

## Counting Federal Overseas Votes on Ballots with State-Election Errors

*United States v. West Virginia*

*(John T. Copenhaver, Jr., S.D. W. Va. 2:14-cv-27456)*

A state supreme court ordered a replacement candidate for a state legislative election, granting a writ of mandamus that also requested the nullification of absentee ballots already sent out that included the withdrawn candidate's name. The U.S. Department of Justice sought an injunction requiring that votes for federal offices be counted in the otherwise voided absentee ballots for overseas voters if the overseas voters did not cast corrected ballots. Although the district judge denied the Justice Department preliminary relief, on full briefing the judge ordered federal votes counted for the four ballots at issue.

*Subject:* Absentee and early voting. *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots; matters for state courts.

The U.S. Department of Justice filed a federal complaint in the Southern District of West Virginia on October 31, 2014, alleging that West Virginia's sending overseas voters absentee ballots only thirty-two days before the November 4 general election—to accommodate a late candidate substitution for one state legislative office—violated the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA).<sup>1</sup> With its complaint, the Justice Department filed a proposed consent decree.<sup>2</sup>

On November 3, Judge John T. Copenhaver, Jr., signed the consent decree, which extended the deadline for overseas absentee ballots cast by voters registered in the state legislative district at issue—district 35 of West Virginia's house of delegates—for the purposes of federal offices—the United States Senate and the United States House of Representatives—by thirteen days, so that federal overseas voters had the full forty-five days mandated by UOCAVA.<sup>3</sup>

On November 6, the Justice Department sought an order requiring West Virginia election officials to count votes for federal offices cast by overseas voters registered in district 35 who returned the original absentee ballot and did not return a corrected absentee ballot.<sup>4</sup>

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1. Complaint, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Oct. 31, 2014), D.E. 1; see Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. See generally Robert Timothy Reagan, *Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act* (Federal Judicial Center 2016).

2. Joint Consent-Decree Motion, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Oct. 31, 2014), D.E. 2.

3. Consent Decree, *id.* (Nov. 3, 2014), D.E. 5.

4. Motion for Emergency Supplemental Injunctive Relief, *id.* (Nov. 6, 2014), D.E. 6.

West Virginia’s supreme court of appeals ordered the ballot substitution on October 1<sup>5</sup> in response to a September 22 petition for a writ of mandamus.<sup>6</sup> The petition brief concluded,

The Petitioners further request that this Court order the Secretary of State to certify Petitioner McDavid to the Kanawha County Clerk for the 35th House District and to instruct the County Clerk to mail valid ballots to all absentee voters with *instructions that the invalid ballot that is incomplete shall be void.*<sup>7</sup>

The supreme court of appeals concluded its opinion, “Writ Granted.”<sup>8</sup> On October 27, West Virginia election officials sought clarification on whether the court intended that federal votes cast on original district 35 ballots by overseas voters would be void.<sup>9</sup> On October 30, the court denied the motion to clarify its earlier opinion.<sup>10</sup>

Judge Copenhaver understood that three overseas voters registered in district 35 returned the original absentee ballot and did not return the amended absentee ballot, so those three voters’ federal votes were at issue.<sup>11</sup> Judge Copenhaver denied the Justice Department immediate relief, concluding, “From all that appears at this preliminary injunction stage, the state officials have taken such steps as necessary to ensure that affected overseas voters in House District 35 have sufficient opportunity to receive, mark and return ballots for the two federal offices.”<sup>12</sup> Judge Copenhaver set a final hearing on the merits for December 1, “[i]n an effort to conclude this matter prior to the Governor’s proclamation of the federal election outcome.”<sup>13</sup> Upon a stipulation by the parties of undisputed facts,<sup>14</sup> Judge Copenhaver canceled the December 1 hearing and ordered briefing completed by December 19.<sup>15</sup>

On December 22, Judge Copenhaver issued a final injunction in favor of counting federal votes on the original district 35 absentee ballots cast by overseas voters who did not cast corrected ballots, now understood to number four.<sup>16</sup>

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5. Mandamus Opinion, West Virginia *ex rel.* McDavid v. Tennant, No. 14-939 (W. Va. Oct. 1, 2014), [www.courts.wv.gov/supreme-court/memo-decisions/fall2014/14-0939memo.pdf](http://www.courts.wv.gov/supreme-court/memo-decisions/fall2014/14-0939memo.pdf), 2014 WL 4922641.

6. Mandamus Petition, *id.* (Sept. 22, 2014), *filed as Ex. 1*, Gov’t Brief, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Nov. 6, 2014), D.E. 7.

7. *Id.* at 12 (emphasis added).

8. Mandamus Opinion, *supra* note 5, at 10.

9. Motion for Clarification, *McDavid*, No. 14-939 (W. Va. Oct. 27, 2014), *filed as Ex. 7*, Gov’t Brief, *supra* note 6.

10. Order, *id.* (Oct. 30, 2014), *filed as Ex. 8*, Gov’t Brief, *supra* note 6; *see* Opinion at 5, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Nov. 18, 2014), D.E. 10 [hereinafter First Federal Opinion], 2014 WL 6471493.

11. First Federal Opinion, *supra* note 10, at 6, 9.

12. *Id.* at 8.

13. *Id.* at 10.

14. Stipulation of Undisputed Facts and Law, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Nov. 25, 2014), D.E. 14.

15. Order, *id.* (Nov. 26, 2014), D.E. 15.

16. Opinion, *id.* (Dec. 22, 2014), D.E. 22 [hereinafter Second Federal Opinion], 2014 WL 7338867; *see* Notification of Compliance, *id.* (Jan. 22, 2015), D.E. 24.

Here, the confusion caused by the issuance of the corrected ballots and the ensuing uncertainty about the validity of the original ballots deprived UOCAVA voters in the 35th House District of a meaningful opportunity to receive, mark, and return a ballot in the November 4, 2014 election. For the small number of those voters who expressed their intent to vote on an original ballot, but failed to return a corrected ballot, counting the original ballot provides the only meaningful relief available.<sup>17</sup>

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17. Second Federal Opinion, *supra* note 16, at 20.