

Philadelphia Federal Court Acts to Prevent Constitutional Problems from Election Day Delays

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Posted on Upon Further Review (<http://uponfurtherreview.philadelphiabar.org>)

March 9, 2009

A Philadelphia voting case is likely to become widely cited in voting litigation around the country as activists seek to make the voting process more user friendly.

At the end of January, federal Judge Harvey Bartle made permanent an injunction ordering the Pennsylvania Secretary of State to require that paper ballots be made available to voters if 50 percent or more of the voting machines at a polling place are inoperable. Bartle, Chief Judge in the Eastern District of Pennsylvania, had issued a preliminary order to that effect last October, a week before the election, after holding a hearing that lasted until 9 p.m.

The decision was highly unusual because no reported case had previously found that potential delays from long lines in casting a ballot could create a Constitutional violation of the right to vote.

The case, NAACP v. Cortes, 2008 US Dist. LEXIS 87442, on behalf of the Pennsylvania NAACP and several voters who had experienced delays from machine failures in the Spring Primary, was tried by Andy Celli and Jonathan Abady of Emery Celli Brinckerhoff&Abady LLP, John Bonifaz of Voter Action, and Michael Churchill of the Public Interest Law Center of Philadelphia. The state, represented by Hanglely Aronchick Segal&Pudlin did not appeal the preliminary injunction and did not object to it being made permanent.

In his opinion explaining the preliminary injunction, Bartle noted the irreparable harm to a citizen's right to vote which arises if they are effectively denied the right to cast their ballot because of machine breakdowns and long waits. Recognizing that "some waiting in line ... is inevitable and must be expected" he went on to declare:

"Nonetheless, there can come a point when the burden of standing in a queue ceases to be an inconvenience or annoyance and becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise."

Based on the evidence in front of it, the Court found "a real danger that a significant number of machines will malfunction." Because the evidence showed substantial delays before machines are repaired, it found the breakdowns will likely "cause unacceptably long lines" which "will unduly burden and thus deprive many citizens of their right to vote." This, the Court said, was a violation of the Equal Protection Clause of the Fourteenth Amendment.

Three points are noteworthy. The court, facing a slippery slope argument of how much delay was too much delay, did not throw up its hands, but instead came up with an empirical analysis that looked to see if the evidence demonstrated that the breakdowns actually deter voters. It found they do. Secondly, the court did not assume that voters could not complain if they were unable to put everything else in their life aside on election day. Instead, it said:

“We would be blind to reality if we did not recognize that many individuals have a limited window of opportunity to go to the polls due to their jobs, child care and family responsibilities, or other weighty commitments. Life does not stop on election day. Many must vote early or in the evening if they are to vote at all.”

A third and final point about the opinion was how seriously it took the right to vote and any interference with it, not only calling it a “grave” injury but acting on that premise.

The question now is what will Judge Bartle’s opinion set in motion, as other courts will confront claims not just of delays from machine breakdowns, but too few machines assigned to polling places, insufficient election officials to timely process voters, and other foreseeable but uncorrected burdens on the voting process.