

Military Absentee Ballots 2004

*United States v. Pennsylvania (1:04-cv-830) and
Reitz v. Rendell (1:04-cv-2360) (Yvette Kane, M.D. Pa.)*

The Justice Department sued to require Pennsylvania to send out absentee ballots to military personnel overseas in time for them to come back and be counted for a primary election. The judge ordered an extension of the ballots' due date. The judge also ordered an extension for military absentee ballots in the general election on a complaint by parents of two soldiers.

Subject: Absentee and early voting. *Topics:* Absentee ballots; military ballots.

Two Thursdays before the Tuesday, April 27, 2004, primary election in Pennsylvania, the U.S. Department of Justice filed an action in the Middle District of Pennsylvania's Harrisburg courthouse to ensure that absentee ballots cast by Pennsylvania citizens in the military would be counted.¹ The department alleged, and was able to prove, that in many of Pennsylvania's sixty-seven counties election officials had violated the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA)² by mailing out ballots with insufficient time for them to be returned by the state's deadline of Friday before the election.³

Pennsylvania responded to the action on Friday, the day after it was filed.⁴ District Judge Yvette Kane heard the matter that same Friday, at 2:48 p.m.,⁵ and granted the department injunctive relief that day.⁶ She was very careful to take testimony in the case and clearly explain her reasoning in her opinion.⁷

One of three active judges in Harrisburg, Judge Kane received the case by random assignment.⁸ In deciding the case, she had the benefit of her previous

1. Complaint, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Apr. 15, 2004), D.E. 1 [hereinafter *United States v. Pennsylvania* Complaint].

2. 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).

3. Preliminary Injunction at 3, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Apr. 16, 2004), D.E. 7 [hereinafter *United States v. Pennsylvania* Preliminary Injunction]; *United States v. Pennsylvania* Complaint, *supra* note 1, at 3–5.

4. Government Brief, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Apr. 16, 2004), D.E. 5.

5. Transcript, *id.* (Apr. 16, 2004, filed Feb. 10, 2005), D.E. 35.

Tim Reagan interviewed Judge Kane for this report by telephone on February 13, 2012.

6. *United States v. Pennsylvania* Preliminary Injunction, *supra* note 3.

7. Interview with Hon. Yvette Kane, Feb. 13, 2012.

8. *Id.*

Had Judge Kane been unavailable, such as because she was on vacation or presiding over a jury trial, the case would have been randomly assigned to one of the other judges. *Id.* Senior judges in the district, which numbered about twice as many as active judges, usually were not assigned time-sensitive injunction cases. *Id.*

experience overseeing Pennsylvania's elections as secretary of the commonwealth from 1995 until her appointment as a federal judge in 1998.⁹

The matter was fraught with political tension and demonstrations on the courthouse steps.¹⁰ Senator Arlen Specter, who was receiving a strong primary-election challenge from Pat Toomey,¹¹ the man who succeeded him as senator six years later,¹² came to the courthouse and asked to address the judge, a request that Judge Kane denied.¹³

Judge Kane declined to order that Pennsylvania accept military absentee ballots by fax or email,¹⁴ but she extended the deadline for their receipt by twenty-four days, to May 17, 2004, so long as the ballots were actually cast before the polls closed on election day.¹⁵ A state judge had granted the same extension a few days before the federal action was filed.¹⁶

Judge Kane conducted an evidentiary proceeding on October 19 and 20, two weeks before the general election.¹⁷ Legal challenges in state court over whether Ralph Nader was entitled to a position on the general-election ballot were not resolved until October 19.¹⁸ Pennsylvania's supreme court determined that Nader should be excluded, but absentee ballots including him had already been sent overseas.¹⁹ Judge Kane determined on October 20 that the Justice Department's proposed remedies would do more harm than good.²⁰

Acting pursuant to powers of attorney, parents of two soldiers—one in Iraq and one in Kuwait—filed a federal complaint in the Middle District on October 27, complaining that the soldiers were not sent absentee ballots on time.²¹ With their complaint, the plaintiffs filed a motion for a temporary

9. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; Interview with Hon. Yvette Kane, Feb. 13, 2012.

10. Interview with Hon. Yvette Kane, Feb. 13, 2012.

11. See James Dao, *Moderates Aid Senator Specter In a Close Race*, N.Y. Times, Apr. 14, 2004, at A23.

12. See Thomas Fitzgerald, Jeff Gammage & Mari Schaefer, *Toomey Beats Sestak*, Phila. Inquirer, Nov. 3, 2010, at A1.

13. Interview with Hon. Yvette Kane, Feb. 13, 2012.

14. *United States v. Pennsylvania* Preliminary Injunction, *supra* note 3, at 4–5.

15. *Id.* at 5–6.

16. See Mark Scolforo, *Judge Extends Deadline for Absentee Ballots from Overseas*, Lancaster Intelligencer J., Apr. 22, 2004, at 1.

17. Docket Sheet, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Apr. 15, 2004); see Joseph A. Slobodzian, *U.S. to Get a Hearing on Ballot Extension*, Phila. Inquirer, Oct. 14, 2004, at A20.

18. Opinion, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Oct. 20, 2004), D.E. 33 [hereinafter *United States v. Pennsylvania* Opinion Denying Injunction], 2004 WL 2384999.

19. *Id.* at 1–2; see Mario F. Cattabiani, *Election Offices Don't Have to Send New Ballots Abroad*, Phila. Inquirer, Oct. 21, 2004, at B4.

20. *United States v. Pennsylvania* Opinion Denying Injunction, *supra* note 18; see Reagan, *supra* note 2, at 14; Cattabiani, *supra* note 19.

21. Complaint, *Reitz v. Rendell*, No. 1:04-cv-2360 (M.D. Pa. Oct. 27, 2004), D.E. 1.

restraining order and a preliminary injunction.²²

Judge Kane heard the motion on October 29.²³ After discussions in chambers, she met with the parties in court to put terms of settlement on the record.²⁴ The parties agreed to an order extending the deadline until eight days after the election for returned absentee ballots for federal offices, so long as the ballots were actually cast before the polls closed.²⁵ Judge Kane signed a stipulated dismissal of the case on November 17.²⁶

The Justice Department's case was stayed on February 22, 2005, by agreement of the parties.²⁷ On July 1, 2006, a new Pennsylvania law went into effect extending the deadline until seven days after an election.²⁸ In light of the statutory change, the parties agreed to dismissal of the action subject to continued monitoring by the department.²⁹

22. Motion, *id.* (Oct. 27, 2004), D.E. 2.

23. Transcript, *id.* (Oct. 29, 2004, filed Oct. 29, 2004), D.E. 18 [hereinafter *Reitz* Transcript].

24. *Id.*

25. Order, *id.* (Oct. 29, 2004), D.E. 17, 2004 WL 2451454; see *Reitz* Transcript, *supra* note 23, at 3–4; see also Chris Brennan, *Guv, GOP Agree on Extending Time to Count Military Votes*, Philadelphia Daily News, Oct. 30, 2004, at 2; Mario F. Cattabiani, *Vote Deadline Extended*, Phila. Inquirer, Oct. 30, 2004, at A1; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 118, 144 n.246 (2010).

26. Order, *Reitz*, No. 1:04-cv-2360 (M.D. Pa. Nov. 17, 2004), D.E. 20.

27. Order, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Feb. 22, 2005), 39.

28. Memorandum of Understanding at 1–2, *id.* (July 28, 2006), D.E. 65 [hereinafter *United States v. Pennsylvania* Memorandum of Understanding].

29. Dismissal Order, *id.* (July 31, 2006), D.E. 66; *United States v. Pennsylvania* Memorandum of Understanding, *supra* note 28, at 2–5.