

## Incorrect Election Results Because of a Malfunctioning Voting Machine

*Shannon v. Jacobowitz*  
(*David N. Hurd, N.D.N.Y. 5:03-cv-1413*)

After votes were counted in a November 2003 election for a town supervisor, a challenger was ahead of an incumbent by twenty-five votes. There was evidence, however, that a voting machine registered only one vote for the incumbent because it failed to advance its tally with each additional vote. Supporters of the incumbent filed a federal complaint alleging that a comparison of the malfunctioning machine to another machine at the same location implied that the incumbent was deprived of approximately 134 votes. The district judge enjoined certification of the election and enjoined the challenger from taking office. In January 2005, the court of appeals determined that the district court's interference with the election was error. The incumbent remained in office through 2007.

*Subject:* Voting irregularities. *Topics:* Voting technology; enjoining certification.

On November 21, 2003, Matthew Shannon, the incumbent town supervisor in Whitestown, New York, filed a federal constitutional action contesting the election of a challenger for his office, David Jacobowitz, in the November 4 election.<sup>1</sup> Apparently, a single voting machine malfunctioned and registered only one vote for the incumbent on the Democratic Party line, because the counter failed to advance with each vote on that line.<sup>2</sup> (The incumbent was listed on the Democratic, Independence, and Conservative party lines; the challenger was listed on the Republican and Working Families party lines.<sup>3</sup>) After the votes were counted, the challenger was ahead of the incumbent by twenty-five votes.<sup>4</sup> Comparing the malfunctioning machine to another machine at the same location, the plaintiffs estimated that the incumbent was deprived of approximately 134 votes.<sup>5</sup> The plaintiffs included five voters who said they voted for the incumbent on the Democratic line at the malfunctioning machine.<sup>6</sup>

On the complaint's filing, a general order set a status conference before a magistrate judge for March 2004.<sup>7</sup> On December 4, 2003, the plaintiffs submitted a brief, a proposed order to show cause, and affidavits of seventy vot-

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1. Complaint, *Shannon v. Jacobowitz*, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003), D.E. 1; *Shannon v. Jacobowitz*, 394 F.3d 90 (2d Cir. 2005); *Shannon v. Jacobowitz*, 301 F. Supp. 2d 249, 251 (N.D.N.Y. 2003).

2. *Shannon*, 394 F.3d at 91–92; *Shannon*, 301 F. Supp. 2d at 252–53.

3. *Shannon*, 394 F.3d at 91; *Shannon*, 301 F. Supp. 2d at 252; see Complaint, *supra* note 1, at 4.

4. *Shannon*, 394 F.3d at 91; *Shannon*, 301 F. Supp. 2d at 252.

5. Complaint, *supra* note 1, at 5.

6. *Id.* at 3; *Shannon*, 301 F. Supp. 2d at 251.

7. Docket Sheet, *Shannon v. Jacobowitz*, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003).

ers who said that they voted for the incumbent on the Democratic line at the malfunctioning machine.<sup>8</sup> That day, Judge David N. Hurd issued an order to show cause why the incumbent should not be declared the winner of the election.<sup>9</sup> At a hearing on December 18,<sup>10</sup> Judge Hurd issued a temporary restraining order enjoining the county board of elections from certifying a winner of the election and enjoining the challenger from taking the office.<sup>11</sup>

On December 30, Judge Hurd converted the temporary restraining order into a preliminary injunction.<sup>12</sup> He determined that federal relief was appropriate because the only possible state remedy was a quo warranto action,<sup>13</sup> which could be so slow as to take the entire term of office and which would be discretionary with the attorney general.<sup>14</sup> On January 27, 2004, Judge Hurd granted the plaintiffs a summary judgment.<sup>15</sup>

On January 7, 2005, the court of appeals reversed the judgment, holding that Judge Hurd was wrong to consider the adequacy of the quo warranto remedy without a showing of intentional state action against the plaintiffs.<sup>16</sup> Judge Hurd, therefore, dismissed the action on February 2.<sup>17</sup>

The incumbent, nevertheless, held his office through 2007.<sup>18</sup>

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8. *Id.*; *Shannon*, 394 F.3d at 92; *Shannon*, 301 F. Supp. 2d at 253; Order to Show Cause, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003), D.E. 8.

9. Order to Show Cause, *supra* note 8.

10. Minutes, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 23; *Shannon*, 301 F. Supp. 2d at 251.

11. Temporary Restraining Order, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 22; *Shannon*, 301 F. Supp. 2d at 251.

12. *Shannon*, 301 F. Supp. 2d at 258.

13. “A common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed . . . .” Black’s Law Dictionary 1371 (9th ed. 2009).

14. *Shannon*, 301 F. Supp. 2d at 254–58.

15. Opinion, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 48, 2004 WL 180253.

16. *Shannon v. Jacobowitz*, 394 F.3d 90, 97 (2d Cir. 2005).

“We have no occasion to consider, and therefore express no opinion on, whether the New York Attorney General’s refusal to bring a quo warranto action on facts such as these might constitute intentional state action of the sort necessary to create a potential due process violation.” *Id.* at 93 n.2.

17. Judgment, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Feb. 2, 2005), D.E. 66.

18. Compare Whitestown Town Board Minutes, Jan. 1, 2008, [town.whitestown.ny.us/content/MinuteCategories/View/1/2008:field=minutes;/content/Minutes/View/138](http://town.whitestown.ny.us/content/MinuteCategories/View/1/2008:field=minutes;/content/Minutes/View/138) (identifying Charles Gibbs as supervisor), with Whitestown Town Board Minutes, Dec. 19, 2007, [town.whitestown.ny.us/content/MinuteCategories/View/1/2007:field=minutes;/content/Minutes/View/156](http://town.whitestown.ny.us/content/MinuteCategories/View/1/2007:field=minutes;/content/Minutes/View/156) (identifying Matthew Shannon as supervisor).