

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No. 10-cv-518 |
| v. |) | |
| |) | |
| THE STATE OF WISCONSIN, et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |
| _____ |) | |

CONSENT DECREE

Plaintiff United States of America (“United States”) initiated this action against the State of Wisconsin (the “State”); the Wisconsin Government Accountability Board (the “G.A.B.”); Judges Gordon Myse, Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, and David G. Deininger, in their official capacities as officers or members of the G.A.B.; and Kevin J. Kennedy, in his official capacity as Director and General Counsel of the G.A.B. (collectively, “Defendants”), to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. §§ 1973ff to 1973ff-7. The United States’ complaint alleges a violation of UOCAVA arising from certain provisions of Wisconsin law which prevent the Defendants from transmitting absentee ballots to absent uniformed services voters and overseas voters (“UOCAVA voters”) by the 45th day before the November 2, 2010 Federal general election, as required by Section 102(a)(8)(A) of UOCAVA, and from the fact that the State has not obtained a hardship waiver of that requirement pursuant to Section 102(g) of UOCAVA. In particular, as a result of Wisconsin’s September 14, 2010 primary election and other state laws related to certifying candidates and preparing ballots for the general election, the

State asserts that it will not be able to transmit ballots by the 45-day deadline provided in UOCAVA. Accordingly, UOCAVA voters will not be provided the time specified under Federal law to receive, mark, and submit their ballots in time to have those ballots counted in the November 2, 2010 Federal general election.

The United States and Defendants, through their respective counsel, have conferred and agree that this action should be settled without the delay and expense of litigation. The parties share the goal of providing UOCAVA voters with sufficient opportunity under Federal law to participate in the November 2, 2010 Federal general election. Accordingly, the parties have negotiated in good faith and hereby agree to the entry of this Consent Decree as an appropriate resolution of the UOCAVA claim alleged by the United States. Accordingly, the United States and Defendants stipulate and agree that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to UOCAVA, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) (“MOVE Act”). UOCAVA provides that absent uniformed services voters and overseas voters 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.

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and this Court has jurisdiction of this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

3. Defendant State of Wisconsin is responsible for complying with UOCAVA, and ensuring that validly-requested absentee ballots are sent to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1.

4. Defendant Wisconsin Government Accountability Board is responsible for administering election laws in the State and promulgating rules applicable to jurisdictions in the State “for the purpose of interpreting or implementing the laws regulating the conduct of elections.” WIS. STAT. § 5.05(1).

5. Defendant Judge Gordon Myse is the G.A.B.’s Chair and is sued in his official capacity. The Chair of the G.A.B. or his designee is responsible for canvassing and certifying the election returns. WIS. STAT. § 7.70(3). Defendants Judges Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, and David G. Deininger are members of the G.A.B. and are sued in their official capacities.

6. Defendant Kevin J. Kennedy is sued in his official capacity as the Director and General Counsel of the G.A.B. As General Counsel of the G.A.B., Defendant Kennedy “perform[s] legal and administrative functions for the board.” WIS. STAT. § 5.05(1m). Defendant Kennedy has been designated by the G.A.B. as the Chief Election Officer for the State pursuant to WIS. STAT. § 5.05(3g).

7. Section 102(a)(8) of UOCAVA requires that states transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a hardship exemption is obtained pursuant to Section 102(g) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8).

8. States can be exempted from the requirement to transmit ballots 45 days in advance of a Federal election if they apply for, and are granted, a hardship waiver from the Presidential Designee for UOCAVA, the Secretary of Defense. 42 U.S.C. § 1973ff-1(g).

9. On August 2, 2010, the State applied for a hardship waiver pursuant to Section 102(g) of UOCAVA. 42 U.S.C. § 1973ff-1(g). Pursuant to Section 102(g)(1)(B) of UOCAVA, the State’s

waiver application included an explanation of the hardship that made the State unable to transmit absentee ballots to UOCAVA voters at least 45 days prior to the November 2, 2010 general election for Federal office. Pursuant to Section 102(g)(2)(B)(i) of UOCAVA, the State's explanation of hardship was based on the fact that Wisconsin's September 14, 2010 primary election date prevented the State from complying with Section 102(a)(8)(A). 42 U.S.C. § 1973ff-1(a)(8)(A).

10. Pursuant to Section 102(g)(1)(D) of UOCAVA, the State's August 2, 2010 waiver application also included the State's proposed comprehensive plan to ensure that all UOCAVA voters who submitted timely requests for absentee ballots would be able to receive and return such ballots in time to have those ballots counted in the November 2, 2010 general election for Federal office. The State's proposed comprehensive plan relied on: the transmission of state absentee write-in ballots to all UOCAVA voters as early as 90 days before the November 2, 2010 election, with a candidate list becoming available online 35 days before the election; permitting the electronic transmission of the official absentee ballot to UOCAVA voters who requested such transmission, and mailing official absentee ballots to all other UOCAVA voters, on October 4, 2010, 29 days before the election; and counting ballots from military voters postmarked by the date of the election and received no later than 10 days after the date of the election.

11. On August 27, 2010, the Department of Defense, pursuant to its statutory authority, issued a decision denying the State's August 2, 2010 application for a hardship waiver. That decision found that the State had shown an undue hardship under Section 102(g)(2)(B)(i), in that the State's September 14, 2010 primary election date prevented the State from complying with Section 102(a)(8)(A) of UOCAVA. The Department of Defense nonetheless denied the State's

waiver application, pursuant to Section 102(g)(2)(A), on the ground that the State's comprehensive plan did not provide UOCAVA voters sufficient time to receive, mark, and return absentee ballots in time to have those ballots counted in the November 2, 2010 Federal general election.

12. The State contends that: (a) its comprehensive plan did provide UOCAVA voters sufficient time to receive, mark, and return absentee ballots in time to have those ballots counted in the November 2, 2010 Federal general election; (b) the denial of the State's hardship waiver application was, therefore, erroneous under Section 102(g)(2) of UOCAVA; and (c) because the State should have received a hardship waiver, its inability, due to the hardship created by its September 14, 2010 primary election date, to transmit absentee ballots to UOCAVA voters at least 45 days before the November 2, 2010 Federal general election should not constitute a violation of Section 102(a)(8)(A) of UOCAVA. The United States denies these contentions.

13. The United States contends that: (a) the State's comprehensive plan did not provide UOCAVA voters sufficient time to receive, mark, and return absentee ballots in time to have those ballots counted in the November 2, 2010 Federal general election; (b) the denial of the State's hardship waiver application was, therefore, correct under Section 102(g)(2) of UOCAVA; and (c) because the State's hardship waiver application was denied, the State's inability to transmit absentee ballots to UOCAVA voters at least 45 days before the November 2, 2010 Federal general election constitutes a violation of Section 102(a)(8)(A) of UOCAVA. The State denies these contentions.

14. Notwithstanding any disagreements between the State and the United States, a failure by the State either to obtain a hardship waiver or to transmit absentee ballots to UOCAVA voters by

the 45th day before the November 2, 2010 Federal general election constitutes a violation of Section 102(a)(8)(A) of UOCAVA.

15. On September 14, 2010, the State will conduct a Federal primary election in which voters will select candidates for the Federal general election on November 2, 2010. The date of the September 14, 2010 primary election is 49 days prior to the November 2, 2010 general election for Federal office. Under Wisconsin law, as the post-election canvassing process takes approximately 14 days, the list of certified candidates for the general election is not required to be available until September 28, 2010, 35 days before the November 2, 2010 general election. WIS. STAT. § 7.08(2)(c). However, the Defendants are able and agree to produce the certified candidate list on September 27, 2010, 36 days before the general election.

16. Local election officials of the State have received timely requests for absentee ballots for the November 2, 2010 Federal general election from voters who are entitled to vote pursuant to the provisions of UOCAVA.

17. Under Wisconsin law, local election officials are required to send official absentee ballots to UOCAVA voters by postal mail, or electronically by either email or telefacsimile, according to the request of the voter, by October 4, 2010, 29 days in advance of the November 2, 2010 Federal general election. WIS. STAT. § 7.15(1)(cm).

18. Under Wisconsin law, ballots from “military electors” must be postmarked by election day and received by a municipal clerk within ten (10) days after election day in order to be counted. WIS. STAT. § 6.221(3)(b). “Military electors” include members of a uniformed service, members of the merchant marine, civilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States, peace corps

volunteers, and spouses and dependents of the above. WIS. STAT. § 6.22(1)(b). Thus, “military electors” include members of a uniformed service stationed overseas or within the United States.

19. Under Wisconsin law, ballots from overseas citizens protected by UOCAVA who do not qualify as “military electors” must be returned by election day to be counted. WIS. STAT. § 6.87(6).

20. In order to avoid the burdens, delays, and uncertainties of litigation and to efficiently and expeditiously promote the parties’ shared goal of providing UOCAVA voters with sufficient opportunity under Federal law to participate in the November 2, 2010 general election, the Defendants will order local election officials to transmit the official absentee ballots by postal mail, or electronically by either email or telefacsimile, according to the request of the voter, no later than October 1, 2010, 32 days before the election. To ensure that Wisconsin’s UOCAVA voters will have sufficient opportunity under Federal law to receive absentee ballots they have requested and submit marked absentee ballots in time to be counted for the November 2, 2010 Federal general election, the parties agree that this Court should enter an order extending the deadline for receipt of ballots from UOCAVA voters to 17 days after the election. Under this extension, absentee ballots from all UOCAVA voters that are executed and sent by November 2, 2010, and received by the close of business on November 19, 2010, will be accepted and tabulated in the final Federal general election results.

WHEREFORE, the parties having freely given their consent, and the terms of the Decree being fair, reasonable, and consistent with the purposes of UOCAVA, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

- (1) For the November 2, 2010 general election, the Defendants shall take
the following steps to ensure that all UOCAVA voters are sent the

official absentee ballot for the general election no later than October 1, 2010: (a) the Defendants will certify the results of the September 14, 2010 primary election no later than September 27, 2010; (b) pursuant to WIS. STAT. § 5.06(6), the G.A.B. will order county election officials to transmit the official absentee ballots to municipal election officials no later than October 1, 2010; (c) pursuant to WIS. STAT. § 5.06(6), the G.A.B. will also order municipal election officials to transmit the official absentee ballots to UOCAVA voters by postal mail, or electronically by either email or telefacsimile, according to the request of the voter, no later than October 1, 2010, after receipt of the official absentee ballots from the county election officials; (d) in the event that any county or municipal election official fails to comply with an order issued by G.A.B. under this paragraph, the Defendants will immediately take such enforcement actions as are necessary and legally available to them to secure compliance with all such orders; and (e) for the November 2, 2010 Federal general election, the Defendants shall order local election officials pursuant to WIS. STAT. § 5.06(6) and shall take such other steps as are necessary to count as validly cast ballots in the November 2, 2010 Federal general election all those ballots, including Federal Write-in Absentee Ballots and state write-in absentee ballots, cast by absent uniformed services voters and overseas voters qualified to vote in Wisconsin pursuant to UOCAVA,

provided such ballots are executed and sent by November 2, 2010, received by November 19, 2010, and are otherwise valid.

- (2) The Defendants shall take such steps as are necessary to afford UOCAVA voters eligible to participate in the State's November 2, 2010 Federal general election a reasonable opportunity to learn of this Court's order by including a notice with every absentee ballot sent to a UOCAVA voter. The notice shall, at minimum: (a) explain that the deadline for the ballot to be executed and sent is November 2, 2010; (b) explain that the deadline for receipt of the ballot, and the hard copy of the voter's request or application for an absentee ballot if it was sent electronically, has been extended to November 19, 2010; and (c) provide appropriate contact information at the G.A.B. for assistance.
- (3) Upon the entry of this Consent Decree, the Defendants shall issue a press statement for immediate release, posted immediately on the State's election information website, and distributed to the Federal Voting Assistance Program; International Herald Tribune (<http://www.ihf.com>); USA Today International (<http://www.usatoday.com>); Military Times Media Group (cvinch@militarytimes.com); Overseas Vote Foundation (<http://www.overseasvotefoundation.org/intro/>); Stars and Stripes (www.estripes.com), and any other appropriate newspaper or news media in the State of Wisconsin. The news release shall, at a minimum: (a) summarize this order, including a notice that the

deadline for receipt of the ballot has been extended to November 19, 2010; (b) identify the contests for Federal office that will be on the ballot on November 2, 2010; and (c) provide appropriate contact information at the G.A.B. for assistance.

(4) The Defendants shall provide a report to the United States Department of Justice no later than October 6, 2010, concerning the transmittal of UOCAVA absentee ballots by the local election jurisdictions. The report shall: (a) certify that absentee ballots were transmitted no later than October 1, 2010, to all qualified UOCAVA voters whose applications for ballots have been received and approved by that date; and (b) indicate, by local election jurisdiction, the number of requests received and the number of UOCAVA absentee ballots transmitted, and the method of transmittal thereof. The report shall also indicate, by local election jurisdiction, the number of requests received and the number of UOCAVA absentee ballots transmitted, and the method of transmittal thereof, on each day after October 1, 2010, through October 4, 2010.

(5) The Defendants shall file a report with the United States Department of Justice no later than December 17, 2010, concerning the number of UOCAVA absentee ballots, by local election jurisdiction, received and counted for the November 2, 2010 general election for Federal office. The report will set forth the following information, by local election

jurisdiction, and categorized by “military electors” and other overseas voters:

a. The number of absentee ballots from UOCAVA voters received before the close of the polls on November 2, 2010, and counted;

b. The number of absentee ballots from UOCAVA voters received and counted after the close of the polls on November 2, 2010, but prior to the close of business on November 19, 2010;

c. The number of absentee ballots from UOCAVA voters received later than the close of business on November 19, 2010; and

d. The number of absentee ballots from UOCAVA voters that were not counted in the general election for Federal office, for reasons other than late receipt.

(6) The Defendants shall take such actions as are necessary to assure that UOCAVA voters shall have a fair and reasonable opportunity to participate in future Federal elections, including proposing legislation and taking any administrative actions needed to fully remedy the potential UOCAVA violations arising from the State's Federal primary election schedule. The parties agree to confer on the progress of these efforts, and Defendants shall provide a status

report to the United States Department of Justice by September 1,
2011.

The Court shall retain jurisdiction over this action to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree through December 31, 2010. Absent notification by the Court before that date, the clerk is directed to close this file subject to reopening upon good cause shown.

ORDERED this 14th day of September, 2010.

/s/ William Conley

William M. Conley
United States District Judge