

Provisional Ballot Procedures in Ohio

Schering v. Blackwell
 (Michael H. Watson, S.D. Ohio 1:04-cv-755)

On election day 2004, a voter filed a federal action challenging a directive by Ohio's secretary of state on the handling of provisional ballots. After an informal status conference, the plaintiff decided not to pursue immediate relief.

Subject: Provisional ballots. *Topic:* Provisional ballots.

At 5:00 p.m. on the day of the November 2, 2004, election, a Hamilton County, Ohio, voter filed a federal action in the Southern District of Ohio's Cincinnati courthouse challenging an October 29, 2004, directive by Ohio's secretary of state on how county boards of elections should handle provisional ballots.¹ Apparently, 155,337 provisional ballots were cast in Ohio on election day.²

District Judge Michael H. Watson held an informal status conference on the following morning.³ At the conference, the plaintiff's attorney said that he would defer adding to the case a request for a temporary restraining order.⁴ A telephonic status conference was set for the following week.⁵ At this conference, the parties agreed that they would inform the court if any further action by the court would be necessary.⁶

The parties stipulated dismissal on March 15, 2005.⁷

Two years later, a pro se litigant attempted to intervene in the case to allege President Bush's orchestration of the September 11, 2001, tragedy.⁸ On

1. Complaint, *Schering v. Blackwell*, No. 1:04-cv-755 (S.D. Ohio Nov. 2, 2004); see Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193, 1199–200 (2005) (describing the lawsuit as a placeholder demonstrating readiness to fight over the standards for evaluating provisional ballots); see also Lisa A. Abraham, *Provisional Ballots Still to Be Verified*, Akron Beacon J., Nov. 4, 2004, at A1; Adam Liptak, *Justice Lets Ohio Ruling on Monitors at Polls Stand*, N.Y. Times, Nov. 3, 2004, at P6; Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1232–33, 1246–49 (2005).

2. See Abraham, *supra* note 1.

3. Minute Entry, *Schering*, No. 1:04-cv-755 (S.D. Ohio Nov. 3, 2004).

Tim Reagan interviewed Judge Watson for this report by telephone on June 7, 2012.

Although Judge Watson's primary chambers were in Columbus, as a recently appointed judge most of his cases at the time were Cincinnati cases. Interview with Hon. Michael H. Watson, June 7, 2012.

4. Minute Entry, *supra* note 3; Docket Sheet, *Schering*, No. 1:04-cv-755 (S.D. Ohio Nov. 2, 2004).

5. Notice of Hearing, *Schering*, No. 1:04-cv-755 (S.D. Ohio Nov. 9, 2004).

6. Minute Entry, *id.* (Nov. 10, 2004); Docket Sheet, *supra* note 4.

7. Stipulation, *Schering*, No. 1:04-cv-755 (S.D. Ohio Mar. 15, 2005); see Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 477 (2008) ("After it became clear that Senator Kerry did not intend to challenge the result of Ohio's election the *Schering* case was dropped [footnote omitted]. But had the election been closer, *Schering* could have turned out to be the *Bush v. Gore* of 2004.").

February 1, 2008, Judge Watson determined that the motion reflected “the fantasies of a troubled mind” and denied the motion.⁹ On April 10, Judge Watson ordered the clerk not to accept any more filings from the would-be intervenor.¹⁰

8. Motion to Intervene, *Schering*, No. 1:04-cv-755 (S.D. Ohio Mar. 13, 2007).

9. Order, *id.* (Feb. 1, 2008).

10. Order, *id.* (Apr. 10, 2008).