

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PEDRO ROSSELLO; LUIS FORTUÑO; * CIVIL NO. 2004-2251(DRD)
ET AL. *

Plaintiffs, *

v. *

SILA CALDERON, individually and in *
her capacity as Governor of Puerto *
Rico; ANIBAL ACEVEDO-VILA, ET AL. *

Defendants. *

AMENDED ORDER AS TO SCOPE OF ELECTORAL RECOUNT

Pending before the court is a request from the Electoral Commission that the court should proceed as to the recount previously ordered by this court in a way that would allow the counting and the **adjudication** of the split ballots in question under the jurisdiction of the court, that is, one mark over a party and two additional marks for the candidates for Governor and Resident Commissioner and/or one mark over a party and two write in votes and/or any other similar combination of three "X"s.

First, **adjudicating** votes creates an expectancy of certainty to the voting citizens which this court cannot provide since the legality of the split ballots is under federal scrutiny under due process, equal protection, and/or dilution of voting rights. Precisely, when the legality of cast ballots is at issue the court should **not** "count first and rule upon legality afterwards." George Bush v. Albert Gore, 531 U.S. 1046, 121 S. Ct. 512 (Dec. 9 2000). The reasoning behind this federal solution is that "count first and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." The concurring opinion of Justice Scalia is part of the majority opinion of the Supreme Court granting a stay of the counting of votes in the Florida election in the year 2000. Under this federal mandate this federal District Court should not

even count the votes. See also Watland v. Linge, 85 F.3d 1079, 1094 Hawaii 2004 (Acoba concurring) (public interest favors determining the legal validity of the votes prior to vote adjudication.) This court however permits the counting of the number of votes but not the **adjudication** precisely because in the adjudication of votes is when “irreparable harm. . . to the country [occurs].” Bush v. Gore, Id. (Concurring opinion Justice Scalia as to the stay of counting of the Florida’s votes). The solution of this matter is consonant with this court’s restraint as to case and controversy to determine whether or not the challenged ballots affect the election. See generally De Jesús Mangual v. Rotger-Sabat, 317 F.3d 45 (1st Cir. 2003).

The court recognizes that it had contemplated other eclectic solutions, however, the **federal** solution to the issue must prevail. (Placing a stamp on the votes advising that they were under federal jurisdiction or permitting a constitutional adjudication subject to the federal jurisdiction; but all of those solutions provide an expectancy which is contrary to federal principles.)

Further, the court has some concern in authorizing the adjudication of said ballots since the court may accidentally lose jurisdiction and/or may lead to a solution under local law that may create friction with our friends at the Supreme Court of Puerto Rico. The court explains.

It is not unreasonable that an elector not affiliated to any particular political party, or not belonging to the PPD party, based upon the “new” **adjudication** of the votes may file a complaint in local court as was done in the case of Manuel R. Suárez Jiménez v. Comisión Estatal de Elecciones, KPE 04-3568 (filed at trial level on November 16, 2004 at 1:55 p.m.) and eventually obtain from the Supreme Court a remedy ordering a certification of the election based on the “new” “adjudicated” split ballots all within five days of the filing of the original complaint at trial level (Supreme Court decision was issued in the cited case on Saturday, November 20, 2004, sometime after 4:16 p.m. when the last

filing was made by Plaintiff Manuel R. Suárez alleging that the removal was frivolous.)¹ (The trial court dismissed the complaint because the defendant's position, in the Commission, was that the votes were valid and being counted; hence there was no "case and controversy.")

Further, the local Supreme Court in its judgment section issued an order that all "mixed ballots be counted and adjudicated." (Manuel R. (Manny) Suárez v. Comisión Estatal de Elecciones, at 2004-0004 (Certification).² Should this District Court also authorize the adjudication and the counting again it is not beyond the realm of possibilities that a potential plaintiff may file a complaint in local court under local law to obtain a quick certification from the Supreme Court declaring a winner under local law leading to potential tension between jurisdictions.

Hence, because the fact that "adjudicating" prematurely the questioned ballots may cause a wrongful expectancy under federal law in the public and "irreparable harm . . . to the public", Bush v. Gore, Id., because the court is concerned in accidentally losing its jurisdiction by an "adjudication" of votes leading to a certification, under the Rules and Regulations of the Electoral Commission for the 2004 Election, § 125,³ and because there is no guarantee that a third party not covered by the orders of this court may file a complaint in local court to certify a winner based on "adjudicated" ballots and obtain a remedy of certification, this court **ORDERS** that the recount procedure be performed by counting the number of the split ballots, identifying and segregating the same, **but not adjudicating the ballots**. The Commission is **ORDERED NOT TO ENTER** any

¹ The allegations of the removed complaint at § 26 contain allegations of equal protection of laws without clarifying if they are under the local or the federal constitution.

² This particular remedy is contrary to the potential federal remedy and leaves the federal court de facto without jurisdiction.

³ The NPP Commissioner has alleged that by operation of Rule 125 of the Regulations of the 2004 Elections, (Ex 2 of the trial), there is danger that after adjudicating the split ballots there is nothing left but to declare a winner again all under local law. This interpretation of course would be made by the local courts.

certification whatsoever until this court renders a final decision as to its jurisdiction under the split ballots object of this complaint.

Any pronouncement by the Supreme Court to the contrary of the mandate contained herein in the case of Manuel R. (Manny) Suárez is hereby **ANNULLED** pursuant to the automatic stay provisions contained in the Federal Removal Statute, 28. U.S.C. 1446(d), “the state court shall proceed no further unless and until the case is remanded.” Hyde Park Partners L.P. v. Connolly, 839 F.2d 837 ((1st Cir.1988). Since 1882, more than two hundred and twenty years ago, the Supreme Court stated in Steamship Co. v. Tugman, 106 U.S. 112, 122, 1 S.Ct. 58, 60 (1882), that at the moment the removal is effected the jurisdiction of the state court “absolutely ceased and that the jurisdiction of [federal court] immediately attached.” Further. . . “[t]he Temporary Stay Order issued by the Superior States Court [is] **void ab initio.**” (Emphasis ours.) Hyde Park Partners L.P. v. Connolly, 839 F.2d 837. Moreover, the state court had a “duty to proceed no further in the case. Any order thereafter made in that court was **coram non judice**, unless its jurisdiction was restored.” Tugman, 106 S. Ct. ar 122, 7 S. Ct. 60. “**This is so even if eventually [it] is determined that removal is improper.**” Id. (Emphasis ours.) This last Supreme Court mandate clearly dictates that potential vices in removal are to be determined by the federal court. Any other solution would be chaotic since the state courts would be determining federal jurisdiction. The Supremacy Clause of the United States Constituion dictates otherwise. The above doctrines were identically reiterated in the case of Sweeney v. Resolution Trust Corp., 16 F. 3d 1, 4 (1st Cir. 1994). Finally, the doctrines of removal from the Supreme Court are applicable to the Supreme Court of Puerto Rico. Volkswagen de P.R. v. P.R. Labor Relations Board, 454 F.2d 38, 42 (1st Cir. 1972) (removal of an appealed case from an agency removed directly from the Supreme Court) reiterated at Carmen M. Hernández v.

Commonwealth of P.R., 30 F..Supp. 205, 211 (D.C.P.R. 1998).⁴

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The court shall issue a further Opinion and Order as to the propriety of the local Supreme Court issuing an Opinion and Order notwithstanding a prior notice of removal in the case of Manuel R. (Manny) Suárez v. Comisión Estatal de Elecciones, KAC 04-3568.

The Electoral Commission and Party Commissioners shall proceed in accordance with this order.

IT IS SO ORDERED.

At San Juan, Puerto Rico, this 24 day of November 2004.

s/ Daniel R. Domínguez
DANIEL R. DOMINGUEZ
U.S. DISTRICT JUDGE