Emphasis Votes

Texas Democratic Party v. Dallas County
(Jorge A. Solis, N.D. Tex. 3:08-cv-2117)

After the votes were counted for the 2008 general election, the Republican incumbent for Texas House of Representatives District 105 was ahead of her Democratic challenger by 20 votes,[1] and a recount was planned.[2] The Democratic Party and two voters filed a federal complaint on December 1, 2008, arguing that planned methods of recounting the votes would fail to include votes for the Democratic candidate by voters who both cast a straight-party vote for the Democratic Party and also selected a Democratic candidate.[3] This type of valid vote is referred to as an emphasis vote.[4] The complaint alleged that this difficulty resulted from the replacement in 1998 of punch-card paper ballots with voting machines.[5]

The incumbent moved to intervene on December 4,[6] and Judge Jorge A. Solis granted intervention on December 8.[7] After the recount, the incumbent's margin of victory decreased by one vote.[8] On December 19, the plaintiffs dropped their claims with respect to the Texas House election.[9]

On April 17, 2009, Judge Solis determined that the complaint did not allege valid claims under section 2 of the Voting Rights Act,[10] pertaining to racial or ethnic discrimination in elections, but the complaint did allege a valid claim under section 5,[11] requiring preclearance of election changes in jurisdictions with a certified history of election discrimination.[12] On July 9, the circuit's chief judge named a three-judge court to hear the section 5 claim.[13] On December 17, the three-judge court determined that the Justice Department had not precleared how the new voting machines registered votes for some voters who selected both

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1. *See* Brandon Formby & Marissa Alanis, *GOP Keeps House Seat in Squeaker*, Dallas Morning News, Nov. 11, 2008, at 1A (reporting that the result allowed the Republican party to keep a one-seat advantage in the Texas House of Representatives).

2. *See* Brandon Formby, *Challenger Plans to Pursue Recount*, Dallas Morning News, Nov. 12, 2008, at 1B; Brandon Formby, *Irving Democrat Seeks Recount in Close Race*, Dallas Morning News, Nov. 20, 2008, at 5B.

3. Complaint, Tex. Democratic Party v. Dallas County, No. 3:08-cv-2117 (N.D. Tex. Dec. 1, 2008), D.E. 1; *see* Brandon Formby, *Democrats Sue as Recount Starts*, Dallas Morning News, Dec. 2, 2008, at 1B.

4. Opinion at 2, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Apr. 17, 2009), D.E. 42.

5. Complaint, *supra* note 3.

6. Intervention Motion, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Dec. 4, 2008), D.E. 6.

7. Intervention Order, *id.* (Dec. 8, 2008), D.E. 9.

8. *See Recount Confirms Republican's Slim Victory*, Dallas Morning News, Dec. 6, 2008, at 3.

9. Stipulation, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Dec. 19, 2008), D.E. 17.

10. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, as amended, 42 U.S.C. § 1973 (2010).

11. *Id.* § 5, 79 Stat. at 439, *as amended*, 42 U.S.C. § 1973c (2010) (requiring that preclearance disputes be heard by a three-judge court).

12. Opinion, *supra* note 4.

13. Order, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. July 9, 2009), D.E. 44.

straight-party choices and choices for individual candidates.[14] On April 23, 2012, however, the court dismissed the section 5 claim in light of intervening Justice Department preclearance.[15] An appeal was dismissed voluntarily on January 25, 2013.[16]

14. Order, *id.* (Dec. 17, 2009), D.E. 45; *see* Jason Trahan & Christy Hoppe, *Federal Judges Disallow Dallas County's Use of Voting Machines*, Dallas Morning News, Dec. 22, 2009.

15. Order, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Apr. 23, 2012), D.E. 95; *see* Christy Hoppe, *Justice Department Upholds Voting Machines*, Dallas Morning News, Mar. 25, 2010, at B6.

16. Order, Tex. Democratic Party v. Dallas County, No. 12-10571 (5th Cir. Jan. 25, 2013).