004); *see* Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 42 U.S.C. §§ 15301–15545 (2010); *see also* William Hershey, *Suit Alleges Voter Impediments*, Dayton Daily News, Sept. 28, 2004, at B1; Mark Niquette, *Suit Aimed at Ballot Rules*, Columbus Dispatch, Sept. 28, 2004, at 1C. *See generally* Brian Kim, *Help America Vote Act*, 40 Harv. J. on Legis. 579 (2003).

2. Preliminary Injunction Motion, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 27, 2004), D.E. 2.

3. Interview with Hon. James G. Carr, June 18, 2012. Tim Reagan interviewed Judge Carr for this report by telephone.

4. *Id.*; *see* Order, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 5, 2004), D.E. 9.

5. Interview with Hon. James G. Carr, June 18, 2012.

6. Amended Complaint, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 1, 2004), D.E. 4; *see* Sandusky Cnty. Democratic Party v. Blackwell, 339 F. Supp. 2d 975, 977 (N.D. Ohio 2004).

7. Intervention Motion, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 4, 2004), D.E. 8.

8. Order, *id.* (Oct. 7, 2004), D.E. 12.

9. Complaint, League of Women Voters of Ohio v. Blackwell, No. 3:04-cv-7622 (N.D. Ohio Oct. 5, 2004), D.E. 1; *see* Laura A. Bischoff, *Blackwell Sued Again on Vote Order*, Dayton Daily News, Oct. 6, 2004, at 3B; Scott Hiaasen, *Second Lawsuit Challenges Ohio Provisional Voting Rules*, Cleveland Plain Dealer, Oct. 6, 2004, at B3.

motion for a preliminary injunction.[10] As luck would have it, Judge Carr drew this case as well.[11] He denied a motion to consolidate the two cases.[12]

Judge Carr granted the Democratic Parties in the first case a preliminary injunction on October 14, a week and three days after the case began.[13] Judge Carr determined that HAVA creates individual rights enforceable through 42 U.S.C. § 1983, plaintiffs have standing to enforce those rights, and the secretary's directive conflicts with HAVA.[14] Both the secretary of state[15] and the interveners[16] appealed.

While his injunction was on appeal, Judge Carr required the secretary to prepare a HAVA-compliant directive; Judge Carr determined, on October 20, that the new directive that the secretary prepared did not comply with HAVA.[17] This was one of five orders Judge Carr issued while his injunction was on appeal;[18] in addition, he discussed with the secretary's attorney the judge's option to enforce his orders with contempt proceedings with the possible assistance of the U.S. Marshal.[19]

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10. Preliminary Injunction Motion, *League of Women Voters of Ohio*, No. 3:04-cv-7622 (N.D. Ohio Oct. 6, 2004), D.E. 8.

11. Docket Sheet, *id.* (Oct. 5, 2004); Interview with Hon. James G. Carr, June 18, 2012.

12. Order, *League of Women Voters of Ohio*, No. 3:04-cv-7622 (N.D. Ohio Oct. 7, 2004), D.E. 9.

13. Sandusky Cnty. Democratic Party v. Blackwell, 339 F. Supp. 2d 975 (N.D. Ohio 2004); Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 571 (6th Cir. 2004); *see* William Hershey, *Judge Overturns Blackwell Directive*, Dayton Daily News, Oct. 15, 2004, at 1B; Mark Niquette, *Provisional Balloting Broadened by Judge*, Columbus Dispatch, Oct. 15, 2004, at 1A; Diane Suchetka, *U.S. Judge Rejects State's Ballot Edict*, Cleveland Plain Dealer, Oct. 15, 2004, at A1.

14. *Sandusky Cnty. Democratic Party*, 339 F. Supp. 2d at 981; *see* Sandusky Cnty. Democratic Party v. Blackwell, 340 F. Supp. 2d 810 (N.D. Ohio 2004) (denying a motion to stay the injunction).

15. Docket Sheet, Sandusky Cnty. Democratic Party v. Blackwell, No. 04-4265 (6th Cir. Oct. 15, 2004); Notice of Appeal, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 14, 2004), D.E. 27; *see* Joe Hallett & Mark Niquette, *Blackwell Vows to Fight Ruling*, Columbus Dispatch, Oct. 16, 2004, at 3B.

16. Docket Sheet, Sandusky Cnty. Democratic Party v. Blackwell, No. 04-4266 (6th Cir. Oct. 15, 2004); Notice of Appeal, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 14, 2004), D.E. 28.

17. Sandusky Cnty. Democratic Party v. Blackwell, 340 F. Supp. 2d 815 (N.D. Ohio 2004); *see* Scott Hiaasen & Bill Sloat, *Provisional Ballots OK'd for Now*, Cleveland Plain Dealer, Oct. 21, 2004, at B3; Mark Niquette, *Judge Blasts Blackwell*, Columbus Dispatch, Oct. 21, 2004, at 1A.

18. *See also Sandusky Cnty. Democratic Party*, 340 F. Supp. 2d 810 (Oct. 18, 2004, denial of motions to stay the injunction during the appeal); Order, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 22, 2004), D.E. 44 (ordering, to ensure full compliance with the court's prior orders, forthwith electronic service on county boards of elections of directives); Order, *id.* (Oct. 18, 2004), D.E. 39 (ordering the preparation of a HAVA-compliant directive in response to a representation by counsel during a teleconference that the secretary had not intended to prepare one); Order, *id.* (Oct. 18, 2004), D.E. 38 (providing a four-hour extension of time to comply with the injunction).

19. Interview with Hon. James G. Carr, June 18, 2012.

Also on October 20, Judge Carr approved in the second case the secretary's directive on provisional ballots for first-time voters.[20] His injunction in the first case already resolved the other matters in the second case.[21] The plaintiffs appealed, but the court of appeals agreed that these other matters were resolved in the first case.[22]

On October 23, the court of appeals affirmed Judge Carr's finding in the first case that the secretary's directive violated HAVA, but reversed Judge Carr's holding that "HAVA requires that a voter's provisional ballot must be counted as a valid ballot if it is cast anywhere in the county in which the voter resides, even if it is cast outside the precinct in which the voter resides."[23] Three days later, the court issued a longer opinion explaining its holding that

> ballots cast in a precinct where the voter does not reside and which would be invalid under state law for that reason are not required by HAVA to be considered legal votes.
>
> To hold otherwise would interpret Congress's reasonably clear procedural language to mean that political parties would now be authorized to marshal their supporters at the last minute from shopping centers, office buildings, or factories, and urge them to vote at whatever polling place happened to be handy, all in the effort to turn out every last vote regardless of state law and historical practice. We do not believe that Congress quietly worked such a revolution in America's voting procedures, and we will not order it.[24]

On the day of the court of appeals' second ruling, Judge Carr ordered the secretary to issue by 3:00 p.m. a directive to county election officials that complied with HAVA and the court of appeals' rulings.[25] The order included a requirement that a notice be posted at polling places: "Your vote, including a vote cast by provisional ballot, will count ONLY if you are voting in the precinct in which you reside. If you do not know whether your correct precinct is located at this polling place, please ask a poll worker now for assistance."[26] Judge Carr saw no such notice at his polling placed when he voted.[27]

On December 29, Judge Carr and the parties agreed to make the injunction permanent.[28] On March 3, 2005, Judge Carr awarded the plaintiffs $64,613.14 in

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20. League of Women Voters v. Blackwell, 340 F. Supp. 2d 823 (N.D. Ohio 2004).

21. *Id.* at 824–25, 831.

22. Order, League of Women Voters v. Blackwell, No. 04-4293, *filed as* Information, League of Women Voters of Ohio v. Blackwell, No. 3:04-cv-7622 (N.D. Ohio Nov. 2, 2004), D.E. 31.

23. Sandusky Cnty. Democratic Party v. Blackwell, 386 F.3d 815 (6th Cir. 2004); *see* John F. Hagan & Bill Sloat, *Court Won't Allow Voting in Wrong Precincts*, Cleveland Plain Dealer, Oct. 24, 2004, at A1; Mark Niquette, *Election Officials Happy Now That Provisional-Ballot Issue Is Put to Bed*, Columbus Dispatch, Oct. 25, 2004, at 1A.

24. Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 568 (6th Cir. 2004).

25. Order, Sandusky Cnty. Democratic Party v. Blackwell, No. 3:04-cv-7582 (N.D. Ohio Oct. 26, 2004), D.E. 46.

26. *Id.* at 3.

27. Interview with Hon. James G. Carr, June 18, 2012.

28. Stipulated Order, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Dec. 29, 2004), D.E. 53.

attorney fees and costs.[29] The court of appeals affirmed.[30] Settlement of fees and costs in the appeal brought the case to a close on January 2, 2007.[31]

29. Sandusky Cnty. Democratic Party v. Blackwell, 361 F. Supp. 2d 688 (N.D. Ohio 2005).

30. Sandusky Cnty. Democratic Party v. Blackwell, 191 F. App'x 397 (6th Cir. 2006).

31. Settlement Notice, *Sandusky Cnty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Jan. 2, 2007), D.E. 71.