

Vote Challengers

Spencer v. Blackwell (Susan J. Dlott, S.D. Ohio 1:04-cv-738)
and Summit County Democratic Central
and Executive Committee v. Blackwell
(John R. Adams, N.D. Ohio 5:04-cv-2165)

Federal complaints were filed in both of Ohio's districts late in the week before the 2004 general election challenging an Ohio statute that permitted political parties to appoint poll watchers to challenge persons who may be voting illegitimately. Both judges issued injunctions on Sunday, but the court of appeals stayed the injunctions on Monday.

Subject: Polling-place activities. *Topics:* Registration challenges; intervention.

In complaints filed in each of Ohio's two federal districts late in the week before the 2004 general election, plaintiffs challenged an Ohio statute that permitted political parties to appoint poll watchers to challenge persons who might be voting illegitimately.¹

The Southern District complaint was filed on Wednesday, October 27,² with motions for a temporary restraining order and a preliminary injunction.³ Defendants were Ohio's secretary of state, Hamilton County election officials, and the chair of the Hamilton County Republican Party.⁴ Judge Susan J. Dlott held a telephone conference with all parties that same day.⁵

As luck would have it, this was Judge Dlott's second emergency election case in two days because she was two cases behind the other Cincinnati judge in the temporary-restraining-order draw.⁶ In the other case, Judge Dlott enjoined preelection widespread challenges to voter registration based on returned mail.⁷

1. *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 549 (6th Cir. 2004).

2. Complaint, *Spencer v. Blackwell*, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 1 [hereinafter *Spencer* Complaint]; *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 550.

3. Motion, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 2.

4. *Spencer* Complaint, *supra* note 2.

5. Transcript at 6, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 28, 2004, filed Nov. 1, 2004), D.E. 20 [hereinafter Nov. 1, 2004, *Spencer* Transcript] (noting that Judge Dlott was at the courthouse until 12:15 the following morning); Order at 1, *id.* (Nov. 1, 2004), D.E. 19 [hereinafter *Spencer* Injunction].

For this report, Tim Reagan interviewed Judge Dlott and her law clerk Sarah Fairweather by telephone on July 30, 2012.

6. Transcript at 24, *Miller v. Blackwell*, No. 1:04-cv-735 (S.D. Ohio Oct. 26, 2004), D.E. 18; Interview with Hon. Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012; see Kimball Perry, *Judge to Decide Voting Issues*, Cincinnati Post, Oct. 30, 2004, at A4.

7. Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 27, 2004), D.E. 11.

Judge Dlott began a three-day hearing on the motions at 1:46 p.m. on Thursday.⁸ Present were two plaintiffs' attorneys with two plaintiffs, two defense attorneys with three defendants, one of whom elected to represent himself, and five attorneys representing Hamilton County voters who had moved to intervene as defendants.⁹ Judge Dlott granted the unopposed motion to intervene.¹⁰

The hearing continued on Friday and Sunday.¹¹ On Friday, the secretary issued a press release reversing his previous position and taking a position at odds with the attorney general, whose office was representing him.¹² The secretary and the attorney general were expected to face each other in the 2006 Republican gubernatorial primary election;¹³ the secretary would defeat the attorney general in that election.¹⁴ During the hearing on Friday, October 30, 2004, Judge Dlott received a copy of the press release, and an additional attorney joined the proceeding.¹⁵ The attorney general refused to represent the secretary's position, which he decided was in conflict with Ohio law.¹⁶ The attorney general later filed an answer on behalf of Ohio as an intervenor.¹⁷

On Sunday, Judge Dlott enjoined "all Defendants from allowing any challengers other than election judges and other electors into the polling places throughout the state of Ohio on Election Day."¹⁸ On Monday, the intervenors filed a notice of appeal¹⁹ and sought from both the district court²⁰

8. Nov. 1, 2004, *Spencer* Transcript, *supra* note 5; *see id.* at 18 (noting that the hearing was conducted in a borrowed courtroom).

9. Nov. 1, 2004, *Spencer* Transcript, *supra* note 5, at 1–5, 18; *see* Motion, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 4 (motion by three voters).

10. Nov. 1, 2004, *Spencer* Transcript, *supra* note 5, at 5.

11. Transcripts, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 29 and 31, 2004, filed Nov. 1, 2004), D.E. 26, 29; *Spencer* Injunction, *supra* note 5, at 1 (noting that the Sunday proceeding concluded late in the evening); *see* Bill Sloat & Jesse Tinsley, *Judge to Decide If GOP Can Challenge Voters*, *Cleveland Plain Dealer*, Nov. 1, 2004, at B1.

12. *See* Barry M. Horstman, *Cincinnati: Ground Zero*, *Cincinnati Post*, Oct. 30, 2004, at A1; Mark Niquette & Darrel Rowland, *Challenge Dispute Shifts to Poll Sites*, *Columbus Dispatch*, Oct. 30, 2004, at 1A; Ted Wendling, *New Ohio Election Uproar*, *Cleveland Plain Dealer*, Oct. 30, 2004, at A1.

13. *See* Niquette & Rowland, *supra* note 12; Wendling, *supra* note 12.

14. *See Blackwell Wins Primary for Ohio Governor*, *Cincinnati Enquirer*, May 3, 2006, at A1.

15. Interview with Hon. Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012; *see* Wendling, *supra* note 12.

16. *See* Horstman, *supra* note 12; Niquette & Rowland, *supra* note 12; Wendling, *supra* note 12.

17. Ohio Answer, *Spencer v. Blackwell*, No. 1:04-cv-738 (S.D. Ohio Nov. 1, 2004), D.E. 28.

18. *Spencer* Injunction, *supra* note 5, at 18; *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004) (quoting the district court order); *see* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 *Geo. Wash. L. Rev.* 1206, 1236–37, 1245–46 (2005).

19. Notice of Appeal, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 23.

20. Motion, *id.* (Nov. 1, 2004), D.E. 21.

and the court of appeals²¹ an emergency stay of the injunction. Judge Dlott denied the stay motion.²²

The Northern District complaint against Ohio and Summit County election officials was filed late in the afternoon on Thursday, October 28,²³ also with a motion for a temporary restraining order.²⁴ On Friday, individual voter challengers moved to intervene on behalf of all challengers statewide, except for challengers in Hamilton County.²⁵ Judge John R. Adams held a telephone conference that day.²⁶ Following the conference, he ordered the parties to refrain from ex parte communications.²⁷ Judge Adams had a strict policy against communications with chambers that did not include all parties.²⁸

Judge Adams and his law clerks worked on the case all weekend.²⁹ On Sunday, Judge Adams granted the intervention motion³⁰ and ordered that “persons appointed as challengers may not be present at the polling place for the sole purpose of challenging the qualifications of other voters.”³¹ Judge Adams wished he had a better record on which to rule, and if he had it to do over again he might have tried to take additional evidence, but the time before the election was very short when he got the case.³² More recently, Judge Adams’s district adopted more specific protocols for how to handle election cases; Judge Adams stresses how important it is for the public to have confidence that parties in cases concerning sensitive matters do not have oppor-

21. Docket Sheet, *Spencer v. Blackwell*, No. 04-4312 (6th Cir. Nov. 1, 2004); *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 550.

22. Order, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Nov. 1, 2004), D.E. 25.

23. Complaint at 4, *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, No. 5:04-cv-2165 (N.D. Ohio Oct. 28, 2004), D.E. 1; *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 549; Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 31, 2004), D.E. 20 [hereinafter *Summit Cty. Democratic Cent. & Exec. Comm. Injunction*], 2004 WL 5550698.

24. Motion, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 28, 2004), D.E. 3; *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 549.

25. Motion, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 29, 2004), D.E. 7; *Summit Cty. Democratic Cent. & Exec. Comm. Injunction*, *supra* note 23, at 4–5.

26. *Summit Cty. Democratic Cent. & Exec. Comm. Injunction*, *supra* note 23, at 4; Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 29, 2004) [hereinafter *Summit Cty. Democratic Cent. & Exec. Comm. Admonishment Order*]; Docket Sheet, *id.* (Oct. 28, 2004).

Tim Reagan interviewed Judge Adams for this report by telephone on August 6, 2012.

27. *Summit Cty. Democratic Cent. & Exec. Comm. Admonishment Order*, *supra* note 26.

28. Interview with Hon. John R. Adams, Aug. 6, 2012.

29. *Id.*

30. Marginal Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 31, 2004), D.E. 18; *Summit Cty. Democratic Cent. & Exec. Comm. Injunction*, *supra* note 23, at 5.

31. *Summit Cty. Democratic Cent. & Exec. Comm. Injunction*, *supra* note 23, at 15; *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 549 (6th Cir. 2004) (quoting the district court order); *see Tokaji*, *supra* note 18, at 1237, 1245.

32. Interview with Hon. John R. Adams, Aug. 6, 2012.

tunities for judge shopping.³³

After Judge Dlott became aware of Judge Adams's case, she called him so that they could coordinate their efforts with respect to the timing of their rulings for the benefit of efficient appellate review.³⁴ Judge Adams found the coordination helpful.³⁵

On Monday, as in the Southern District, the intervenors filed a notice of appeal³⁶ and sought from both the district court³⁷ and the court of appeals³⁸ an emergency stay of the injunction. Judge Adams denied the stay motion.³⁹

On Monday, the court of appeals stayed the district court injunctions.⁴⁰ Judge James L. Ryan determined that the plaintiffs did not have standing to bring their cases.⁴¹ Judge John M. Rogers was willing to assume standing; he held that the public interest in fraud-free elections pursuant to established rules weighed against the injunctions.⁴² Judge R. Guy Cole, Jr., dissented, concluding that "the citizens of Ohio have the right to vote without the threat of suppression, intimidation, or chaos sown by partisan political operatives."⁴³ Sixth Circuit Justice Stevens declined to reinstate the injunctions: "That reasonable judges can disagree about the issues is clear enough."⁴⁴

Appeals filed by the State of Ohio after the election⁴⁵ were dismissed on

33. *Id.*

34. Interview with Hon. Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

35. Interview with Hon. John R. Adams, Aug. 6, 2012.

36. Notice of Appeal, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 5:04-cv-2165 (N.D. Ohio Oct. 27, 2004), D.E. 32.

37. Motion, *id.* (Nov. 1, 2004), D.E. 25.

38. Docket Sheet, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 04-4311 (6th Cir. Nov. 1, 2004); Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 549–50 (6th Cir. 2004).

39. Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Nov. 1, 2004), D.E. 26.

40. *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d 547; see Edward B. Foley, *The Future of Bush v. Gore?*, 68 Ohio St. L.J. 925, 993 (2007).

41. *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 551–52 (concurring).

42. *Id.* at 551 (opinion for the court).

43. *Id.* at 552–55 (dissenting).

44. *Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004); see Foley, *supra* note 40, at 993; Tokaji, *supra* note 18, at 1237, 1245.

The allegations of abuse made by the plaintiffs are undoubtedly serious—the threat of voter intimidation is not new to our electoral system—but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs' claims.

... I have faith that the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.

Spencer, 543 U.S. at 1302–03.

45. See Notice of Appeal, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 5:04-cv-2165 (N.D. Ohio Nov. 30, 2004), D.E. 32; Notice of Appeal, *Spencer v. Blackwell*, No. 1:04-cv-738 (S.D. Ohio Nov. 30, 2004), D.E. 35.

March 28, 2005, as moot.⁴⁶ On December 22, Judge Adams granted the plaintiffs in his case a voluntary dismissal.⁴⁷

On April 28, Judge Dlott denied⁴⁸ the plaintiffs a preliminary injunction based on a second amended complaint.⁴⁹ On May 25, 2006, Judge Dlott granted⁵⁰ a stipulated dismissal⁵¹ in light of a 2006 reform of Ohio's election law, which, among other things, included a voter-identification provision.⁵²

46. Docket Sheet, *Spencer v. Blackwell*, No. 05-3006 (6th Cir. Jan. 5, 2005); Docket Sheet, *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, No. 05-3005 (6th Cir. Jan. 5, 2005).

47. Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Dec. 22, 2005), D.E. 48.

48. Order, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Apr. 28, 2005), D.E. 64.

49. Second Amended Complaint, *id.* (Apr. 14, 2005), D.E. 53.

50. Order, *id.* (May 25, 2006), D.E. 75.

51. Stipulation, *id.* (May 23, 2006), D.E. 74.

52. Ohio H.B. 3, Jan. 31, 2006; see Laura A. Bischoff, *Taft Signs Election Reform Measure*, Dayton Daily News, Feb. 1, 2006, at B1; Reginald Fields, *Voter ID Bill Gets Taft's Signature*, Cleveland Plain Dealer, Feb. 1, 2006, at B3; Carrie Spencer Ghose, *Taft Signs Voting Changes Into Law*, Cincinnati Post, Feb. 1, 2006, at A8; Jim Siegel, *Coming This Fall: Voters Must Show ID at Polls*, Columbus Dispatch, Feb. 1, 2006, at 1A.