

Enjoining Temperamental Voting Machines

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

A federal complaint filed on Friday, October 29, 2010, challenged the planned use of touchscreen voting machines that the complaint alleged would default to votes for the other party. The district judge assigned to the case was at an airport returning from a week out of town, and he referred the case to a magistrate judge for a status conference on the day that the complaint was filed. On Saturday, the district judge heard the case and issued a temporary restraining order requiring warning notices at polling places instructing voters to review carefully the machines' registration of the voters' choices.

Subject: Voting procedures. *Topics:* Voting technology; election errors; case assignment.

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 He 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 were 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

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.

Judge Daniel died on July 20, 2012. Judicial Milestones, www.uscourts.gov/judicial-milestones/david-w-daniel.

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.

dispute—just a few of the state’s 100 counties—to warn voters that the touchscreens were 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

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.