

Holding an Election Before University Students Can Register

May v. City of Montgomery
(*Myron H. Thompson, M.D. Ala. 2:07-cv-738*)

The federal action challenged the moving up of a local election, because it meant that students at a predominantly Black university would not be in town in time to vote. Soon after the action was filed, the Justice Department precleared the change. The federal court declined jurisdiction over state claims.

Subject: Election dates. *Topics:* Student registration; section 2 discrimination; section 5 preclearance; three-judge court; matters for state courts; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

On Thursday, August 16, 2007, twelve days before a city election, a member of Montgomery's city council and two mayoral candidates filed a federal action in the Middle District of Alabama complaining that the city's moving its election for mayor and city council from the second Tuesday in October to the fourth Tuesday in August disadvantaged first-time voters at predominantly Black Alabama State University because many of them would not have moved to town in time to register to vote.¹ The election date had been moved to comply with the state's implementation of the federal Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),² which requires sufficient time between an election and a potential runoff for absentee ballots to reach overseas voters.³ The plaintiffs argued that UOCAVA did not apply to elections that did not include federal offices.⁴

The complaint alleged that the earlier election violated section 2 of the Voting Rights Act because it discriminated against Black voters,⁵ violated section 5 because it had not yet been precleared,⁶ and violated state law.⁷ The

1. Complaint, *May v. City of Montgomery*, No. 2:07-cv-738 (M.D. Ala. Aug. 16, 2007), D.E. 1; *May v. City of Montgomery*, 504 F. Supp. 2d 1235, 1236 (M.D. Ala. 2007); see Andre Coe, *Election Prompts Lawsuit*, *Montgomery Advertiser*, Aug. 17, 2007.

2. 52 U.S.C. §§ 20301–20311. See generally Robert Timothy Reagan, *Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act* (Federal Judicial Center 2016).

3. *May*, 504 F. Supp. 2d at 1236.

4. Complaint, *supra* note 1, at 6.

5. *Id.* at 10; see Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, as amended, 52 U.S.C. § 10301.

6. Complaint, *supra* note 1, at 10; see VRA, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, as amended, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

7. Complaint, *supra* note 1, at 11.

plaintiffs' motion for a temporary restraining order, filed one day after the complaint was filed, discussed only section 5.⁸

The court assigned the case to Judge Myron H. Thompson, who notified the circuit's chief judge that a section 5 claim required a three-judge district court.⁹ That same day, the circuit's chief judge designated a three-judge court for the section 5 claim.¹⁰

When Judge Thompson was assigned a case that was referred to a three-judge court, it was his practice to volunteer to do the logistical legwork in the case.¹¹ On August 20, he conducted a conference with the parties by telephone.¹²

The three-judge court held a short telephone oral argument with the parties and the Justice Department on August 22, and the Justice Department assured the court that the preclearance issue would be resolved promptly.¹³ On August 23, the earlier election was precleared, mooting the section 5 claim, so the three-judge court was dissolved.¹⁴

Noting that the plaintiffs did not seek immediate relief on their section 2 claim, Judge Thompson declined to exercise immediate jurisdiction over the state-law claim: "It should be a *state* judge that should enjoin or vacate a *State's* municipal election under *state* law, with that judicial decision subject to review by *state* appellate judges."¹⁵ On February 28, 2008, the parties agreed that the plaintiffs would dismiss their section 2 claim with prejudice and dismiss their state claim without prejudice.¹⁶

8. Temporary-Restraining-Order Motion, *May v. City of Montgomery*, No. 2:07-cv-738 (M.D. Ala. Aug. 17, 2007), D.E. 6; *see May*, 504 F. Supp. 2d at 1236–37.

9. Docket Sheet, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 16, 2007); Interview with Hon. Myron H. Thompson, June 6, 2012.

Tim Reagan interviewed Judge Thompson for this report by telephone.

10. Order, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 16, 2007), D.E. 4.

11. Interview with Hon. Myron H. Thompson, June 6, 2012.

12. Order, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 20, 2007), D.E. 13.

13. Docket Sheet, *supra* note 9; Interview with Hon. Myron H. Thompson, June 6, 2012 (noting that three-judge oral arguments are usually held in person).

14. Order, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 24, 2007), D.E. 27, 2007 WL 2460607; *May*, 504 F. Supp. 2d at 1236.

15. *May*, 504 F. Supp. 2d at 1237; *see* Transcript at 3, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 23, 2007, filed Aug. 23, 2007), D.E. 23 (informing the parties at a teleconference the day before Judge Thompson's ruling how he was likely to rule).

16. Judgment, *May*, No. 2:07-cv-738 (M.D. Ala. Feb. 28, 2008), D.E. 56.