

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

UNITED STATES OF AMERICA, :	:	
Plaintiff	:	
	:	CIVIL ACTION NO. 1:CV-04-830
v.	:	
	:	(Judge Kane)
THE COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
EDWARD G. RENDELL, Governor	:	
of the Commonwealth of Pennsylvania;	:	
and PEDRO A. CORTES, Secretary	:	
of the Commonwealth of Pennsylvania,	:	
Defendants	:	

MEMORANDUM AND ORDER

The background of this Order is as follows:

In connection with the November 2, 2004 General Election, Pennsylvania's sixty-seven counties have issued a total of 26,739 absentee ballots to overseas and military voters. The first of these was dispatched to voters in remote locations on August 24, 2004. These ballots included the names of Ralph Nader as a candidate for President and Peter Miguel Camejo, a candidate for Vice President. Thereafter, the sufficiency of Messrs. Nader and Camejo's nomination paper was the subject of a legal challenge in the Commonwealth and Supreme Courts of Pennsylvania. As the challenge was heard on appeal and remand, Nader and Camejo were ordered off the ballot, then on the ballot, and then off the ballot again.

The 2004 Pennsylvania General Election Ballot was first certified by the Secretary of the Commonwealth pursuant to state law on September 17, 2004. At that time, consistent with the court order then in effect, the Secretary's Ballot Certification excluded the names of Nader and Camejo. Counties issued absentee ballots reflecting the amended certified list of candidates without Messrs. Nader and Camejo listed as candidates. On September 21, 2004, the Secretary

amended the Certification to add Nader and Camejo to the ballot. On October 13, 2004, pursuant to court order, Nader and Camejo were again removed from the Secretary's list of certified candidates.

The State Courts of Pennsylvania expedited review of the challenge to Nader and Camejo's nomination paper and diligently undertook to finally resolve the Nader/Camejo challenge with all due speed. Despite the courts' best efforts however, the appeal process resulted in resolution of Nader's candidacy less than two weeks before the November 2, 2004 election. Only on October 19, 2004, was a final order issued from the Supreme Court of Pennsylvania affirming the Commonwealth Court's Order that Nader be excluded from the ballot.

The United States Government, charged with protecting the rights of overseas voters pursuant to the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), seeks injunctive relief to address the practical implications of the final certification of the slate of candidates so late in the election calendar.¹ Almost all of the absentee ballots issued to UOCAVA voters since August 24, 2004 include Nader and Camejo as candidates. To address its claim that UOCAVA voters with Nader ballots will be disenfranchised, the Government seeks "the widest possible relief" in the form of an emergency order directing that the Secretary of the

¹ UOCAVA requires, in pertinent part, that each state:

(1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general . . . elections for Federal office; [and]

(2) accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election

42 U.S.C.S. § 1973ff-1(a).

Commonwealth advise Pennsylvania's 67 county election directors to prepare and dispatch new ballots to all UOCAVA voters. To ensure that these ballots are returned in time to be counted, the Government further requests that this Court order that the time for the return of UOCAVA ballots be extended beyond the statutory deadline of November 2, 2004, and/or that the Court order that UOCAVA ballots may be returned by fax or email. For the reasons that follow, the Government's request for injunctive relief must be denied.

I. Standard for Preliminary Injunctive Relief

It is well established that the grant of injunctive relief under Federal Rule of Civil Procedure 65(a) "is an "extraordinary remedy, which should be granted only in limited circumstances." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989) (internal citation omitted). The moving party bears the burden of establishing that the requested injunctive relief is warranted. Id. In determining whether to grant emergency injunctive relief, the Court must consider the following four factors: (1) the likelihood that the applicant will prevail on the merits of the substantive claim; (2) the extent to which the moving party will be irreparably harmed in the absence of injunctive relief; (3) the extent to which the non-moving party will suffer irreparable harm if the Court grants the requested injunctive relief; and (4) the public interest. AT&T v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994) (citations omitted). District courts should only grant injunctive relief after consideration of each of these factors. Id. at 1427 n.8.

II. Discussion

In support of its motion for preliminary injunctive relief, the United States offered the testimony

of two witnesses: (1) Mark DeDomenic, the Assistant Deputy Director of the United States Military Postal Service (“USMPS”) and (2) Pauline K. Brunelli, Director of the Federal Voting Assistance Program (“FVAP”).²

Mr. DeDomenic testified regarding the procedures the United States employs to ensure the delivery of mail to members of the United States’ armed services stationed at various embassies and bases throughout the world. Additionally, Mr. DeDomenic testified about the challenges and delays that attend delivery of mail to service men and women currently serving in the theaters of Afghanistan and Iraq. Mr. DeDomenic testified that, on average, it requires seven to ten days for the USMPS to deliver mail to military bases and embassies in Europe, Asia and South America. In contrast, it requires approximately two weeks to deliver mail to service members in Afghanistan and Iraq, although this process has taken as long as 29 days. Finally, Mr. DeDomenic testified that as of October 25, 2004, the USMPS will begin using express mail delivery from all Air Force Post Offices and Foreign Post Offices to ensure the timely delivery of absentee ballots with respect to the November 2, 2004 general election.

Ms. Brunelli testified regarding the efforts undertaken by the FVAP to ensure that uniformed service members and overseas citizens are informed about their right to register and vote absentee in the 2004 elections. In fulfilling its responsibilities, Ms. Brunelli testified that the FVAP provides

² The hearing on this matter concluded at approximately 11:30 p.m. on the date this Order was issued. The transcript of the hearing has not yet been finalized. In referring to the testimony taken at the hearing on this matter, the Court has consulted and relied upon an initial draft of the hearing transcript. However, in the interests of time and accuracy, the Court finds it to be unnecessary to provide exact citation to the draft transcript of the record in this matter.

education and information services to voters at all foreign military installations, as well as at embassies and consulates throughout the world. As part of this educational campaign, the FVAP provides information to UOCAVA voters regarding the respective voting procedures and requirements of all fifty states and the District of Columbia, as well as all United States' territories.

Ms. Brunelli testified that fourteen states and one territory have implemented procedures pursuant to statute or regulation that provide for an extension of time to count ballots received from overseas voters after November 2, although Ms. Brunelli did not testify that Pennsylvania had such procedures. Additionally, Ms. Brunelli testified that 33 states permit the faxing of ballots to absentee voters and six states allow ballots to be sent overseas by electronic mail. According to Ms. Brunelli, Pennsylvania allows for facsimile transmission of ballots to overseas voters located in hazardous locations, although Ms. Brunelli acknowledged that she was unaware of any Pennsylvania statute or other regulation authorizing this practice.³

Despite the fact that challenges to the candidacy of Messrs. Nader and Camejo were lodged on August 9, 2004, Ms. Brunelli testified that the FVAP has undertaken no special efforts to advise UOCAVA voters about these challenges and the possibility that Messrs. Nader and Camejo might not be certified in Pennsylvania as candidates for President and Vice President, respectively. Instead, Ms. Brunelli and the FVAP have advised UOCAVA voters to remain informed about such matters by referring to newspapers and other media. Additionally, despite the fact that the challenges to the

³ Ms. Brunelli also admitted that she was unfamiliar with provisions of the Pennsylvania Constitution that may bear upon the constitutionality of transmitting faxed ballots. In addition, Ms. Brunelli admittedly did not instruct voting assistance officers under her direction to consult any state constitutions when preparing the voting assistance guide issued by the FVAP.

Nader-Camejo candidacy were pending, the FVAP advised all UOCAVA voters to return their absentee ballots on or before October 15, 2004 to ensure timely delivery.

Ms. Brunelli further testified regarding the kinds of procedures that the FVAP advises states to employ regarding overseas voters. Furthermore, Ms. Brunelli testified about hypothetical means by which absentee voters allegedly could return absentee ballots. However, Ms. Brunelli did not offer testimony as to how such procedures could be implemented with respect to the instant case, nor whether such procedures would comply with applicable Pennsylvania law.

Ms. Brunelli conceded that those states that permit the issuance or return of absentee ballots by facsimile or electronic mail do so pursuant to statute or regulation. Ms. Brunelli acknowledged that she is unaware of written policies, practices or procedures that would provide for the transmission of faxed ballots in accordance with applicable Pennsylvania laws or regulations. Moreover, Ms. Brunelli admitted that she did not know whether the transmission of faxed ballots would violate the provisions in the Pennsylvania Constitution regarding the secrecy of ballots. Ms. Brunelli agreed that implementing any new procedures to allow for facsimile balloting at this juncture would necessarily require the drafting and issuance of procedures and instructions to be used by voters and election officials. Ms. Brunelli also acknowledged that returning ballots via facsimile would necessarily allow any person who handles a faxed ballot to see the voter's ballot. In this regard, Ms. Brunelli conceded that such a process would differ from the procedures now in place in Pennsylvania designed to ensure voter secrecy.

In its review of the testimony taken, the Court notes that neither Mr. DeDomenic nor Ms. Brunelli testified that any UOCAVA voters will be prevented from voting absentee in the November 2,

2004 general election. Neither Mr. DeDomenic nor Ms. Brunelli testified that any absentee ballots issued by Pennsylvania to UOCAVA voters were legally incorrect or otherwise invalid. Ms. Brunelli, the Director of FVAP and the official responsible for UOCAVA voter education, did not testify that any UOCAVA voter has complained or otherwise expressed concern regarding their ability or right to vote in the November 2, 2004 general election. In sum, neither of the Government's witnesses offered testimony supporting the Government's contention that UOCAVA voters will be disenfranchised absent immediate injunctive relief, nor that the issuance of absentee ballots by Pennsylvania to all absentee voters requesting such ballots violates UOCAVA, nor that the non-issuance of second absentee ballots to UOCAVA voters would violate UOCAVA.

The Government contends that the fact that UOCAVA protected individuals have received ballots including the names of Nader and Camejo rather than the final ballot as certified on October 13, 2004, that excludes those names represents an UOCAVA violation. As the Commonwealth Defendants note, this fact does not ipso facto support a finding that the Commonwealth is in violation of UOCAVA. As UOCAVA does not govern ballot content, the burden is on Plaintiff to establish that the alleged ballot defect undermines the right of UOCAVA voters to cast their ballots. Plaintiff has made no such showing here, but instead has established that UOCAVA voters will, like all other absentee voters in Pennsylvania, vote the ballot that was legally correct at the time they requested and were provided absentee ballots. Likewise, Plaintiff has provided the Court with no indication that UOCAVA voters would be irreparably harmed by casting the same ballot as every other absentee voter registered in the state who received a similar ballot. All evidence presented indicates that these absentee ballots will be counted by the counties and votes for Nader will be treated as write-in votes

for that candidate. Plaintiff is thus unlikely to establish a UOCAVA violation and to prevail on the merits. However, even were this Court able to find as a matter of law that the ballots containing Mr. Nader's name deny UOCAVA voters the right to vote absentee, the potential harm to the Commonwealth and the public interest weigh heavily against issuing emergency relief.

In considering the harm to the non-movant, the district court must balance the hardships to the respective parties. Pappan Enters. v. Hardee's Food Sys., 143 F.3d 800, 805 (3d Cir. 1998). The Court must ensure that the issuance of relief would not harm the non-movant parties more than a denial would harm the movant. Id.

As a preliminary matter, the Government has not specified exactly what type of relief is needed to prevent irreparable harm to UOCAVA voters. At the hearing, the Government asked for "wide range of remedies" to be tailored to the "wide range" of individual UOCAVA voters.

A request for a "wide range of remedies" runs contrary to the narrow tailoring of an emergency injunctive remedy required by law. Davis v. Romney, 490 F.2d 1360, 1370 (3d Cir. 1974). In the Government's amended proposed order, the Government seeks to have the Court order Defendants to "instruct all county election officials in Pennsylvania to prepare and mail . . . corrected ballots for the Presidential election . . ." (Doc No. 19.) These second ballots would be sent and received through express mailing and/or electronic transmissions and the absentee ballot deadline would be extended to accommodate processing. (Id.)

In contrast to the Government's unsupported claims of irreparable harm to UOCAVA voters, the Commonwealth adduced substantial evidence that the injunctive relief sought will harm the Pennsylvania election system and the public at large by undermining the integrity and efficiency of

Pennsylvania's elections. The testimony of statewide and county election officials clearly establishes that the relief requested by the Government will prevent the efficient administration of the 2004 general election in Pennsylvania in a number of ways. Monna Accurti, Commissioner of the Bureau of Commissions, Elections and Legislation, testified that if election directors were required to issue new ballots to overseas voters, the counties will be unable to meet their obligations under the Pennsylvania Election Code, including their duty to count and report election returns. In turn, the ability of the Secretary of the Commonwealth to certify the election results and to vote Pennsylvania's electoral college vote by December 7, 2004, may be impaired.

Under Pennsylvania law, each county is responsible for administering the election on election day, including preparing voter registration, processing and mailing absentee ballots, and preparing various voting equipment. The Commonwealth established that the counties will be unable to meet these obligations if the relief requested is granted. Election officials from three of the largest counties in Pennsylvania testified to the unprecedented number of new voter and absentee applications received in anticipation of the upcoming election as well as the strained county resources in preparing for election day. Joseph Passarella, Director of Elections for Montgomery County and Chairman of the Elected Officials in Pennsylvania testified that "there are some counties that will not get everybody in the poll book, just won't do it . . . we've [got] everybody working around the clock to data enter and they won't get them all it."

Election directors testified to the substantial and unusual burdens that their offices face in this election year. Currently these officials are stretched to meet their statutory duties including providing sample ballots, provisional ballots, absentee ballots, voting machines and poll registers. Many offices

are working extended hours, seven days a week to meet these challenges. An order directing them to provide new ballots to overseas voters will require most election directors to review the records of individual overseas voters and to hand-address absentee ballots to those who received ballots containing the names of Messrs. Nader and Camejo. Even assuming that such an exercise would result in the timely mailing and return of these ballots, it likely cannot be accomplished without diverting scarce resources from the core responsibilities of election directors. While officials hand-address corrected ballots, their responsibilities in processing new voter registration and preparing the polling places will go unattended to. The Commonwealth Defendants have produced convincing evidence that any additional burden on an already taxed system may stretch it to the breaking point.

Plaintiffs have produced no evidence to justify such a risk. Indeed, the testimony of the elections directors raises serious concerns that the various remedies suggested by the Government may do more to disenfranchise overseas voters than the harm they seek to cure. Absent court intervention, UOCAVA voters will likely return absentee ballots. The evidence indicates that those ballots containing Mr. Nader's name that are voted for Ralph Nader will be recorded as a write-in vote for Nader in the same manner as those ballots cast by state-side absentee voters. UOCAVA voters will enjoy constitutionally protected secret ballots, as they would if they voted in their home counties.

The "remedies" proposed by the Government invite unpredictability to an otherwise orderly and time tested elections process. If, as the Government suggests, UOCAVA voters are provided with "Presidential only" ballots that are returned with their original absentee ballots, these voters will be required to forego secrecy so that their Presidential ballot vote can be substituted for their Presidential vote on the original ballot. Such a procedure risks undermining the integrity of the election system. The

same is true of the Government's alternative scheme to submit duplicate ballots to all UOCAVA voters and allow for their late return. Such a scheme burdens the election director with guarding against duplicate voting, and invites challenges to UOCAVA ballots, again undermining public confidence in the process and delaying election returns.

Fax and electronic mail voting as proposed by the Government are even more problematic. These methods of voting are not legislatively sanctioned, are incapable of implementation by all counties, and they deprive voters of the right of secrecy. This court was not privileged to hear testimony from any UOCAVA voters, but must seriously question whether any UOCAVA voter would willingly bargain away his or her right to privacy in voting for an amended ballot that deleted Mr. Nader's name.

The court's assessment of the relative harms must take into consideration the practical implications of failing to act. The Government has presented convincing evidence that overseas and military voters receive competent assistance and support in the exercise of their right to vote. Ms. Brunelli testified that the FVAP is prepared to issue notice to its voting assistance office expeditiously. Indeed, Ms. Brunelli advised the Court that the FVAP can provide notice of issues arising with respect to the election process within 24 hours. The Court expects that the FVAP's voting officers will quickly apprise these voters who have not yet cast a Presidential ballot of the developments in Pennsylvania that alter the slate of candidates. It is not known how many UOCAVA voters have already returned ballots containing Mr. Nader's name. UOCAVA voters who have returned Nader ballots will be treated like all of the Pennsylvania absentee voters who returned Nader ballots. As discussed above, to do otherwise would jeopardize the efficient and fair administration of elections in Pennsylvania.

As discussed, the Government has not demonstrated any of the four factors required before this Court may grant preliminary relief. In contrast, the demonstrated harm to the Commonwealth and its counties and the potential public harm to Pennsylvania voters weighs heavily in favor of denying the requested relief. Accordingly, the Government's motion will be denied.

III. Order

AND NOW, this 20th day of October, 2004, **IT IS ORDERED THAT** the United States' Motion for Temporary Restraining Order and Preliminary Injunctions is hereby **DENIED**.

S/ Yvette Kane
Yvette Kane
United States District Judge