

Counting Federal Write-In Ballots Even If Election Officials Did Not Receive Absentee-Ballot Applications

Bush v. Hillsborough County Canvassing Board
(Lacey A. Collier, N.D. Fla. 3:00-cv-533)

A district judge ruled that it was improper for counties to not count federal write-in ballots cast by overseas voters solely because the counties had no record of an application for an absentee ballot or solely because the ballots were not postmarked.

Subject: Absentee and early voting. *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); military ballots; absentee ballots; write-in candidate; enforcing orders.

During a time of uncertainty over who had won Florida's electoral votes in the 2000 presidential election, George W. Bush, Richard Cheney, and Florida's Republican Party filed a federal complaint on Sunday, November 26, in the Northern District of Florida to challenge the rejection by seven counties—Collier, Hillsborough, Okaloosa, Orange, Pasco, Polk, and Walton—of some absentee ballots cast by overseas and military voters.¹

On Friday, December 1, the plaintiffs moved for expedited hearing,² and Judge Lacey A. Collier set the case for hearing on December 5.³ On December 8, Judge Collier granted the plaintiffs relief.⁴

The Uniformed and Overseas Citizens Absentee Voting Act of 1986⁵ provided for the use of a federal blank absentee ballot by an overseas voter

1. Complaint, *Bush v. Hillsborough Cty. Canvassing Bd.*, No. 3:00-cv-533 (N.D. Fla. Nov. 26, 2000), D.E. 1; *Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1306 (N.D. Fla. 2000); *see also* Steve Bousquet & Phil Long, *GOP Pushes Harder to Find Votes*, Miami Herald, Nov. 26, 2000, at 1A (reporting on earlier related state-court challenges); Michael Cooper, *The Multipronged Strategy for Bush's Absentee Votes*, N.Y. Times, Nov. 27, 2000, at A14 (same); David Karp, *Suit Hinges on Overseas Ballots*, St. Petersburg Times, Nov. 28, 2000, at 1B (same); Jeff Kunerth & John Kennedy, *It's Not Over; We'll Get a Winner But Not a President*, Orlando Sentinel, Nov. 26, 2000, at A1 (same).

Okaloosa and Walton are in the Northern District; the other five counties are in the Middle District. 28 U.S.C. § 89.

2. Motion, *Bush*, No. 3:00-cv-533 (N.D. Fla. Dec. 1, 2000), D.E. 5; *Bush*, 123 F. Supp. 2d at 1306.

3. Order, *Bush*, No. 3:00-cv-533 (N.D. Fla. Dec. 1, 2000), D.E. 4; *Bush*, 123 F. Supp. 2d at 1306; *see Minutes, Bush*, No. 3:00-cv-533 (N.D. Fla. Dec. 5, 2000), D.E. 21; *see also* Louis Cooper, *Rejected Ballot Issue in Judge's Court*, Pensacola News J., Dec. 6, 2000, at 2A.

4. *Bush*, 123 F. Supp. 2d 1305; *see* Marc Caputo, *U.S. Judge: Overseas Ballots Must Be Counted*, Palm Beach Post, Dec. 10, 2000, at 18A; Louis Cooper, *Some Overseas Ballots Ruled Valid*, Pensacola News J., Dec. 9, 2000, at 2A; Michael Cooper & Richard Pérez-Peña, *In a Shadow, Other Cases Go On*, N.Y. Times, Dec. 12, 2000, at A26 (“Judge Collier rejected several of the Bush camp’s arguments for reinstating votes, but agreed in two areas.”); William Yardley, Phil Long & Andres Viglucci, *GOP Fights Tossing of Undated Ballots*, Miami Herald, Dec. 6, 2000, at 21A. *See generally* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 143–44 (2010).

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who had not received the state's absentee ballot in time, despite having requested it in time.⁶ The write-in ballot included an oath that the voter had made a timely application for an absentee ballot.⁷ Judge Collier ordered the counties to count federal write-in ballots even if the counties had no record of the voters' requesting absentee ballots.⁸ "We must presume, without evidence to the contrary, that if the election official does not have the application on record, it is because of a problem with the overseas mail system or their own clerical error."⁹

Judge Collier also ordered the counties to count federal write-in ballots even if they were not postmarked, because the federal statute specified no postmark requirement and the ballot included an oath that the voter had timely submitted the ballot from outside the United States.¹⁰

On December 9, the plaintiffs filed a motion with the court certifying that they had been only partially successful in notifying local election officials of Judge Collier's ruling,¹¹ and Judge Collier granted the plaintiffs a temporary restraining order requiring compliance with her ruling even without formal notice.¹²

5. 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).

6. *Bush*, 123 F. Supp. 2d at 1310–12.

7. *Id.* at 1317.

8. *Id.*

9. *Id.*; *see* Reagan, *supra* note 5, at 15.

10. *Bush*, 123 F. Supp. 2d at 1316–17.

11. Motion, *Bush v. Hillsborough Cty. Canvassing Bd.*, No. 3:00-cv-533 (N.D. Fla. Dec. 9, 2000), D.E. 25.

12. Temporary Restraining Order, *id.* (Dec. 9, 2000), D.E. 26; *see* Corrected Temporary Restraining Order, *id.* (Dec. 12, 2000), D.E. 27.