

Enjoining Temperamental Voting Machines

*Fetzer v. Barlett (Malcolm J. Howard
and David W. Daniel, E.D.N.C. 4:10-cv-158)*

Four Republican Party county chairs, another voter, and a Republican candidate filed a federal complaint in the Eastern District of North Carolina on Friday, October 29, 2010, to enjoin the use of allegedly defective touchscreen voting equipment in the following Tuesday's general election.¹ The complaint alleged that if the machines were not calibrated properly, Republican voters' choices could be counted for Democratic candidates.² The complaint included a prayer that the court regard it as a motion for a temporary restraining order.³

The court assigned the case to Judge Malcolm J. Howard, who was out of town that week in service to the Foreign Intelligence Surveillance Court.⁴ Judge Howard learned of the filing while waiting for his plane at National Airport.⁵ He referred the case to Magistrate Judge David W. Daniel for a 4:00 p.m. status conference that day.⁶ Judge Howard, whose chambers are in Greenville, heard motions in Raleigh on Saturday afternoon⁷ and granted the plaintiffs a temporary restraining order.⁸ The order required polls using the machines in dispute—just a few of the state's 100 counties—to warn voters that the touchscreens are sensitive and so the voters should review their choices carefully.⁹ The order also required preservation of evidence concerning how the machines functioned.¹⁰

After the election, the plaintiffs withdrew their request for a hearing on a preliminary injunction.¹¹ Later that month, the plaintiffs voluntarily dismissed the case.¹²

1. [Complaint](#), *Fetzer v. Barlett*, No. 4:10-cv-158 (E.D.N.C. Oct. 29, 2010), D.E. 1; see Lynn Bonner, *GOP Files Suit, Saying Electronic Voting Machines Are Flawed*, *Raleigh News & Observer*, Oct. 29, 2010.

2. [Complaint](#), *supra* note 1; see *Voting-Machine Maker Denies GOP Claim*, *Raleigh News & Observer*, Nov. 2, 2010 (“The manufacturer of North Carolina’s touch-screen voting machines says the devices can’t be programmed to default votes to Democrats, as alleged last week by Tom Fetzer, the state Republican Party chairman.”).

3. [Complaint](#), *supra* note 1, at 17–18.

4. [Docket Sheet](#), *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Oct. 29, 2010); Interview with Hon. Malcolm J. Howard, Apr. 15, 2014.

Tim Reagan interviewed Judge Howard for this report by telephone.

5. Interview with Hon. Malcolm J. Howard, Apr. 15, 2014.

6. [Order](#), *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Oct. 29, 2010), D.E. 4.

7. [Docket Sheet](#), *supra* note 4.

8. [Temporary Restraining Order](#), *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Oct. 30, 2010), D.E. 7; see Lynn Bonner, *Judge Orders Voting Machine Alerts*, *Raleigh News & Observer*, Oct. 31, 2010; Laura Oleniacz, *Judge Orders That Voters Be Warned About Voting Machine Issues*, *New Bern Sun J.*, Nov. 1, 2010.

9. [Temporary Restraining Order](#), *supra* note 8; Interview with Hon. Malcolm J. Howard, Apr. 15, 2014.

10. [Temporary Restraining Order](#), *supra* note 8.

11. [Notice](#), *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Nov. 8, 2010), D.E. 18.

12. [Voluntary Dismissal](#), *id.* (Nov. 24, 2010), D.E. 21.