

## Emphasis Votes

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

During a recount for a state legislative election, one political party and two voters filed a federal action complaining that emphasis votes—in which a voter casts both a straight-party vote and a vote for the specific office—would improperly not be counted because of the switch from punch-card ballots to voting machines. After the recount was completed, the plaintiffs dropped their claims with respect to the specific election, but more general claims remained. The district court found that election procedures with respect to emphasis votes did not discriminate in violation of section 2 of the Voting Rights Act, but they were in violation of section 5 because they had not been precleared. In time, the Justice Department precleared the changes.

*Subject:* Recounts. *Topics:* Voting technology; recounts; section 5 preclearance; three-judge court; section 2 discrimination; intervention.

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 twenty votes,<sup>1</sup> and a recount was planned.<sup>2</sup> The Democratic Party and two voters filed a federal complaint on December 1 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 selected a Democratic candidate.<sup>3</sup> This type of valid vote is referred to as an emphasis vote.<sup>4</sup> The complaint alleged that this difficulty resulted from the replacement in 1998 of punch-card paper ballots with voting machines.<sup>5</sup>

The incumbent moved to intervene on December 4,<sup>6</sup> and Judge Jorge A. Solis granted intervention on December 8.<sup>7</sup> After the recount, the incum-

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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 Texas's 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.

Judge Solis retired on May 1, 2016, and died on October 8, 2021. Federal Judicial Center

bent's margin of victory decreased by one vote.<sup>8</sup> On December 19, the plaintiffs dropped their claims with respect to the Texas house election.<sup>9</sup>

On April 17, 2009, Judge Solis determined that the complaint did not allege valid claims under section 2 of the Voting Rights Act,<sup>10</sup> pertaining to racial or ethnic discrimination in elections, but the complaint did allege a valid claim under section 5,<sup>11</sup> requiring preclearance of election changes in jurisdictions with a certified history of election discrimination.<sup>12</sup> On July 9, the circuit's chief judge named a three-judge district court to hear the section 5 claim.<sup>13</sup>

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

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Biographical Directory of Article III Federal Judges, [www.fjc.gov/history/judges](http://www.fjc.gov/history/judges).

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*, 52 U.S.C. § 10301.

11. *Id.* § 5, 79 Stat. at 439, *as amended*, 52 U.S.C. § 10304 (requiring that preclearance disputes be heard by a three-judge district 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.

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.

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); see Robert Barnes, *Court Blocks Key Part of Voting Rights Act*, Wash. Post, June 26, 2013, at A1; Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. Times, June 26, 2013, at A1.

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