

## Voting Without Notice of Errors

*ACLU v. Brunner*

*(Kathleen M. O'Malley, N.D. Ohio 1:08-cv-145)*

The ACLU and two voters filed a federal complaint on January 17, 2008, in the Northern District of Ohio, challenging the legality of Cuyahoga County's plan to use for the March 4 presidential primary election a central count optical scan system that lacks error notification while other counties would use voting systems that would prevent spoiled ballots by providing voters with notice of errors and an opportunity to correct the errors.<sup>1</sup> One of the plaintiffs was African-American; the defendants included Ohio's secretary of state, the Cuyahoga County Board of Elections and its four members, and the Cuyahoga County Board of Commissioners and its three members.<sup>2</sup>

Among the complaint's prayer for relief was a prayer for a preliminary injunction,<sup>3</sup> but the plaintiffs did not file a motion for such an injunction with their complaint.<sup>4</sup> The court assigned the case to Judge Kathleen M. O'Malley.<sup>5</sup> Not wanting to do the plaintiffs' work for them but also wanting to make sure the case progressed efficiently, Judge O'Malley contacted the plaintiffs about the discrepancy between their complaint and the lack of an injunction motion.<sup>6</sup> On January 23, after contacting the plaintiffs, Judge O'Malley set a telephone conference for January 24.<sup>7</sup> At the conference, Judge O'Malley set a preliminary injunction hearing for February 5,<sup>8</sup> and the plaintiffs filed their motion for a preliminary injunction on January 28.<sup>9</sup>

The plaintiffs subpoenaed testimony at the February 5 hearing from the director of the board of elections for Franklin County, the county that includes Columbus.<sup>10</sup> On February 2, the director moved to quash the subpoena, complaining that it was unreasonable to ask that he be away from Franklin County, which is in the Southern District of Ohio, three days before voting would start.<sup>11</sup> On February 4,

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1. Complaint, *ACLU v. Brunner*, No. 1:08-cv-145 (N.D. Ohio Jan. 17, 2008), D.E. 1; see Joe Guillen, *ACLU Files a Lawsuit to Block Vote Switch*, Cleveland Plain Dealer, Jan. 18, 2008, at B1.

2. Complaint, *supra* note 1.

3. *Id.* at 18.

4. Docket Sheet, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Jan. 17, 2008).

5. Docket Sheet, *supra* note 4.

Tim Reagan interviewed Judge O'Malley for this report by telephone on July 19, 2012.

Judge O'Malley was elevated to a seat on the Court of Appeals for the Federal Circuit on December 27, 2010. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/history/home.nsf/page/judges.html>.

6. Interview with Hon. Kathleen M. O'Malley, July 19, 2012 (describing this as a teaching moment for her law clerks).

7. Notice, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Jan. 23, 2008), D.E. 5; Docket Sheet, *supra* note 4.

8. Minutes, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Jan. 24, 2008), D.E. 6.

9. Preliminary Injunction Motion, *id.* (Jan. 28, 2008), D.E. 8.

10. Subpoena, *id.*, attached to Motion to Quash, *id.* (Jan. 28, 2008), D.E. 21.

11. Motion to Quash, *supra* note 10.

Judge O'Malley ordered him to appear by telephone.<sup>12</sup> Because Judge O'Malley had one of the first high-tech courtrooms, the director testified by videoconference.<sup>13</sup>

On February 4, the NAACP's Cleveland branch filed an amicus curiae brief in opposition to the ACLU's preliminary injunction motion.<sup>14</sup> On instructions from the national head office, the branch withdrew the brief on February 7; the local branch had filed a brief on a matter of national concern without approval from the national head office.<sup>15</sup>

The February 5 hearing lasted seven hours.<sup>16</sup> Judge O'Malley denied the injunction.<sup>17</sup> A significant factor working against the plaintiffs was how late they had filed their complaint.<sup>18</sup> There was considerable evidence from the board of elections supporting the difficulties of implementing any relief.<sup>19</sup>

On a stipulation by the county that it would use notice-based voting equipment for the November 4 general election, the plaintiffs voluntarily dismissed the case on April 2.<sup>20</sup>

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12. Order, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Feb. 4, 2008), D.E. 28.

13. Interview with Hon. Kathleen M. O'Malley, July 19, 2012.

14. Amicus Curiae Brief, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Feb. 4, 2008), D.E. 27.

15. Motion to Withdraw Document, *id.* (Feb. 7, 2008), D.E. 33; *see* Docket Sheet, *supra* note 4 (noting Feb. 19, 2008, permission from the court to withdraw the brief).

16. Minutes, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Feb. 6, 2008), D.E. 30.

17. *Id.*; *see* Mark Niquette & Holly Zacharia, *Tally in Fight with Brunner: 1 New LawsUIT, 1 Challenge Lost*, Columbus Dispatch, Feb. 6, 2008, at 1B.

18. Interview with Hon. Kathleen M. O'Malley, July 19, 2012.

19. *Id.*

20. Voluntary Dismissal, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Apr. 2, 2008), D.E. 50; *see* Order, *id.* (Apr. 4, 2008), D.E. 51 (granting dismissal).