

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
)	Case No. 3:08CV709
v.)	
)	
JEAN CUNNINGHAM, et al.,)	
)	
Defendants.)	
)	
)	

**UNITED STATES’ REBUTTAL TO DEFENDANTS’ OPPOSITION TO PLAINTIFF’S
MOTION FOR PERMANENT RELIEF**

The United States respectfully submits its rebuttal to the Defendants’ Opposition to the United States’ Motion for Permanent Relief. Because this Court’s October 15, 2009 Final Order (“Order”) addressed liability issues only and deferred key issues related to relief, and because limited future relief is necessary to ensure Defendants’ compliance with the requirements of Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. § 1973ff et seq., the United States’ Motion for Permanent Relief should be granted.

I. ARGUMENT

This Court’s Order did not end this litigation. Instead, it specifically deferred ruling on critical remaining relief issues, including those related to relief for future elections, to afford the parties time to negotiate an appropriate plan. Based on the Defendants’ inability to meet ballot-

mailing deadlines, and because the Defendants refuse to discuss any plan to ensure future UOCAVA compliance, Court-ordered relief is appropriate.

A. THE COURT’S OCTOBER 15, 2009 ORDER IS NOT FINAL AS TO FUTURE RELIEF

The Defendants argue that this Court’s October 15, 2009 Order was a final order that ended this case. They are incorrect. “A final order is one which disposes of all issues in dispute as to all parties. It ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” Doe v. Alfred, 79 F.3d 1141, 1141 (4th Cir. 1996) (citing Catlin v. United States, 324 U.S. 229, 233 (1945)).

The Court’s Order did not dispose of all disputed issues. Rather, it explicitly and appropriately deferred two key issues to the parties: first, the method by which the Commonwealth would count and certify the designated ballots for the November 2008 election, and second, “the determination as to the appropriate way in which to ensure Virginia’s compliance with UOCAVA in future federal elections.” Order at 2. The parties agreed on a plan to count and certify the designated ballots for the November 2008 election. The Defendants, however, have rebuffed every attempt to discuss reasonable, limited steps to ensure future UOCAVA compliance.

The Issue of Appropriate Future Relief Has Always Been Integral to This Litigation

From the outset, the United States made clear its intent to seek a Court order as to 1) the Defendants' liability for violating UOCAVA, and 2) a plan to ensure future UOCAVA compliance. See Compl. in Interv. at 4; First Am. Compl. at 4. To put the liability issue before the Court as quickly as possible, however, the parties agreed to defer discovery as to facts related

to future relief until this Court had made a liability finding. United States Magistrate Judge Dennis W. Dohnal approved that agreement. See June 2, 2009 electronic mail from the Honorable Dennis W. Dohnal to parties' counsel ("Issues of liability and possible remedy will be bifurcated and discovery will be stayed as to the latter issue pending resolution of liability or further Order of the Court").¹ In its Cross-Motion for Summary Judgment, moreover, the United States further requested "a brief period following the entry of judgment to confer with the Defendants and report to the Court on *all relief issues*, including the appropriate scope of relief for UOCAVA violations in the November 2008 general election, *as well as future relief.*" U.S. Opp. to Defs.' Mot. for Summ. J. and Cross-Mot. for Summ. J. at 21-22 (emphasis added).

The Issue of Future Relief Was Integral to the Court's Liability Order

¹ Judge Dohnal's June 2, 2009 email states in full:

Counsel: To summarize our conference call to hopefully insure that we are "all on the same page". Mr. Dybing will confer with his clients this promptly to determine which DOJ discovery demands can be complied with and which, for whatever reason (including [sic] burdensomeness), they object to in regard to which objections will be lodged with the court per Rule. **Issues of liability and possible remedy will be bifurcated and discovery will be stayed as to the latter issue pending resolution of liability or further Order of the Court.** Counsel will "meet and confer" as to any dispute re whether a particular discovery demand involves liability or remedy and thereafter communicate with this court if the issue cannot be resolved. Mr. Dellheim will review any objections lodged by Mr. Dybing as to production of discovery related to liability and move to compel if he concludes he needs such info. in support of his anticipated cross motion for summary judgment. Mr. Dellheim will also initiate a draft of a Scheduling Order to incorporate all this with reasonable briefing deadlines for the anticipated cross motions for S/J, Mr. Dybing to file first. Please forward same to me and I'll pass it onto J. Williams for his approval/revisions. Please advise if there is any disagreement with what I have attmpted [sic] to summarize. Thank you.

Judge D

(Emphasis added.) The Defendants lodged no objections to Judge Dohnal's accurate summary.

As noted, the Court's liability Order specifically contemplated the parties' cooperation as to future relief. Order at 2 (deferring to the parties "the appropriate way in which to ensure Virginia's compliance with UOCAVA in future federal elections"). Accordingly, the United States provided a draft consent decree to the Defendants, and sought to confer with them as to future relief on numerous occasions; the United States reported the status of those attempts to the Court on November 4, 2009, January 1, 2010, February 3, 2010, and March 31, 2010. Future relief has been a contemplated phase of this litigation from the start, and this Court appropriately entrusted the parties to seek to resolve it amicably in the first instance.

Thus, while the Defendants have now rejected all discussion as to future relief, they cannot now reject the following facts: 1) the United States properly sought relief to ensure compliance for future elections in its Complaint and Amended Complaint, 2) the parties, with Judge Dohnal's consent, stayed discovery as to that live remedial issue pending any potential liability order, 3) the United States reaffirmed the necessity of future relief in its Cross-Motion for Summary Judgment, and 4) this Court's liability Order explicitly deferred ruling on that remedial issue to permit the parties time to negotiate appropriate terms. Accordingly, the Court Order was not final, as it explicitly and appropriately reserved resolution of the key element of permanent relief sought in this case.

B. DEFENDANTS' PAST FAILURES TO COMPLY WITH BALLOT MAILING DEADLINES JUSTIFY A LIMITED PROGRAM TO ENSURE FUTURE COMPLIANCE WITH FEDERAL LAW

The Defendants argue that future relief is unnecessary primarily because the Virginia Code has been amended to conform to recent UOCAVA amendments known as the Military and Overseas Voter Empowerment Act ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589,

123 Stat. 2195, 2318-2335 (2009). This argument misconstrues the remedial relief the United States seeks. Future relief is required because of the Defendants' demonstrated inability to meet ballot mailing deadlines imposed by State law.

While the United States commends Virginia's efforts to conform State law to new federal law requirements, the facts in this case amply demonstrate that State oversight and procedures are simply insufficient to guarantee Virginia election officials' compliance with critical ballot mailing deadlines. This Court is intimately familiar with the Commonwealth's lapses leading up to the November 2008 general election, lapses which, but for the remedy imposed by this Court, would have disenfranchised numerous military and overseas voters.² Moreover, Defendants do not deny that, just one month after the Court's October 2009 liability Order in this case, they again violated State law under similar circumstances during the November 2009 election by failing to mail absentee ballots to military and overseas voters within state law time frames. Because the November 2009 general election was not a Federal election, these additional lapses did not implicate UOCAVA; they do, however indicate Virginia's on-going failure to meet critical ballot mailing deadlines, resulting in the potential disenfranchisement of the Commonwealth's overseas and military voters. Further, they indicate additional failures on the part of the Commonwealth to train its local election officials adequately in correct UOCAVA procedures, as well as oversight failures related to ensuring that local election officials comply with those procedures. It is essential, therefore, that the State adopt the training, monitoring, and

² Had the Commonwealth met even the bare requirements of State law – which required absentee ballots to be available no later than 45 days before the election – there would have been no federal law violation.

reporting requirements common to UOCAVA cases and, based on the circumstances, necessary here.³

Despite the Defendants' repeated failures to mail absentee ballots to Virginia UOCAVA voters within timeframes mandated by State law, they nonetheless resist even the most minimal and short-lived procedures to ensure future compliance with federal law. In support of their recalcitrance, the Defendants rely on Blackwell v. Thomas, 476 F.2d 443 (4th Cir. 1973), for the proposition that, absent cognizable danger of a recurrent law violation, it is not appropriate to assume that local officials will engage in future violations. In Blackwell, after the plaintiffs filed their complaint alleging discrimination in jury selection practices, local officials voluntarily sought and obtained a judicial order to correct the challenged behavior. As such, the court properly found it unlikely that local officials – who had cooperated in remedying the alleged violations prior to judgment – would fail to comply with that judicial order, or that they would not immediately rectify future violations that were brought to their attention.

The story is quite different here. The Defendants have steadfastly resisted responsibility for their federal law violations. Moreover, just one month after this Court's liability Order, they again failed to meet critical ballot mailing deadlines. With so many of Virginia's citizens living overseas and serving in the military, the stakes are simply too high, the consequences too grave, and the State's record too blemished not to require a minimal, short-lived program designed to ensure strict compliance with federal law in upcoming elections for federal office.

³ The United States referenced the Defendants' November 2009 failure to meet critical ballot mailing deadlines in its Motion for Permanent Relief. The Defendants' opposition pleading declined to challenge the United States' averments as to that failure. However, to the extent they wish to do so, the United States would reluctantly request leave to reactivate briefly discovery as to that and other issues related to the need future relief. As noted, the parties, under Judge Dohnal's supervision, had agreed to stay discovery as to that issue, pending this Court's liability determination.

C. THE FEDERAL VOTING ASSISTANCE PROGRAM'S REPORT IS NOT RELEVANT TO THE FUTURE COMPLIANCE QUESTION AT ISSUE HERE

As discussed in more detail in the United States' Motion for Permanent Relief, the Legislative Initiatives assessment in FVAP's Election Survey Report is not relevant to the central question of ensuring that Virginia military and overseas voters receive a fair and reasonable opportunity to participate in future elections for federal office. In FVAP's words, and according to the Defendants' own Memorandum, this report discusses FVAP's assessment of State implementation of FVAP's legislative initiatives. It is not a review of State conduct, nor is it an assessment of the effectiveness of State or local election officials' implementation of its statutory obligations -- state or federal. Nor is it in any way a forecast or guarantor of future UOCAVA compliance. While conformity between federal and state law is beneficial, Defendants' conduct in this case demonstrates it is not sufficient. Virginia election officials have failed to comply with applicable ballot mailing deadlines in the past; such failures provide no assurance of compliance in the future and, indeed, give rise to a cognizable risk of on-going, future violations of law. The Defendants' training and oversight lapses raise similar concerns. Accordingly, the narrowly-tailored relief the United States seeks will provide reasonable assurance that the disenfranchisement of Virginia's military and overseas voters that occurred in 2008 will not occur again.

II. CONCLUSION

Based on the foregoing reasons, and those stated in the United States' Motion for Permanent Relief, the United States respectfully requests that this Court grant that Motion and enter the Proposed Order, in addition to any other relief the Court deems appropriate.

Respectfully submitted,

THOMAS E. PEREZ
ASSISTANT ATTORNEY GENERAL
NEIL H. MACBRIDE
UNITED STATES ATTORNEY

/s/_____

Robin E. Perrin
Virginia State Bar No. 65825
Assistant United States Attorney
United States Attorney's Office
600 East Main Street, Suite 1800
Richmond, Virginia 23219
Telephone: (804) 819-5400
Facsimile: (804) 819-7417
Email: Robin.Perrin2@usdoj.gov

T. CHRISTIAN HERREN JR.
REBECCA J. WERTZ
RICHARD DELLHEIM (admitted pro hac vice)
LEMA BASHIR
United States Department of Justice
Civil Rights Division, Voting Section
950 Pennsylvania Ave., NW
Room NWB-7254
Washington, D.C. 20530

Phone: (202) 305-1291

Fax: (202) 307-3961

chris.herren@usdoj.gov

rebecca.j.wertz@usdoj.gov

richard.dellheim@usdoj.gov

lema.bashir@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

Robert A. Dybing
rdybing@t-mlaw.com
Attorney for the Defendant

By:

/s/ _____
Robin E. Perrin
Virginia State Bar No. 65825
Assistant United States Attorney
United States Attorney's Office
600 East Main Street, Suite 1800
Richmond, Virginia 23219
Telephone: (804) 819-5400
Facsimile: (804) 819-7417
Email: Robin.Perrin2@usdoj.gov