

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	1:04-CV-0830
THE COMMONWEALTH OF PENNSYLVANIA;)	
EDWARD G. RENDELL, Governor of the)	(Judge Kane)
Commonwealth of Pennsylvania; and)	
PEDRO A. CORTÉS, Secretary of the)	Filed Electronically
Commonwealth of Pennsylvania,)	
Defendants)	Corrected Brief

**BRIEF IN OPPOSITION TO MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

This is a civil action on behalf of the United States pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff--1973ff-6 (“UOCAVA” or “the Act”). The Act provides, *inter alia*, that “absentee uniformed services voters” and “overseas voters” (as defined by the Act) shall be permitted “to use absentee registration procedures and to vote by absentee ballot in general, special, primary and runoff elections for Federal office.” 42 U.S.C. § 1973ff-1.¹

The United States seeks injunctive relief under UOCAVA to assure that military and overseas voters who (a) are qualified to vote in the November 2, 2004, General Election in the Commonwealth of Pennsylvania, and (b) submitted to

¹ These voters will be referred to as “military and overseas voters” throughout this brief.

appropriate county elections officials applications for absentee ballots on or before October 1, 2004, will be afforded a reasonable opportunity to submit *second* absentee ballots and have those ballots canvassed and counted in accordance with Pennsylvania law for the *Federal* offices that will appear on the General Election ballot. This motion arises from the unresolved status of challenges to the nomination papers filed by Ralph Nader and Peter Miguel Camejo who are candidates of the Independent political body for the offices of President and Vice President, respectively (the *Nader* case).

FACTS

On August 16, 2004, the Pennsylvania Department of State (Department) issued a memorandum describing the policies and procedures that it would follow and direct the county boards of elections to follow for the 2004 General Election to assure compliance with UOCAVA and section 1305 of the Pennsylvania Election Code (25 P.S. § 3146.5). To assure Pennsylvania's compliance with laws relating to the early and timely delivery of absentee ballots to those electors who are specially protected by UOCAVA and related Pennsylvania law, the Department – acting under section 201(e) of the Pennsylvania Election Code (25 P.S. § 2621(e)) – required each county board of elections to make a series of reports at certain intervals describing: (a) the number of absentee ballot applications received from military and overseas voters by the county board of elections on or before certain dates; (b) the number of such absentee ballot applications that had been approved

by the county board of elections; (c) the certification of the county board of elections or its representative that, as of the dates set in the reports (August 24, September 20, and October 11, 2004), it had delivered or mailed special write-in absentee ballots or other appropriate special absentee ballots to *all* qualified absentee military and overseas voters whose applications had been approved by those dates; and (d) the certification and assurance of the county board of elections or its representative that it had and would continue to process promptly such applications for absentee ballots that it should receive or approve after the applicable date, and deliver or mail official absentee ballots, special write-in absentee ballots or other appropriate special absentee ballots within 48 hours after the application for absentee ballot has been approved. The Department directed each county board of elections to report immediately any deviation from the deadlines prescribed by Pennsylvania law and work with the Department to remedy any deviation promptly. (Exhibits 1 and 2)

On Friday, September 17, 2004, the Secretary of the Commonwealth (“the Secretary”) certified and transmitted to county boards of elections the form and content of the General Election ballot. However, as a consequence of an order issued by the Supreme Court of Pennsylvania on the afternoon of Monday, September 20, 2004, the Secretary on September 21, 2004, amended that certification to *add* to the General Election ballot the names of Ralph Nader and

Peter Miguel Camejo as Independent political body candidates for the offices of President and Vice President, respectively.

Because the Supreme Court ordered Commonwealth Court in the *Nader* case immediately to consider objections alleging that the Nader-Camejo nomination papers did not include the number of valid signatures required by law, the Department in its September 21 memorandum instructed the county boards of elections to be prepared for the possibility of additional amendments to the ballot certification. Based on the facts and circumstances that existed at the time, the Department suggested that when Commonwealth Court finally determined whether Nader and Camejo were to be named candidates on the November 2, 2004 General Election ballot, the county boards of elections would need to be prepared to deliver or mail a second absentee ballot to those absentee electors who received an absentee ballot that did not reflect the final, certified ballot. For reasons described in this brief, the Secretary no longer holds this opinion.

On October 7, 2004, the Department of State updated the county boards of elections as to the status of the *Nader* case and reminded the boards regarding the specific statutory requirements and mandates prescribed by the Election Code for delivering and mailing absentee ballots to absentee military and overseas voters.

From September 21 until the afternoon of October 13, 2004, the names of Nader and Camejo have been part of the ballot certified by the Secretary for the General Election ballot. All absentee ballots that have been delivered or mailed

since September 21 – and those that county boards have prepared for imminent delivery or mailing – correctly included the names of Nader and Camejo. By contrast, absentee ballots and special write-in absentee ballots that were delivered or mailed by county boards of elections between August 30 – when Commonwealth Court ordered the names of Nader and Camejo to be stricken – and September 20, 2004, again, correctly did *not* include the names of Nader and Camejo on the absentee ballots or within the list of known candidates that accompanied special write-in absentee ballots. Finally, the special write-in absentee ballots that were delivered before Commonwealth Court issued its August 30, 2004, order correctly *included* Nader and Camejo as named candidates. On October 13, 2004, the Commonwealth Court issued an order directing the Secretary not to certify Nader and Camejo as named candidates. The Secretary issued an amended certification on October 13, 2004. The matter is pending appeal in the Pennsylvania Supreme Court at No. 182 MAP 2004.

ARGUMENT

THE UNITED STATES CANNOT ESTABLISH THAT IT IS ENTITLED TO PRELIMINARY RELIEF.

A. General Principles

In determining whether to grant a motion seeking emergency injunctive relief, a Court must consider: (1) the likelihood that the applicant will prevail on the merits; (2) the extent to which the movant is being irreparably harmed by the

complained of conduct; (3) the extent to which the non-moving party will suffer irreparable harm if the preliminary injunction is issued; and (4) whether granting preliminary injunctive relief will be in the public interest. *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992). The moving party bears the burden of demonstrating these factors and entitlement to the relief sought. *Instant Air Freight v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989). A Court should grant injunctive relief only if the movant produces evidence sufficient to convince the court that *all* four factors favor preliminary relief. *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987). Moreover, injunctive relief must be framed to remedy the harm claimed by the party. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945). An injunction must be narrowly tailored to remedy the specific harm shown. *Davis v. Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974).

B. The United States Cannot Establish a Likelihood of Success on the Merits

Plaintiff cannot establish an entitlement to the broad injunctive relief it requests, nor is it able to demonstrate that it will prevail on the merits of its claim that the Commonwealth is in specific violation of UOCAVA. The Commonwealth has complied with its duties under UOCAVA. Plaintiff cannot establish a statewide failure by county election officials to forward absentee ballots to military and overseas voters in the manner required by UOCAVA.

C. Application of Balancing Principles Suggests that the Commonwealth and the Non-defendant Counties Will Suffer More Irreparable Harm than the Military and Overseas Voters the United States Seeks to Protect.

Plaintiff suggests that military and overseas voters will suffer irreparable harm because they not only have the right to participate in Federal elections by absentee ballot, 42 U.S.C. 1973ff *et seq.*, but their right to vote includes the opportunity to vote for all certified candidates who will appear on the ballot and a protection against losing one's vote due to the inclusion of candidates who will not appear on the ballot. The United States cites no authority for this later proposition.

Second absentee ballots are unnecessary and any extension of time sought to ensure the return of these second absentee ballots would create confusion with voters and impose significant burdens upon the county boards of elections. Therefore a second ballot would risk the fair, orderly, uniform and timely administration of the General Election. Given that the ballot status of Nader and Camejo has varied during the absentee ballot process that began August 24 and will continue until October 26, and that the date of the General Election is only 19 days away without a determination from the courts as to the *final* status of Nader and Camejo on the November 2 ballot, elections officials have expressed grave concern about whether it is possible to mail a second absentee ballot to affected absentee electors after the Supreme Court decides whether Nader and Camejo will appear on the ballot. Many counties have declared that the delivery or mailing of second ballots to a select number of absentee electors – the affected absentee

electors depending upon which ballot that the absentee voter received – so close to the November 2 election will cause great chaos and confusion in the election process. This will severely prejudice the fair and orderly administration of the General Election.

Considering all of the facts and circumstances that now prevail in the absentee balloting process for the November 2, 2004 election, it is the opinion of the Secretary that the delivery and mailing of a second absentee ballot to a substantial number of military and overseas voters – so close to the date of the General Election presents a very substantial risk of severe interference with the fair, orderly, uniform and *timely* administration of the General Election.²

For example, as part of the relief sought, the Plaintiff has not only asked this Court to order the delivery and mailing of second absentee ballots at a time so close to the General Election, it has also sought a substantial extension of the date by which those second absentee ballots must be returned to the county boards of elections. An extension of the deadline for returning absentee ballots to the county boards of elections could, in turn, imperil the ability of the Commonwealth of Pennsylvania to determine finally – under the procedures prescribed by Pennsylvania law – the certified winners of the election for Presidential Electors within the time period mandated by Federal law. At the same time, the county

² Some counties will not have available the actual addresses in any one place but rather may have to review each absentee ballot application to determine the mailing address actually used. Other counties will be faced with the substantial time it may take to stuff, seal and address a second absentee ballot.

boards of elections, acting in good faith, have endeavored to deliver absentee ballots to *all* qualified absentee electors substantially in the time required by Pennsylvania law. Those ballots were in the proper form at the time delivered or mailed to the voters by the county boards of elections.

Finally, the delivery or mailing of a second absentee ballot under these circumstances is not mandated by any provision of Pennsylvania law. When faced with issues regarding the withdrawal or removal of a previously certified candidate for elected office shortly before a primary or election, the Commonwealth Court has ordered that either the Secretary of the Commonwealth or the county boards of elections not certify votes received on behalf of that candidate or has ordered that the candidate be removed from the ballot without requiring any extraordinary additional measures in connection with absentee ballots previously sent to voters prior to the date of the decision and the day of the Election.³ In fact, in two instances, the Commonwealth Court specifically directed the Philadelphia City Commissioners not to count in the tally any absentee ballots cast for the candidate.⁴

³ See Exhibits 3-5. See also, *In Re: Nomination Paper of Ralph Nader and Peter Miguel Camejo as Candidates of an Independent Political Body for President and Vice President in the General Election of November 2, 2004*, No. 568 M.D. 2004 (October 13, 2004) (Exhibit 6).

⁴ In the one federal court case that specifically addresses absentee ballots, the City of Chicago's Board of Election Commissioners issued four different versions of the ballot to absentee voters. *Wojkowski v. LaVelle, et al.*, No. 86 C 1541, 1986 U.S. Dist LEXIS 28076, (N.D. Ill. March 17, 1986) (Exhibit 7). The withdrawal of a candidate caused the issuance of the second ballot, which contained a punch hole numbering error. *Id.* at *2. The third ballot corrected the numbering error and removed the name of the withdrawn candidate and was used until the final ballot was available. *Id.* at *4. The Court determined that since all the absentee ballots were collected at the central office for the Board of Election Commissioners, all of the absentee ballots should be kept separately at the central office instead of distributing them to the precincts, which was the normal procedure. *Id.* at *15. The absentee ballots could then be counted separately and parties could "contest the propriety of the absentee ballots with the aid of concrete facts – the election results." *Id.* at *16. This case is factually distinguishable from the present matter. The absentee ballots that were sent to UOCAVA-protected voters were not the result of mistakes. The ballots that were sent

In another case, the Commonwealth Court refused to allow a candidate to withdraw 20 days before an election because the ballots had already been printed and military absentee ballots could not be sent, voted, and returned in time to be counted. The Court observed *In re Petition of Dieterick*, 583 A.2d 1258 (Pa. Commw. Ct. 1990), “the election process has already commenced and cannot now be reversed without violating the strict timeframe provided for absentee ballots.” *Dieterick*, at 1261. In this present case, because the county boards of elections are quickly approaching various statutorily set deadlines, the printing and delivery of new ballots cannot be accomplished in most counties consistent with other statutory deadlines. *See* 25 P.S. §§ 3146.5(b), 3146.2a, and 3146.6(a).

In this election, all of the qualified electors voting by absentee ballot in a timely manner *will have* had the opportunity to choose the Presidential candidate of their choice – either by casting a vote for the named candidates or by writing in a different candidate of the voter’s choice. Even though the ballot status of Nader and Camejo has changed several times and remains uncertain, because the county boards of elections have complied with their duties under the Election Code in good faith, the Secretary is convinced that no qualified absentee elector will disenfranchised from voting for the office of Presidential Elector or any other office in the November 2, 2004 General Election.

contained the list of candidates that was properly certified at the time the ballots were sent. Even in that situation the court left the ultimate decision up to the county board of elections.

D. The public interest does not favor the grant of an injunction.

This proceeding occurs two weeks prior to the General Election. If this court should now order the Secretary to direct the counties to issue a second absentee ballot and mandate a 30-day extension for receipt of those second ballots, the consequent expense and burden to Defendants and the 67 counties, the risks to the ability of Pennsylvania to certify a result in sufficient time to provide that result to the Electoral College, and the need for a fair, orderly, uniform administration of the General Election for all Pennsylvania voters, would not be in the public interest. For example, if counties issue a second ballot at this late date, all military and overseas voters who received a ballot containing the names of Nader and Camejo would receive that second ballot. To the extent any of those voters had returned those ballots and voted for either President Bush or Senator Kerry, they would be able to change those votes. Clearly, those voters should not be permitted to cast a second vote since they have already exercised their franchise. Voters are only afforded an opportunity to exercise their vote once in any election. Any administrative procedure that the counties would be required to institute to safeguard against this “double voting” would not only be a tremendous burden, it may not be possible because the first ballot would never be opened.

Overseas absentee voters can vote for President up to and including Election Day and when they choose to fill in their absentee ballots is a matter of personal

choice. There is no legal requirement that they vote absentee at any particular time in the period before the election. Voters who voted for Ralph Nader already chose to vote when they did so and chose to vote based upon the facts that were known at the time. Voters who already have voted for Bush or Kerry also made their decision based upon the facts they knew at the time. Sending all military and overseas voters a second absentee ballot gives every one of those voters a second opportunity to make a decision, even to reconsider their first votes for Bush or Kerry. No voter on Election Day has the same opportunity. Voters on Election Day who vote, for example, early in the morning cannot change their vote later in the day if they learn something new. Military and overseas voters who have not yet voted now have the knowledge that Nader is not an authorized candidate and presumably will make their decisions accordingly. In short, there is nothing in the federal statute, Pennsylvania law, or in notions of fair treatment of voters, that would require second absentee ballots, particularly since the ballots they already received were accurate and correct at the time they were mailed and received

A 30-day extension of time from the date the Pennsylvania Supreme Court issues a final decision in the *Nader* litigation creates not only practical and burdensome hurdles for the counties and the Secretary, but it may create a series of constitutional problems associated with the Electoral College process required for Pennsylvania to cast its 21 electoral votes on December 13, 2004 for President and Vice-President. For example, the Secretary would not be able to certify the results

of any elected office until the 30-day deadline passed and a determination regarding whether a second ballot for each military and overseas voter was received. Until election results are certified, individuals seeking to challenge these results for any office will not be able to file petitions for recounts. 25 P. S. § 3261 *et seq.* Statutory recount provisions would not be triggered until second ballot issues were resolved. See generally, Act 2004-97. (Exhibit 8)

Even if these larger concerns could be addressed, there is little that the Secretary of the Commonwealth could do to direct counties to implement the Court's order because he does not have the statutory authority to mandate post election procedures for the counties. Counties would be making their own decisions on these procedures, such as whether to impound the absentee ballots already received or whether to send them to the various districts for normal Election Day challenges (i.e., someone actually is in the district or showed up to vote or signatures do not match). Procedures would have to be devised, county-by-county, for determining whether second ballots received were voted before the close of the polls on Election Day, or are genuine, and should override first ballots.

In addition, the remedy Plaintiff suggests would violate the Pennsylvania Constitution because it would order the submission of absentee ballots by facsimile machine or electronically and compromise the secrecy of the ballot. Article VII, § 4 of the Pennsylvania Constitution specifically mandates that "secrecy in voting be

preserved.” Submission of ballots by facsimile machine or electronically, would disclose the identity of the persons casting the ballots. The state constitutional requirement that secrecy in voting be maintained was not intended to confer an individual right on voters. Rather, the requirement is concerned with maintaining the integrity of the election process. Secrecy in voting prevents coercion of voters, and it ensures that the institution and resolution of challenges to an absentee voter’s qualifications will not be affected by the knowledge of how the voter’s ballot was cast.

In support of its argument for faxing and e-mailing ballots to UOCAVA-protected overseas voters, the Plaintiff cites to *United States v. State of Georgia*, No. 1:04-CV-2040-CAP, stating that the federal district court in that case ordered the use of faxing and e-mail as a remedy to a UOCAVA violation. The Georgia matter is distinguishable from the current matter before this Court. In the Georgia case, counties had failed to send out absentee ballots to military and overseas voters by the deadline for the primary election. The United States brought an enforcement action against Georgia requesting that the court order an extension of ballot receipt deadlines and various methods of sending ballots to and receiving ballots from military and overseas voters. Georgia agreed that the UOCAVA deadlines had not been met and acquiesced to the proposed settlement. In the matter before this Court, the Pennsylvania counties did not fail to meet the UOCAVA deadlines for sending out absentee ballots. In trying to be compliant

with the deadline, the counties sent out a ballot that was officially certified at the time. The present matter is also distinguishable in that, based upon court filings in a separate case, the Secretary of State of Georgia requested that the court impose the requirements requested by the United States.⁵ Thus, it appears that the United States and Georgia were in agreement on the remedies to be imposed. In fact, the order issued by the court in response to the Secretary of State's Motion in *Larios* is identical in the requirements imposed on the state. In the present matter, the Governor and the Secretary do not agree that there has been a violation of UOCAVA.

CONCLUSION

The Government has produced no evidence that its proposed extraordinary relief is necessary to ensure the UOCAVA rights of Pennsylvania's military and overseas voters are protected. Accordingly, Plaintiff's motion should be denied.

Respectfully submitted,

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October 15, 2004

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⁵ See Defendant's Motion to Alter Method, Timing and Receipt of Absentee Ballots of Uniformed and Overseas Citizens, *Larios v. Cox*, (N.D. GA) (No. 1:03-CV-693-CAP) (Exhibit 9).

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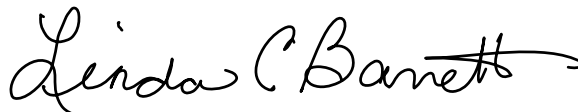
CERTIFICATE OF SERVICE

I, LINDA C. BARRETT, Chief Counsel for the Department State, hereby certify that on October 15, 2004, I caused to be served a copy of the foregoing document entitled Brief in Opposition to Motion for a Temporary Restraining Order and Preliminary Injunction – Corrected Brief, to be delivered by electronic mail and U. S. Mail to counsel for the for the following:

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