Unequal Recount Procedures
in a Gubernatorial Election

Washington State Republican Party v. Reed
(Marsha J. Pechman, W.D. Wash. 2:04-cv-2350)

Washington's Republican Party and a voter filed a federal complaint in the Western District of Washington's Seattle courthouse on Saturday, November 20, 2004, challenging inter-county inconsistencies in a gubernatorial recount and alleging that as a result, "King County voters are more likely to have their votes count than voters outside of King County."[1] According to the complaint,

> election workers in an optical scan county may review an undervote ballot, apply a subjective standard in evaluating any marks on the ballot to determine whether the voter intended to vote for a particular candidate, and then may enhance a mark or pattern made by the voter or duplicate the ballot by making a mark on a different ballot that will then be counted.[2]

With their complaint, the plaintiffs filed a motion for a temporary restraining order.[3]

The first judge that the Clerk of Court could find to come in over the weekend to hear the emergency case was Judge Marsha J. Pechman.[4] Court records then were not as available electronically then as they are now, so Judge Pechman reviewed the papers at the courthouse, called in a couple of law clerks and a court reporter, and held a telephonic conference on Sunday.[5] Judge Pechman granted an unopposed oral motion by Washington's Democratic Party to intervene.[6] On representations by Washington's attorneys, Judge Pechman concluded that immediate relief was not required, because the ballots in question would be preserved for later examination.[7] At the end of the hearing, Judge

---

1. Complaint at 2, Wash. State Republican Party v. Reed, No. 2:04-cv-2350 (W.D. Wash. Nov. 20, 2004), D.E. 1; *see* Steve Miletich & Brier Dudley, *GOP Files Suit Over Recount*, Seattle Times, Nov. 21, 2004, at B1.

After regular counting of votes, the Republican candidate was ahead of the Democratic candidate by 261 votes. *See It's Rossi by 261*, Seattle Times, Nov. 18, 2004, at A1.

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

3. Temporary Restraining Order Motion, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 20, 2004), D.E. 2.

4. Interview with Hon. Marsha J. Pechman, Oct. 15, 2015.

Tim Reagan interviewed Judge Pechman for this report by telephone.

5. Interview with Hon. Marsha J. Pechman, Oct. 15, 2015; Transcript, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 21, 2004, filed Dec. 3, 2004), D.E. 27.

6. Transcript, *supra* note 5, at 4–5.

7. *Id.* at 19; Order, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 22, 2004), D.E. 5; *see* Lynn Thompson, *Judge Says No to GOP, Won't Halt Recount*, Seattle Times, Nov. 22, 2004, at B1; *see also* Susan Gilmore & Keith Ervin, *When Ballot Is in Question, Here's What Happens*, Seattle Times, Nov. 23, 2004, at A1 ("Enhanced ballots are logged with the precinct number, given an identification number and initialed by the election worker. While they are not separated from the rest of the ballots, . . . they will be easy to find if they come into question in legal proceedings.").

Pechman informed the parties that although she handled the emergency motion, the case would be permanently assigned to a judge at random.[8]

The plaintiffs filed an amended complaint[9] and a motion for a preliminary injunction on Monday.[10] On Wednesday, with the Republican candidate ahead by 42 votes after completion of the first recount,[11] the plaintiffs voluntarily dismissed the action.[12] Judge Ricardo S. Martinez approved the dismissal on the following Monday.[13]

After a statewide hand recount, the Democratic candidate lead by 129 votes.[14] During the hand recount, Washington's supreme court denied, on December 14, mandamus intervention sought by the Democratic Party[15] and reversed, on December 22, a temporary restraining order granted to the Republican Party.[16] On December 30, the Democratic candidate was certified the winner of the election.[17]

---

8. Transcript, *supra* note 5, at 19.

9. Amended Complaint, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 22, 2004), D.E. 6.

10. Preliminary Injunction Motion, *id.* (Nov. 22, 2004), D.E. 7.

11. *See* Ralph Thomas, *A Governor by Christmas?*, Seattle Times, Nov. 25, 2004, at A1; *see also* Blaine Harden, *Wash. Governor's Race Tightens*, Wash. Post, Dec. 15, 2004, at A9.

12. Voluntary Dismissal, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 24, 2004), D.E. 22; Notice, *id.* (Nov. 24, 2004), D.E. 21 (withdrawing injunction motion).

13. Order, *id.* (Nov. 29, 2004), D.E. 25.

14. www.sos.wa.gov/elections/2004gov_race.aspx (2004 gubernatorial election results posted by Washington's secretary of state); *see A Look Back at 58-Day Wait and 3 Counts*, Seattle Times, Dec. 31, 2004, at A18.

15. McDonald v. Reed, 153 Wash. 2d 201, 103 P.3d 722 (2004); *see* Blaine Harden, *Wash. Governor's Race Tightens; Mostly Democratic King County Finds 561 Uncounted Votes*, Wash. Post, Dec. 15, 2004, at A9.

16. Wash. State Republican Party v. King Cnty. Div. of Records, 153 Wash. 2d 220, 103 P.3d 725 (2004); *see* Blaine Harden, *Democrat Takes Lead in Washington State; Supreme Court Allows Disqualified Absentee Ballots from King County*, Wash. Post, Dec. 23, 2004, at A4.

17. *See* Sarah Kershaw, *Governor-Elect Declared in Washington Recounts*, N.Y. Times, Dec. 31, 2004, at 18 (reporting also that the victor declined the other candidate's offer of a runoff election); David Postman, *Doubts Linger as Gregoire Win Certified*, Seattle Times, Dec. 31, 2004, at A1 (same).