

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE DUPAGE COUNTY BOARD OF ELECTION)	
COMMISSIONERS, a body politic; KAMI)	
HIERONYMUS, not individually, but as County Clerk)	
of Bureau County; SHARON HOLMES, not)	
individually, but as County Clerk of DeKalb County;)	
RENNETA MICKELSON, not individually, but as)	
County Clerk of Kendall County; NANCY NELSON,)	No. 08 C 232
not individually, but as County Clerk of Lee County;)	
BARBARA M. LINK, not individually, but as County)	Judge Castillo
Clerk of Henry County; JOHN A. CUNNINGHAM,)	Magistrate Judge Cox
not individually, but as County Clerk of Kane County;)	
and the CITY OF AURORA BOARD OF ELECTION)	
COMMISSIONERS, a body politic,)	
)	
Plaintiffs,)	
)	BRIEF FOR THE UNITED
v.)	STATES AS
)	<u>AMICUS CURIAE</u>
ILLINOIS STATE BOARD OF ELECTIONS, a body)	
politic; and JOHN LAESCH, JOTHAM STEIN, BILL)	
FOSTER, each individually, as certified Democratic)	
candidates for the February 5, 2008, Special Primary)	
Election for the 14th Congressional District; CHRIS)	
LAUZEN and JIM OBERWEIS, each individually, as)	
certified Republican candidates for the February 5,)	
2008, Special Primary Election for the 14th)	
Congressional District,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

The United States respectfully submits this brief as amicus curiae to address important issues presented by this case affecting the right to vote of uniformed servicemembers and overseas citizens under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff to 1973ff-6 of 1986 (“UOCAVA”). UOCAVA protects the right of military

servicemembers (including their family members) and overseas citizens to vote by absentee ballot in all federal elections conducted by the state in which they were last domiciled. 42 U.S.C. §§ 1973ff-1, 1973ff-6. Plaintiffs in this action seek relief pertaining to the procedures to be used in the February 5, 2008 special primary and the March 8, 2008 special general elections to fill the vacancy in the office of United States Representative for the 14th Congressional District. Certain portions of the declaratory relief requested pertain specifically to UOCAVA, and the United States has a strong interest in ensuring the State is in compliance with UOCAVA for the elections.

We set forth below the general legal standards that states must meet under UOCAVA, and then address the proposals for the March 8, 2008 special general election and the February 5 special primary as they pertain to the rights guaranteed under UOCAVA. In short, if implemented in a timely manner with adequate notice and instructions, the proposal to use the special write-in absentee voter's blank ballot for the March 8 election appears to be a feasible means for achieving compliance with UOCAVA. With regard to the February 5 special primary election, to the extent they are needed, there are several measures Illinois (the "State") and local election authorities could implement to ensure protected voters overseas can cast ballots for the February 5 primary election, including expedited means of transmitting either printed or write-in ballots and/or adjusting the deadline for receiving ballots after the election.

II. BACKGROUND

On December 3, 2007, following the resignation of Illinois Congressman Dennis Hastert, Governor Blagojevich issued Writs of Election for holding a special election to fill the vacancy in Illinois' 14th Congressional District ("the District"). The Governor scheduled a special

primary election for February 5, 2008, the same date as the regularly scheduled federal primary election, and a special general election for March 8, 2008. On January 10, 2008, Plaintiffs, eight of the election authorities involved in the conduct of the election in the District, filed this action naming as Defendants the Illinois State Board of Elections (“SBE”) and each of the candidates certified to run in the special primary election. Plaintiffs contend that the time periods between (1) the date the SBE certified the candidates and the special primary and (2) between the special primary and the special general election do not allow them to perform various election code-required procedures in a timely manner, including facilitating absentee voting by UOCAVA citizens. Plaintiffs seek a declaration that their proposed modifications to the election calendars for the special elections, and certain other proposed procedures affecting UOCAVA voters, meet the requirements of state and federal law and are otherwise proper and necessary. (Compl. ¶¶ 36, 46.)

With regard to UOCAVA voters, Plaintiffs seek approval for use of the special write-in absentee ballot provided for in the state election code for the March 8 general election, and also, if necessary, for the February 5, 2008, special primary. (See Compl. ¶ 46.) Under Illinois law, if an election authority is unable to provide printed ballots to UOCAVA voters at least sixty days prior to the date of a general election for federal officers, it must mail a special write-in absentee ballot in lieu of the printed ballot. 10 Ill. Comp. Stat. 5/16-5.01(b). A list of all candidates for whom nominating papers have been filed and for whom the UOCAVA voter is qualified to vote must be included with the special write-in absentee ballot. Id. The Complaint does not specify the date by which Plaintiffs would be required to mail the special write-in absentee ballots prior to the March 8 general election, and does not identify the circumstances under which special

write-in absentee ballots would need to be utilized for the February 5 special primary. The Complaint also does not specify the procedures to notify UOCAVA voters of the names of the certified winners of the February 5 special primary election.

Plaintiffs also seek approval to modify the State statutory deadlines for accepting absentee ballots, including UOCAVA ballots. (Compl. ¶ 33; Pls.' Ex. B.) Under Illinois law, ballots from absentee voters, including voters covered under UOCAVA, will be counted as long as they are postmarked by midnight on the day preceding the election and received not later than fourteen (14) days after the election. 10 Ill. Comp. Stat. 5/19-8; 10 Ill. Comp. Stat. 5/18A-15. Under this provision, UOCAVA ballots timely postmarked would be accepted through February 19 for the special primary and through March 22 for the special general election. Due to the compressed time between the primary election and the March 8 election, Plaintiffs seek approval to shorten the fourteen-day period for receipt of ballots after the February 5 primary to just three (3) days – to February 8. *Id.* For the special general election, Plaintiffs seek to extend the deadline for accepting absentee ballots to March 29, 2008. The proposals set out in the Complaint do not include a plan for providing notice to UOCAVA voters of the altered deadlines for accepting and counting ballots for the 2008 special elections.

Based on information supplied to the SBE, it appears likely that all of the election authorities in the District have mailed special primary ballots to UOCAVA voters. We note, however, that the information provided to the United States to date does not confirm in every instance the dates the ballots were mailed.

III. DISCUSSION

A. *UOCAVA Requirements*

UOCAVA requires, *inter alia*, that each state allow qualified United States citizens “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. Citizens protected by UOCAVA include: (1) members of the United States uniformed services and merchant marines; (2) their spouses and dependents; and (3) United States citizens residing outside the United States. 42 U.S.C. § 1973ff-6.¹ In order to allow absent military and overseas citizens to exercise this right, states must ensure that absentee ballots are mailed sufficiently in advance of a scheduled election so as to allow the receipt, execution, and return of the ballot to the appropriate election official by the state statutory deadline. This federal right would be meaningless if state election officials mail ballots too late to allow those voters to participate.

Based on United States Postal Service, United States Military Postal Service Agency, and United States Department of State estimates, it is well established that a minimum of thirty days is needed for round trip delivery of international and military mail to overseas locales. These estimates take into account the fact that some military personnel are stationed in remote areas.²

¹ Under UOCAVA, a voter may request (pursuant to the Federal Post Card Application established by the Act) that election officials send an absentee ballot “for each subsequent election for Federal office held in the State through the next 2 regularly scheduled general elections for Federal office.” 42 U.S.C. § 1973ff-3(a). Thus, for the 2008 special elections, election officials are required to provide absentee ballots to all voters for whom such applications were processed since the November 2, 2004 federal general election, and who are otherwise qualified to vote in the special election.

² The U.S. Department of Defense, through its Federal Voting Assistance Program (“FVAP”), is the primary administrator of UOCAVA. Based on federal postal data and its experience in administering

Federal courts have accepted the thirty-day benchmark for determining violations of UOCAVA. See United States v. Georgia, No. 1:04-cv-2040-CAP (N.D. Ga. July 15, 2004); United States v. Pennsylvania, No. 1:cv-04-830, (M.D. Penn. Apr. 16, 2004), attached as Exhibits 1 and 2, respectively.

B. The March 8 Special General Election

For the March 8, 2008 election, the central element of Plaintiffs' proposal as it affects UOCAVA voters is to mail special write-in absentee ballots to their qualified absent military voters and overseas citizens. Plaintiffs explain that this measure is needed because the schedule for canvass of the February 5 special primary, in conjunction with other State deadlines, will delay the availability of the printed ballots well beyond when overseas ballots should be mailed to be timely under State and federal law. The adoption and use of a write-in ballot as a back-up long has been recognized by FVAP and numerous states as a useful mechanism for ensuring that overseas ballots can be sent in a timely manner when regular ballots are delayed due to election contests, litigation, or ballot printing difficulties. See <http://www.fvap.gov/services/initiatives.html>.³ If election officials mail the special write-in absentee ballots to all qualified UOCAVA voters sufficiently in advance of the March 8 election to permit UOCAVA voters to receive, cast, and return the ballot by the deadline, they would avert a UOCAVA violation. However, to effectuate this opportunity, the State must ensure voters are provided (1) reasonable opportunities to learn

the Act, FVAP advises that thirty days is the minimum time officials should allow for overseas delivery and return. As Plaintiffs note in the Complaint (Compl. ¶ 39), FVAP *recommends* that states allow forty-five days for the round trip mailings overseas. See <http://www.fvap.gov/services/initiatives.html>;

³ Congress provided in UOCAVA for a similar option – the Federal Write-in Ballot – which states must accept in all federal general elections if certain criteria are met. Uniformed servicemembers and overseas citizens can download the federal write-in ballot from the FVAP web site, or obtain it at military bases, embassies, and other locations around the world.

who the candidates are so they may cast a timely and informed write-in vote, and (2) adequate notice and instructions concerning the casting of a timely ballot under the altered timetable Plaintiffs propose.

Accomplishing these objectives seems feasible. First, the special write-in absentee ballots can be – and should be – sent out well in advance of the March 8 election, because officials need not await any of the canvassing or other post-election proceedings. To ensure timeliness and consistency, it would be beneficial if officials agree upon, or the Court orders, a deadline for mailing the special write-in absentee ballots. In setting that date, officials must take into account the Illinois law requirement that absentee ballots must be postmarked by March 7, 2008. Thus, sufficient time must be allowed for voters to receive their ballots, obtain the results of the primary and have the ballot postmarked by March 7, so it can arrive no later than March 29, the deadline proposed in the Complaint (Pls.’ Ex. B.) These circumstances permit the State to meet the forty-five-day window recommended by FVAP and sought by Plaintiffs (Compl. ¶ 42), because the proposed deadline for SBE’s canvass of the election is February 13 – forty-five days from the ballot counting deadline of March 29. Id.

Second, to notify UOCAVA voters of their options for voting, election officials should post the information about the procedures prominently on the SBE and the local election authorities’ web sites, and provide alternative ways for voters without access to the Internet to conveniently contact the SBE or the Plaintiffs to obtain the necessary information. Additionally, the instructions included with the special write-in absentee ballot should set out clearly the methods by which voters can obtain the results of the primary election, and the applicable procedures and deadlines for casting the special write-in absentee ballot. Election officials

should request assistance from FVAP in notifying the eligible UOCAVA voters of the modifications in election procedures, including methods for learning of the names of the candidates on the general election ballot.⁴ The State also should issue a press statement for immediate release concerning these procedures, to be posted immediately on the SBE's web site and distributed to media sources most likely to reach voters in international locations. The FVAP is available and willing to assist the State in identifying the most practicable means for disseminating notice to the affected UOCAVA voters.

C. The February 5 Special Primary Election

For the February 5, 2008, special primary election, Plaintiffs propose to move up the last day for counting absentee ballots, including UOCAVA ballots, from February 19 to February 8, just three days after the election. For the reasons set forth above, this would raise concerns if any UOCAVA special primary ballots have not been mailed in time to allow for their timely receipt and return. If, in fact, all overseas ballots were mailed to eligible voters within the thirty-day window (e.g., by January 9 if the receipt deadline is February 8), it appears the State would meet UOCAVA requirements with regard to the February 5 primary election.

If, however, there are overseas UOCAVA ballots that have not been mailed at least thirty days before the Plaintiffs' proposed February 8 deadline, further steps must be taken to ensure protected voters are not disenfranchised. A number of alternatives are available to ensure that

⁴ State election officials frequently coordinate with FVAP to devise news releases regarding modifications in election procedures, especially when emergency situations or UOCAVA-related court orders produce an urgent need to notify affected voters worldwide. These notices are posted on the FVAP web site, and can be immediately transmitted by email to military facilities around the world, State Department offices, and other organizations and outlets likely to reach UOCAVA voters.

UOCAVA voters have sufficient time to receive and transmit their ballots, even under a compressed calendar.

1. *Expedited Transmission of the Ballot*

Election authorities could offset the delayed transmittal of ballots by sending overseas ballots by an appropriate express mail or courier delivery method, and provide pre-paid envelopes to expedite the return of the ballots to election officials.⁵ FVAP provides guidance to states and localities concerning the most effective methods of expedited transmittal to overseas locales when needed. Postal information compiled by FVAP was transmitted by SBE to Plaintiffs in December. These alternatives are also available to the State if for any reason the write-in ballots are not sent out sufficiently in advance of the March 8 special general election.

2. *Extension of the Deadline for Accepting Absentee Ballots*

The Court also could approve an extension of the date by which ballots are counted to address any late mailing problems that remain. Accepting UOCAVA ballots for some period of time after election day (so long as they are postmarked no later than election day) is a common method of remedying or avoiding a UOCAVA violation. Federal courts have ordered extensions of ballot receipt deadlines as UOCAVA relief on many occasions, most recently in United States v. Georgia, No. 1:04-CV-2040-CAP (N.D. Ga. July 15, 2004) (Ex. 1) (granting TRO and preliminary injunction to remedy late mailing by Georgia counties for primary election of July 20, 2004 and truncated run-off schedule). See also United States v. Pennsylvania, No. 1:04-CV-0830 (M.D. Pa. Apr. 16, 2004) (Ex. 2) (granting TRO and preliminary injunction to remedy late

⁵ The Court also could authorize election officials to transmit ballots to voters by telefacsimile or by email, and/or to accept the return of voted ballots by the same means. See United States v. Georgia, No. 1:04-cv-2040-CAP (N.D. Ga. July 15, 2004) (Ex. 1).

mailing by Pennsylvania counties for primary election of April 27, 2004); United States v. Pennsylvania, No. 88-0610 (M.D. Pa. Apr. 25, 1988) (Ex. 3) (granting TRO and preliminary injunction extending by fourteen days the deadline for receipt of absentee ballots from qualified overseas voters). Like a number of other states, Illinois provides by statute for acceptance of ballots from UOCAVA voters after election day, accepting ballots through the fourteenth day after the election. 10 Ill. Comp. Stat. 5/19-8. Plaintiffs propose to cut short that window significantly for the February 5 election (from fourteen to three days) to accommodate other deadlines. That truncation of the deadline should not be approved if it will result in disenfranchising UOCAVA voters.

We note that even if Plaintiffs are required to accept absentee ballots beyond the proposed February 8 deadline, it is possible to proceed with minimal disruption to the canvassing deadlines. The Court could permit the State to formally certify the election results on the schedule proposed, provided the number of outstanding UOCAVA ballots could not mathematically alter the outcome, subject to amendment or recertification of the vote totals to reflect ballots received through the end of the fourteen-day period, or whatever extended period may be necessary. This approach has been adopted or approved by courts as part of a UOCAVA remedy involving extension of the counting deadlines beyond election day. See United States v. Georgia, No. 1:04-cv-2040-CAP (N.D. Ga. July 15, 2004) (Ex. 1); United States v. Oklahoma, No. Civ-02-1273L (W.D. Okla. Sept. 12, 2002) (Ex. 4). In fact, guidance issued by the SBE regarding canvassing procedures for the special primary election on February 5, 2008 contemplated just such a procedure to balance the UOCAVA concerns with the State's legitimate interest in completing the canvass procedures to accommodate preparations for the

March 8 election. (See Ex. 5, December 12, 2007 Mem. from Mossman to 14th Cong. Dist. Election Authorities) (local tabulations could be amended to add ballots that arrive after the scheduled canvass date but before the fourteenth day after the election).

Thus, to the extent that any election authority has not timely mailed ballots for the February 5 special primary to eligible UOCAVA voters, the State has a number of avenues for relief to ensure that the rights of UOCAVA voters are protected. The options available to the State and the Court, if relief is necessary, can be reasonably implemented and narrowly tailored to afford the necessary opportunities to vote in this federal election.

IV. CONCLUSION

A central issue before the Court is the right of overseas citizens, many of whom are members of the U.S. Armed Forces deployed on dangerous missions in their country's service, to participate in elections for federal offices. While Plaintiffs and the State of Illinois have important interests in being able to administer a fair and orderly special election under the compressed timetable they face, ensuring that procedures are in place to prevent disenfranchisement of UOCAVA voters is both essential and feasible. Subject to the additional protections and implementation measures discussed herein, it appears Plaintiffs' proposal for using the State write-in ballot is reasonable to address the State's UOCAVA obligations. In entering relief, we request that the Court require the parties to fully address the UOCAVA concerns discussed herein so that all eligible UOCAVA voters will be afforded the opportunity to vote guaranteed by federal law.

Respectfully submitted,

Date: 14th day of January, 2008

PATRICK J. FITZGERALD
United States Attorney

GRACE CHUNG BECKER
Acting Assistant Attorney General

s/Joan Laser

s/Puja Lakhani

JOAN LASER
Assistant United States Attorney
219 South Dearborn St., 5th Floor
Chicago, IL 60604
Phone: (312) 353-1857

CHRISTOPHER COATES
Acting Chief
REBECCA J. WERTZ
PUJA LAKHANI
Attorneys
Voting Section
950 Pennsylvania Ave., NW
Room NWB-7254
Washington, D.C. 20530
Phone: (202) 514-6331
Fax: (202) 307-3961
rebecca.wertz@usdoj.gov
puja.lakhani@usdoj.gov

EXHIBIT “1”
to United States’
Amicus Curiae Brief

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

versus

THE STATE OF GEORGIA and
CATHY COX, Secretary of State of
Georgia,

Defendants.

CIVIL ACTION

NO. 1:04-CV-2040-CAP

ORDER

This matter is now before the court on the plaintiff's motion for a temporary restraining order and preliminary injunction. For the reasons set forth below, this motion is GRANTED.

Factual Background

The United States of America filed this action pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq. ("UOCAVA"). UOCAVA provides, in relevant part, that each state shall "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office" and shall "accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the

appropriate State election official not less than 30 days before the election." 42 U.S.C. § 1973ff-1(a)(1)-(2). In this action, the United States seeks injunctive relief in order to ensure that overseas voters who filed timely applications for absentee ballots and are, therefore, protected under UOCAVA will have an opportunity to vote and to have their ballots counted in Georgia's federal primary elections, to be held on July 20, 2004, and in any federal primary runoff elections to be conducted on August 10, 2004.¹

The State of Georgia is charged with the responsibility of assuring that the state's election laws, as applied, comply with federal law, including the provisions of UOCAVA. Secretary of State Cathy Cox is the chief election officer of the State of Georgia and, as such, is responsible for the administration of state laws affecting voting and for assuring that elections in the state are conducted in accordance with the law. See O.C.G.A. § 21-2-50.

The parties agree on the relevant facts in this matter. The State of Georgia is conducting its federal and state primary elections on July 20, 2004, and will conduct any necessary primary runoff elections on August 10, 2004. The federal and state general elections will then be held on November 2, 2004, and any necessary runoff

¹Pursuant to § 1973ff-4 of the statute, "[t]he Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this subchapter."

elections will be held on November 23, 2004. Under Georgia law, absentee ballots sent from overseas voters must be received by the close of the polls on the day of the election in order to be counted for either federal or state offices. See O.C.G.A. § 21-2-386(a)(1). Thus, in this case, the deadline for receipt of absentee ballots in the primary elections is 7:00 p.m. on July 20, 2004, and the deadline for receipt of absentee ballots in the primary runoff elections is 7 p.m. on August 10, 2004.

County election officials in the state have received timely requests for absentee ballots from a number of overseas voters who are entitled to vote for federal offices under UOCAVA. At issue now is the question of whether those voters have sufficient time in which to receive and cast their ballots for federal offices and, if not, what remedial relief the court should order to preserve their statutory rights.²

After this court struck down the state's previous state house and senate reapportionment plans, see Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), and subsequently adopted interim plans for use in the upcoming elections, see Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004), the court issued an order altering the deadline provided in O.C.G.A. § 21-2-384(a), so that Georgia's counties would be

² UOCAVA only pertains to federal, and not state, offices. However, in a separate motion filed by the Secretary of State in Larios v. Cox, Civil Action No. 1:03-CV-693 (N.D. Ga.), the Secretary asks that the same protection be extended to overseas voters casting ballots for state offices.

required to issue absentee ballots by 30 days prior to the July 20 primary, rather than the 45 days provided by statute. See Larios v. Cox, Civil Action No. 1:03-CV-693 (N.D. Ga. March 30, 2004). The Secretary of State recently discovered that a number of counties were unable to meet this deadline and that absentee ballots in some counties were sent out as late as July 8, 2004. As a result, both the Secretary of State and the United States have expressed concerns that the late mailing of absentee ballots may not leave overseas voters protected by UOCAVA with sufficient time to receive, execute, and return their ballots before the July 20, 2004 deadline. The United States has also indicated that similar problems are likely to arise with any necessary runoff elections, as there is only a three-week window between the primary elections and the primary runoff elections.

Legal Analysis

A district court may grant preliminary injunctive relief where the movant establishes that (1) it has a substantial likelihood of success on the merits, (2) it will suffer irreparable harm unless the injunction is issued, (3) the harm it will suffer in the absence of an injunction outweighs the possible harm suffered by the opposing party if the injunction is issued, and (4) an injunction will not disserve the public interest. Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d

1242, 1246-47 (11th Cir. 2002). It is well established in the Eleventh Circuit that "a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to all four elements." Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001) (citation and quotation marks omitted).

The court does not doubt, and the parties do not disagree, that these elements have been satisfied in this case. The United States is likely to prevail on its claim that the State of Georgia is in violation of UOCAVA, as several counties were not able to send absentee ballots in a timely manner so as to ensure that those protected by the statute would have time to receive them, execute them, and send them back to county election officials before the election deadlines. The United States has also established the necessary irreparable injury, in that many overseas voters will be unable to cast their ballots in time for their votes to be counted in the federal primary elections and, because of the short time period between the primary and the primary runoff, will almost certainly be unable to cast their ballots in time for their votes to be counted in the federal primary runoff elections. This threatened injury clearly outweighs the possible injury the injunction may cause to the State of Georgia and the Secretary of State, particularly as these parties agree that some remedies are needed in order to protect the affected voters. Finally, the public interest favors the grant of an

injunction. Therefore, the court concludes that the United States is entitled to injunctive relief.

However, because injunctive relief is an extraordinary remedy, the court will exercise its power only as necessary to remedy the established harm. The court recognizes the importance of preserving citizens' fundamental right to cast their votes in elections and to have those votes counted. However, this concern must be balanced against the need to protect against voter irregularity and the recognition that enhancing all citizens' ability to vote in the November general elections, for which a higher voter turnout is expected, requires that the primary elections be conducted and concluded in a timely manner, leaving ample time for any ballot recounts and for the printing of ballots to be used in the general elections.

Conclusion

Accordingly, the court hereby GRANTS the plaintiff's motion for a temporary restraining order and preliminary injunction and ORDERS as follows:

The following relief is ordered to address the delay in issuance of UOCAVA covered absentee ballots³ for the July 20, 2004 Primary Election. Additionally, the

³ A UOCAVA-protected ballot from military personnel, their dependents or other qualified citizens is one where such a voter's absentee ballot application was received by the appropriate State election official not less than 30 days before the election. 42 U.S.C. § 1973ff.

same relief provided herein shall also be applicable as to all UOCAVA-covered overseas voters for the August 10, 2004 Primary Runoff Election, regardless of when the voter's application is made.

A. Facsimile Ballots

The Georgia Secretary of State and the registrars of Georgia's 159 counties are given the authority to send requested ballots to voters by facsimile transmission or email and to accept the returned of voter oaths and voted ballots to a single secure facsimile machine that is under the supervision of the Secretary of State. The Secretary shall promptly place each ballot received via facsimile in a sealed unmarked envelope and place that envelope within a second envelope containing the voter's oath. The Secretary shall then immediately transmit the ballots by overnight or personal delivery to the election superintendent in the appropriate county for verification and counting with all other absentee ballots. Transmission of returned voted ballots under this order may be made directly from the voter via facsimile, or may originate as image files sent via electronic mail to the Federal Voting Assistance Program's read-only computer facilities and then relayed to the Secretary via facsimile. In duplicating the received facsimiles of the ballots for purposes of permitting those ballots to be read by the appropriate counting equipment, the county

election officials shall use the duplication of ballot procedures and the vote review panel as described in state law in order to assure the integrity of the ballot duplication process. O.C.G.A. § 21-2-483.

Any such ballot returned via facsimile to the Secretary prior to 7:00 p.m. Eastern Daylight Time on July 20, 2004, shall be tabulated and incorporated into the final certified tally of results. Ballots received by the Secretary after 7:00 p.m. on July 20 shall be kept unopened, and preserved in the manner specified by state law. O.C.G.A. § 21-2-386 (a) (1).

B. Use of the Federal Write-In Absentee Ballot

Congress has provided for a write-in absentee ballot form for use by UOCAVA-protected overseas voters desiring to vote in Federal general elections. 42 U.S.C. § 1973ff-2. The criteria for use of this form under UOCAVA are:

1. The voter must be located overseas;
2. The voter must have applied for the absentee ballot at least 30 days before the election; and
3. The voter must not have received the requested ballot.

42 U.S.C. § 1973ff-2(a)(1-3).

Congress has made no provision for the use of this Federal Write-In Absentee ballot (FWAB) in primary elections. However, this form has the notable advantage of wide availability; federal law requires that it be available to UOCAVA-covered overseas voters, and the form is on hand at U.S. military installations and diplomatic facilities worldwide, as well as on the World Wide Web, so that UOCAVA-covered overseas voters have access to the form regardless of their location.

This court therefore orders that the Secretary make this form available via her agency's website, www.sos.state.ga.us, along with information about the candidates on the July 20 primary ballot for each political party for each office, including all of the federal offices and the statewide state-level offices. These federal write-in ballot forms may then be used by the eligible UOCAVA-protected overseas voters to vote in Georgia's primary election in the manner described above for other facsimile ballots, or in the manner described below for ballots sent via express mail, and subject to the same time restrictions applicable under this order to ballots sent by each method.

C. Extending the Deadline for Receipt of Mailed Absentee Ballots

Under Georgia law, in order for an absentee ballot to be properly received and counted, it must be received by the county voter registrar by 7:00 p.m. on Election

Day. O.C.G.A. § 21-2- 386. Because of the delay in the mailing out of the requested absentee ballots, the deadline for receipt of absentee ballots mailed back to the various Georgia counties shall be extended by three business days, so that absentee ballots from the eligible UOCAVA-covered overseas voters mailed on or before July 20, 2004, and received by the appropriate voter registrars in the issuing counties by 5:00 p.m. Eastern Daylight Time on July 23, 2004, will be deemed valid and will be tabulated and incorporated into the county's final certified results. Ballots received after that date and time will be kept unopened, and preserved in the manner specified by state law. O.C.G.A. § 21-2-386 (a) (1).

D. Other Means of Express Delivery

The Secretary shall make available to the eligible UOCAVA-protected overseas voters an account with Federal Express and an account with United Parcel Service (UPS) by which absentee ballots may be returned to her or to the appropriate county election officials by 5:00 p.m. on July 23, 2004, three days after the primary election. The Secretary and the State shall bear the cost of such transmittals, and shall immediately convey these ballots to the appropriate county officials by overnight or personal delivery. Information regarding access to these accounts will be made

available through the Federal Voting Assistance Program and the Office of the Georgia Secretary of State.

E. Deadlines and Delivery Methods for the Primary Runoff Election

Georgia will conduct its runoff primary elections on August 10, 2004. The court directs that the same methods for transmittal and delivery of UOCAVA-protected overseas voters' absentee ballots shall be utilized by the Secretary and the registrars of Georgia's 159 counties for the primary runoff election. As with the primary election, the court orders that ballots voted prior to the closing of the polls at 7:00 p.m. Eastern Daylight Time on August 10, 2004, may be received and counted by the Secretary of State and the various county registrars if they are received in either of these offices by the close of business at 5:00 p.m. on Friday, August 13, 2004, via U.S. Mail or overnight delivery. As previously ordered, all ballots transmitted via facsimile to the Secretary must be received by 7:00 p.m. on the day of the runoff election, August 10, 2004, in order to be accepted and counted.

F. Notice of Relief to Affected Voters

The defendants shall notify the Director of the Federal Voting Assistance Program ("FVAP") of the United States Department of Defense as soon as this order has been signed and request that the FVAP take such action as is necessary to notify

the eligible overseas voters of the relief afforded in this order, including the extension of time for receipt of absentee ballots. The defendants shall assist the FVAP in whatever way may be reasonably necessary to aid that agency in publicizing this extension of time.

In addition to the publicity described in the preceding paragraph, the defendants shall take the following steps to endeavor to give affected voters notice of the contents of this order:

1. Issue a press statement for immediate release, posted immediately on the Georgia Secretary of State's Web site, and distributed as broadly and immediately as practicable to national and local wire services, to radio and television broadcast stations within the State, and to daily newspapers of general circulation in the State, describing this order, advising the press of its newsworthiness, and specifically giving members of the press a way to contact senior officials of the Georgia Elections Division for answers to questions.
2. Prepare and distribute written public service announcements describing this order for broadcast on radio and television networks, including but not limited to the U.S. Armed Forces

Network, and announcements describing this order on World Wide Web sites of interest to military and non-military U.S. citizens living abroad.

3. For the primary runoff election of August 10 only, publish paid advertisements describing this order and the relief afforded therein in at least a single day's issue of all international and domestic editions of the International Herald Tribune, USA Today, Stars & Stripes, the Army Times, the Navy Times, the Air Force Times and the Marine Times.
4. Direct the county voter registrars and election superintendents to make all reasonable efforts, including the use of all available public records and personal knowledge, to locate each UOCAVA-covered overseas voter in their jurisdiction whose absentee ballot was issued on or after June 23, 2004; to notify each such voter individually, by electronic mail, telephone or facsimile, of the relief contained in this order; and to offer electronic or other means faster than traditional mail service of transmitting or re-transmitting an absentee ballot to each such voter.

G. Report of Compliance

Within 50 days after August 10, 2004, the defendants shall file a report with this court with respect to the July 20 primary election and the August 10, 2004, primary runoff election if such an election is held, which reports sets forth the following information:

1. The dates on which each of the 159 counties in the State of Georgia began and completed the process of mailing ballots to overseas voters, as defined by UOCAVA, for each election;
2. The number of valid absentee ballots received by each county by the close of the polls on July 20, 2004, from such voters at that election, and the number received by each county by the close of the polls on August 10, 2004, from such voters at that election, and the means by which each ballot was received;
3. The number of absentee ballots, by county, received and counted after the close of the polls on July 20, 2004, but prior to 5 p.m. on July 23, 2004, from such voters at the July 20 election, and the number of such ballots, by county, received and counted after the close of the polls on August 10, 2004, but prior to 5 p.m. on

August 13, 2004, from such voters at the August 10 runoff, and the means by which each ballot was received; and

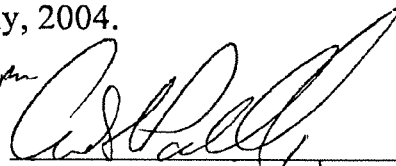
4. The number of absentee ballots, by county, received from such voters later than 5 p.m. on July 23, 2004, for the July 20 primary election, and for that reason not counted, and the number of such ballots, by county, received from such voters later than 5 p.m. on August 13, 2004, for the August 10 runoff, and for that reason not counted, and the means by which each such ballot was received.

H. Jurisdiction Retained

The court retains jurisdiction of this action to enter such further relief as may be necessary for the effectuation of the terms of this order, and, on a showing of good cause or by agreement of the parties, to enter such relief as may abate, for the November 2, 2004 federal general election and all federal primary and general elections and runoff elections thereafter, the conditions that gave rise to the UOCAVA violations complained of in the United States' complaint.

SO ORDERED, this 15 day of July, 2004.

5:47 pm



Charles A. Pannek, Jr.
United States District Judge

FILED IN CHAMBERS
7-1504
Arthur B. Thomas, Clerk
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SARA LARIOS, et al.,

Plaintiffs,

versus

CATHY COX, in her official
capacities as Secretary of State of
Georgia and Chair of the State
Election Board,

Defendant.

CIVIL ACTION

NO. 1:03-CV-693-CAP

ORDER

This matter is now before the court on the defendant's motion to alter the method, timing, and receipt of absentee ballots of uniformed and overseas citizens. For the reasons set forth below, this motion is GRANTED.

Factual Background

The Secretary of State has filed this motion in response to concerns raised by the United States Department of Justice and in an effort to ensure that overseas voters will have an opportunity to vote and to have their ballots counted in Georgia's federal and state primary elections, to be held on July 20, 2004, and in any federal and state primary runoff elections to be conducted on August 10, 2004.

After this court struck down the state's previous state house and senate reapportionment plans, see Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), and

subsequently adopted interim plans for use in the upcoming elections, see Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004), the court issued an order altering the deadline provided in O.C.G.A. § 21-2-384(a), so that Georgia's counties would be required to issue absentee ballots by 30 days prior to the July 20 primary, rather than the 45 days provided by statute. See Larios v. Cox, Civil Action No. 1:03-CV-693 (N.D. Ga. March 30, 2004).¹ The Secretary of State recently discovered that a number of counties were unable to meet this deadline and that absentee ballots in some counties were sent out as late as July 8, 2004.

As a result of the late filing of absentee ballots, both the Secretary of State and the United States have expressed concerns that overseas voters may not have sufficient time to receive, execute, and return their ballots in time for their votes to be counted in the upcoming primary elections. The United States has also indicated that similar problems are likely to arise with any necessary runoff elections, as there

¹ In that same order, the court modified other election deadlines and further provided that:

Any further inquiry or requests for modification or suspension of any such statutes or regulations that are necessary and will assist the Secretary of State in providing the citizens of the State of Georgia a fair, efficient, effective and constitutional election may be reported to this court as necessary. The court stands ready to assist as necessary to provide constitutional, effective, fair and accurate elections.

Order of March 30, 2004, at 4.

is only a three-week window between the primary elections and the primary runoff elections.

The State of Georgia is conducting its federal and state primary elections on July 20, 2004, and will conduct any necessary primary runoff elections on August 10, 2004. The federal and state general elections will then be held on November 2, 2004, and any necessary runoff elections will be held on November 23, 2004. Under Georgia law, absentee ballots sent from overseas voters must be received by the close of the polls on the day of the election in order to be counted for either federal or state offices. See O.C.G.A. § 21-2-386(a)(1). Thus, in this case, the deadline for receipt of absentee ballots in the primary elections is 7:00 p.m. on July 20, 2004, and the deadline for receipt of absentee ballots in the primary runoff elections is 7 p.m. on August 10, 2004.

The Secretary of State is particularly concerned with ensuring that the state complies with, or remedies any failure to comply with, the requirements of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq. ("UOCAVA"). UOCAVA provides, in relevant part, that each state shall "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office" and shall "accept and process, with respect to any

election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election." 42 U.S.C. § 1973ff-1(a)(1)-(2). Although UOCAVA only pertains to federal offices, the Secretary of State has expressed a concern that overseas voters be afforded the opportunity to cast their votes for state offices as well.

County election officials in the state have received timely requests for absentee ballots from a number of overseas voters who are entitled to vote under UOCAVA. Thus, the relevant issue now is the question of whether those voters have sufficient time in which to receive and cast their ballots for federal and state offices and, if not, what remedial relief the court should order to preserve their rights.

Legal Analysis

The court concludes that remedial relief is warranted in this instance. The State of Georgia is most likely in violation of UOCAVA, as several counties were not able to send absentee ballots in a timely manner so as to ensure that those protected by the statute would have time to receive them, execute them, and send them back to county election officials before the election deadlines. As a result, many overseas voters will be unable to cast their ballots in time for their votes to be counted in the federal and

state primary elections and, because of the short time period between the primary and the primary runoff, will almost certainly be unable to cast their ballots in time for their votes to be counted in the federal and state primary runoff elections.

The court recognizes the importance of preserving citizens' fundamental right to cast their votes in elections and to have those votes counted. However, this concern must be balanced against the need to protect against voter irregularity and the recognition that enhancing all citizens' ability to vote in the November general elections, for which a higher voter turnout is expected, requires that the primary elections be conducted and concluded in a timely manner, leaving ample time for any ballot recounts and for the printing of ballots to be used in the general elections.

Conclusion

Accordingly, the court hereby GRANTS the defendant's motion to alter the method, timing, and receipt of absentee ballots of uniformed and overseas citizens and ORDERS as follows:

The following relief is ordered to address the delay in issuance of UOCAVA covered absentee ballots² for the July 20, 2004 Primary Election for all statewide and

² A UOCAVA-protected ballot from military personnel, their dependents or other qualified citizens is one where such a voter's absentee ballot application was received by the appropriate State election official not less than 30 days before the election. 42 U.S.C. § 1973ff.

state-level offices. Additionally, the same relief provided herein shall also be applicable as to all UOCAVA-covered overseas voters for the August 10, 2004 Primary Run-Off Election, regardless of when the voter's application is made.

A. Facsimile Ballots

The Georgia Secretary of State and the registrars of Georgia's 159 counties are given the authority to send requested ballots to voters by facsimile transmission or email and to accept the returned voter oaths and voted ballots to a single secure facsimile machine that is under the supervision of the Secretary of State. The Secretary shall promptly place each ballot received via facsimile in a sealed unmarked envelope and place that envelope within a second envelope containing the voter's oath. The Secretary shall then immediately transmit the ballots by overnight or personal delivery to the election superintendent in the appropriate county for verification and counting with all other absentee ballots. Transmission of returned voted ballots under this order may be made directly from the voter via facsimile, or may originate as image files sent via electronic mail to the Federal Voting Assistance Program's read-only computer facilities and then relayed to the Secretary via facsimile.

In duplicating the received facsimiles of the ballots for purposes of permitting those ballots to be read by the appropriate counting equipment, the county election officials shall use the duplication of ballot procedures and the vote review panel as described in state law in order to assure the integrity of the ballot duplication process. O.C.G.A. § 21-2-483.

Any such ballot returned via facsimile to the Secretary prior to 7:00 p.m. Eastern Daylight Time on July 20, 2004, shall be tabulated and incorporated into the final certified tally of results. Ballots received by the Secretary after 7:00 p.m. on July 20 shall be kept unopened, and preserved in the manner specified by state law. O.C.G.A. § 21-2-386(a) (1).

B. Use of the Federal Write-In Absentee Ballot

Congress has provided for a write-in absentee ballot form for use by UOCAVA-protected overseas voters desiring to vote in Federal general elections. 42 U.S.C. § 1973ff-2. The criteria for use of this form under UOCAVA are:

1. The voter must be located overseas;
2. The voter must have applied for the absentee ballot at least 30 days before the election; and
3. The voter must not have received the requested ballot.

42 U.S.C. § 1973ff-2(a)(1-3).

While Congress has made no provision for the use of this Federal Write-In Absentee ballot (FWAB) in primary elections for state offices, this court recognizes that this form has the notable advantage of wide availability; federal law requires that it be available to UOCAVA-covered overseas voters, and the form is on hand at U.S. military installations and diplomatic facilities worldwide, as well as on the World Wide Web, so that UOCAVA-covered overseas voters have access to the form regardless of their location.

This court therefore orders that the Secretary make this form available via her agency's website, www.sos.state.ga.us, along with information about Statewide and State-level candidates on the July 20 primary ballot for each political party for each office. These federal write-in ballot forms may then be used by the eligible UOCAVA-protected overseas voters to vote in Georgia's primary election for statewide and state-level offices in the manner described above for other facsimile ballots, or in the manner described below for ballots sent via express mail, and subject to the same time restrictions applicable under this order to ballots sent by each method.

C. Extending the Deadline for Receipt of Mailed Absentee Ballots

Under Georgia law, in order for an absentee ballot to be properly received and counted, it must be received by the county voter registrar by 7:00 p.m. on Election Day. O.C.G.A. § 21-2-386. Because of the delay in the mailing out of the requested absentee ballots, the deadline for receipt of absentee ballots mailed back to the various Georgia counties shall be extended by three business days, so that absentee ballots from the eligible UOCAVA voters mailed on or before July 20, 2004, and received by the appropriate voter registrars in the issuing counties by 5:00 p.m. Eastern Daylight Time on July 23, 2004, will be deemed valid and will be tabulated and incorporated into the county's final certified results. Ballots received after that date and time will be kept unopened, and preserved in the manner specified by state law. O.C.G.A. § 21-2-386(a)(1).

D. Other means of Express Delivery

The Secretary shall make available to the eligible UOCAVA-protected overseas voters an account with Federal Express and an account with United Parcel Service (UPS) by which absentee ballots may be returned to her or to the appropriate county election officials by 5:00 p.m. on July 23, 2004, three days after the primary election. The Secretary and the State shall bear the cost of such transmittals, and shall

immediately convey these ballots to the appropriate county officials by overnight or personal delivery. Information regarding access to these accounts will be made available through the Federal Voting Assistance Program and the Office of Georgia Secretary of State.

E. Deadlines and Delivery Methods for the Primary Runoff Election

Georgia will conduct its runoff primary elections on August 10, 2004. The court directs that the same methods for transmittal and delivery of UOCAVA-protected overseas voters' absentee ballots shall be utilized by the Secretary and the registrars of Georgia's 159 counties for the Primary Runoff election. As with the primary election, the court orders that ballots voted prior to the closing of the polls at 7:00 p.m. Eastern Daylight Time on August 10, 2004, may be received and counted by the Secretary of State and the various county registrars if they are received in either of these offices by the close of business at 5:00 p.m. on Friday, August 13, 2004 via U.S. Mail or Overnight delivery. As previously ordered, all ballots transmitted via facsimile to the Secretary must be received by 7:00 p.m. on the day of the runoff election, August 10, 2004, in order to be accepted and counted.

F. Notice of Relief to Affected Voters

The defendants shall notify the Director of the Federal Voting Assistance Program ("FVAP") of the United States Department of Defense as soon as this order has been signed and request that the FVAP take such action as is necessary to notify the eligible overseas voters of the relief afforded in this order, including the extension of time for receipt of absentee ballots. The defendants shall assist the FVAP in whatever way may be reasonably necessary to aid that agency in publicizing this extension of time.

In addition to the publicity described in the preceding paragraph, the defendants shall take the following steps to endeavor to give affected voters notice of the contents of this order:

1. Issue a press statement for immediate release, posted immediately on the Georgia Secretary of State's Web site, and distributed as broadly and immediately as practicable to national and local wire services, to radio and television broadcast stations within the State, and to daily newspapers of general circulation in the State, describing this order, advising the press of its newsworthiness, and specifically giving members of the press a way to contact

senior officials of the Georgia Elections Division for answers to questions.

2. Prepare and distribute written public service announcements describing this order for broadcast on radio and television networks, including but not limited to the U.S. Armed Forces Network, and announcements describing this order on World Wide Web sites of interest to military and non-military U.S. citizens living abroad.
3. For the primary runoff election of August 10 only, publish paid advertisements describing this order and the relief afforded therein in at least a single day's issue of all international and domestic editions of the International Herald Tribune, USA Today, Stars & Stripes, the Army Times, and the Navy Times.
4. For the July 20 primary election only, direct the county voter registrars and election superintendents to make all reasonable efforts, including the use of all available public records and personal knowledge, to locate each UOCAVA-covered overseas voter in their jurisdiction whose absentee ballot was issued on June 23 or later; to notify each such voter individually, by

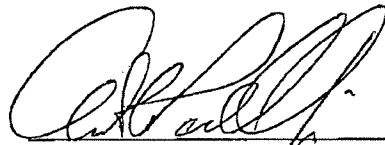
electronic mail, telephone or facsimile, of the relief contained in this order; and to offer electronic or other means faster than traditional mail service of transmitting or re-transmitting an absentee ballot to each such voter.

G. Jurisdiction Retained

The court retains jurisdiction of this action to enter such further relief as may be necessary for the effectuation of the terms of this order, and, on a showing of good cause or by agreement of the parties, to enter such relief as may abate, for the November 2, 2004 election, the conditions that gave rise to the UOCAVA problems that have been brought to the court's attention by the Secretary of State.

SO ORDERED, this 15 day of July, 2004.

5:47 pm



Charles A. Pannell, Jr.
United States District Judge

EXHIBIT “2”
to United States’
Amicus Curiae Brief

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
	:	CIVIL ACTION NO. 1:CV-04-830
v.	:	
	:	(Judge Kane)
THE COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
EDWARD G. RENDELL, Governor	:	
of the Commonwealth of Pennsylvania;	:	
and PEDRO A. CORTES, Secretary	:	
of the Commonwealth of Pennsylvania,	:	
Defendants	:	

ORDER

This matter is before the Court on motion of the Government for Temporary Restraining Order and Preliminary Injunction directing that the Commonwealth of Pennsylvania take steps to ensure that American citizens abroad receive the rights guaranteed by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff-1973ff-6 (“UOCAVA” or “the Act”).

The Act provides, *inter alia*, that “absentee uniformed services voters” and “overseas voters” (as defined by the Act) (hereinafter “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. § 1793ff-1. Plaintiff seeks injunctive relief under the Act to assure that overseas voters who (a) are qualified to vote in the April 27, 2004, General Primary Election in the Commonwealth of Pennsylvania, and (b) submitted to appropriate county elections officials applications for absentee ballots on or before Monday, March 29, 2004, will be afforded a reasonable opportunity to submit their absentee ballots in a manner that is deemed timely by Pennsylvania officials and to have

those ballots canvassed and counted in accordance with Pennsylvania law for the Federal offices that appear on the absentee voters' General Primary ballot.

As a State, Defendant Commonwealth of Pennsylvania must comply with the duties imposed on the States as required by the Act. Defendant Pedro A. Cortes, the Secretary of the Commonwealth of Pennsylvania, is the administrative head of the Single State Office – the Pennsylvania Department of State – that has been designated by the Commonwealth of Pennsylvania under § 102(b)(1) of the Act (as amended by the Help America Vote Act of 2002). 42 U.S.C. § 1973ff-1. By statute, the Pennsylvania Legislature has assigned the Secretary of the Commonwealth certain responsibilities that are relevant to Pennsylvania's compliance with the Act. However, in its implementation of the Commonwealth of Pennsylvania's responsibilities under the Act, the General Assembly of the Commonwealth by statute has assigned many responsibilities necessary for compliance with the Act to the 67 County Boards of Elections. See generally 25 Pa. Stat. Ann. §§ 3146.1-3146.9 (West 1994 & Supp. 2003) (Article XIII of the Pennsylvania Election Code – relating to voting by qualified absentee electors).

In determining whether to grant a motion seeking emergency injunctive relief, this Court must consider the following four factors: (1) the likelihood that the applicant will prevail on the merits; (2) the extent to which the movant is being irreparably harmed by the complained of conduct; (3) the extent to which the non-moving party will suffer irreparable harm if the preliminary injunction is issued; and (4) whether granting preliminary injunctive relief will be in the public interest. S. & R. Corp. v. Jiffy Lube Int'l. Inc., 968 F.2d 371, 374 (3d Cir. 1992). The moving party bears the burden of demonstrating these factors. Instant Air Freight v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989). The

Court should grant injunctive relief only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief. ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir.1987). Moreover, injunctive relief must be framed to remedy the harm claimed by the party. Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945). An injunction must be narrowly tailored to remedy the specific harm shown. Davis v. Romney, 490 F.2d 1360, 1370 (3d Cir. 1974); see also Tuttle v. Arlington City Sch. Bd., 195 F.3d 698, 708 (4th Cir. 1999) (“An injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation.”) (citation omitted).

There can be no doubt that Plaintiff is entitled to injunctive relief. Plaintiff is likely to prevail on the merits of its claim that the Commonwealth is in violation of UOCAVA. Plaintiff has established that county election officials have failed in their duty to timely forward absentee ballots to citizens abroad including the men and women serving our nation’s military. Plaintiff established that overseas ballots require on average 30 days for transit to and from the absentee voter. Yet, a survey by the Pennsylvania Department of State’s Bureau of Commissions, Elections and Legislation, conducted between April 7 and April 12, 2004 of all 67 county election offices, discloses that many counties have not satisfied their important legal obligations to forward absentee ballots so that they are timely received. Time lines are especially critical in the case of military voters. Based on this, Plaintiff has shown reasonable grounds to believe that this failure constitutes a violation of the Act.

Plaintiff has established the irreparable harm necessary to receive preliminary injunctive relief. Under Pennsylvania law, absentee ballots received after 5:00 P.M. Eastern Time on the Friday before

the election may not be counted with respect to any office. 25 Pa. Stat. Ann. § 3146.6(a) (West Supp. 2003). Some overseas voters who applied for an absentee ballot on or before March 29, 2004, and who were not provided an absentee ballot in the time prescribed by Pennsylvania law, see 25 Pa. Stat. Ann. § 3146.5(a) (West 1994), reside or are physically situated at locations so remote from their counties of residence in Pennsylvania that they likely will be unable to return an absentee ballot in time or to cast a vote in this General Primary unless afforded relief from the April 23, 2004, statutory deadline for the receipt of absentee ballots. See 25 Pa. Stat. Ann. § 3146.6(a) (West Supp. 2003).

Further, the public interest favors the grant of an injunction and the expense and burden to Defendants imposed by the relief ordered is far outweighed by the importance of protecting and enforcing the right of every eligible Pennsylvanian to vote. Thus, Plaintiff is entitled to injunctive relief.

Because injunctive relief is an extraordinary remedy, it must be granted sparingly, with the Court exercising its powers only as necessary to remedy the established harm. Hartford-Empire Co., 323 U.S. at 410. It is Plaintiff who bears the burden of establishing entitlement to the relief it seeks. Instant Air Freight, 882 F.2d at 800. The Court is satisfied by the testimony and exhibits that the rights established by the UOCAVA can be enforced with a four prong order: the deadline for the acceptance of absentee ballots will be extended to May 17, 2004, federal write-in ballots will be accepted, the Commonwealth will be required to provide and fund the overnight mailing of overseas absentee ballots, and the Commonwealth will notify the affected voting public of these accommodations.

The Court has considered Plaintiff's argument that the Commonwealth should be required to permit absentee voting by fax or electronic mail. Although counsel for the Government may be correct that these procedures "make sense" in this electronic age, and that they are used safely in forty-nine

other states, Plaintiff has not established entitlement to this form of relief. An order requiring these new forms of voting would involve this Court devising and superimposing its own election scheme on a complex legislatively sanctioned system spread across sixty seven diverse counties. The Government has produced no evidence that this form of extraordinary relief is necessary to ensure the UOCAVA rights of Pennsylvania's overseas voters are protected. Counsel speculated that there may be some military voters for whom even traditional mail is inaccessible. If this is so, the Government has not satisfied its burden of producing evidence to support this contention. Indeed, the Government's sole witness has explained that every military unit is assigned a voting officer charged with protecting the precious right of every man and woman serving our nation in these difficult times.

ACCORDINGLY, IT IS ORDERED THAT:

1. As a remedy to assure the rights of overseas voters who are protected by the Act, the Secretary of the Commonwealth shall take all reasonable steps necessary to direct the County boards of elections to accept absentee ballots cast for federal offices included on the April 27, 2004 primary election by overseas voters as defined by the Act as timely received, as long as they are received by the appropriate county board of elections no later than 5 p.m. on Monday, May 17, 2004, notwithstanding the deadline prescribed by 25 Pa. Stat. Ann. § 3145.6(a).
2. The Secretary of the Commonwealth shall further direct all County boards of elections to accept any vote for federal office in the April 27, 2004 primary election that is received on a federal write-in absentee ballot.
3. To facilitate a timely return of the ballots, the Commonwealth shall provide overseas voters with

the opportunity to return ballots by overnight delivery, the expense of which shall be borne by the Commonwealth.

4. For those absentee ballots received from the overseas voters, the Secretary of the Commonwealth shall take all reasonable steps necessary to direct the County boards of elections to canvass the absentee ballots in accordance with Pennsylvania law and to count the valid votes cast for federal offices only, those determined by the board of elections to be valid absentee ballots under Pennsylvania law.
5. No absentee ballot cast by an absent uniformed services voter or overseas voter shall be valid unless it was cast by the voter no later than 8:00 p.m. eastern daylight time on Tuesday, April 27, 2004. For purposes of determining that an absentee ballot was timely cast, the Secretary of the Commonwealth shall take all reasonable steps necessary to direct the County boards of elections to accept the date affixed to the voter's signed declaration on the absentee ballot envelope prescribed by the Department of State or similar declaration, indicating that the voter had cast his or her absentee ballot on or before the date indicated by the voter in the declaration. The Secretary of the Commonwealth will direct the County boards of elections that proof of mailing or delivery of the completed absentee ballot on or before April 27, 2004, will not be required to demonstrate that the ballot was timely cast.
6. The Defendants shall immediately take all reasonable steps to give notice of the relief in this Order to all qualified overseas voters who have pending requests for absentee ballots in any Pennsylvania County. The efforts to publicize the Order shall include the following:
 - a. The Secretary of the Commonwealth shall issue a press statement for immediate release

describing this Order, advising the press of its newsworthiness, and specifically giving members of the press a way to contact the Pennsylvania Department of State's Office of Communications and Press for answers to questions. This press release shall be posted immediately on the Department of State's website, and distributed as broadly and immediately as practicable, to wire services, to radio and television broadcast stations within the Commonwealth, to daily newspapers of general circulation in the Commonwealth, and to daily and non-daily newspapers in the Commonwealth that circulate among minority language readers.

- b. The Commonwealth shall place paid advertisements in multiple overseas publications and other periodicals likely to be accessible to United States military and non-military overseas voters and prepare public service announcements describing this Order for broadcast on radio and television networks, including but not limited to the United States Armed Forces Network.
- c. The Secretary of the Commonwealth will take all reasonable means to direct the County boards of elections to send, by first class U.S. mail, a communication describing this Order and the relief afforded therein to every overseas voter who requested an absentee ballot on or before March 29, 2004, and whose absentee ballot has not yet been received by the county board of elections. The notice shall be mailed to the address supplied by the voter for delivery of the absentee ballot. Any ballot mailed or otherwise transmitted to an overseas voter after the date of this Order shall include the notice described herein.

- d. The United States and its agencies, including the Federal Voting Assistance Program ("FVAP"), shall take such action as might be necessary and appropriate to assist the Commonwealth with the notification of overseas voters of the extension of time for receipt of such ballots by elections officials of the Commonwealth, including posting announcements on internet sites likely to be visited by affected voters or persons who may have contact with those voters.
6. Within forty-five (45) days after May 17, 2004, the Secretary of the Commonwealth, in conjunction with the county election officials, shall file a report with the Department of Justice and with the Court which sets forth the following information regarding the federal offices included in the April 27, 2004 primary election:
 - a. The dates on which each of the 67 counties in the Commonwealth began and completed the process of mailing ballots to overseas voters;
 - b. The number of absentee ballots received by each county from overseas voters by 5:00 p.m. on May 17, 2004;
 - c. The number of absentee ballots, by county, received from such overseas voters and counted after the statutory deadline of 5:00 p.m. on April 23, 2004 but prior to the deadline proscribed in this Order;
 - d. The number of absentee ballots, by county, received from such overseas voters later than 5:00 p.m. on May 17, 2004, and for that reason not counted; and

- e. The number of federal write-in absentee ballots received by each county board of elections.

S/Yvette Kane
Yvette Kane
United States District Judge

Date: April 16, 2004

EXHIBIT “3”
to United States’
Amicus Curiae Brief

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 Plaintiff :
 :
 vs. :
 :
 COMMONWEALTH OF PENNSYLVANIA; :
 ROBERT P. CASEY, GOVERNOR OF :
 THE COMMONWEALTH OF :
 PENNSYLVANIA; JAMES J. :
 HAGGERTY, SECRETARY OF THE :
 COMMONWEALTH OF PENNSYLVANIA :
 :
 Defendants :

CIVIL NO. 88-0610
(Judge Kosik)

FILED
SCANTON
APR 25 1988

TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The court, having considered United States' application for a temporary restraining order and motion for preliminary injunction and the declarations filed in support thereof, and after service and notice to the Commonwealth of Pennsylvania, and having heard the counsel for the parties, hereby finds that:

1. Defendants have inadvertently failed to take such steps as are necessary to ensure that those individuals located outside the United States on April 26, 1988, primary election day, who are qualified to vote absentee pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§1973ff, et seq., and who have applied in a timely fashion for absentee ballots, will be given a reasonable opportunity to execute and return such ballots before 5 p.m., Friday, April 22, 1988 (the deadline for receipt of such ballots).

2. There are reasonable grounds to believe that this

failure involves a violation of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§1973ff, et seq.

3. The United States citizens located abroad who are eligible to vote in the Commonwealth of Pennsylvania under the aforementioned Act will be irreparably injured by this failure because these overseas citizens have not been given a reasonable opportunity to execute and return absentee ballots before 5 p.m., Friday, April 22, 1988, and, as such, they will effectively be denied their right to vote in the April 26, 1988 primary election.

4. Issuance of this Order will serve the public interest by protecting the right to vote of American citizens overseas, as that right is set forth in the Uniformed and Overseas Citizens Absentee Voting Act.

5. The degree of harm that may be suffered by defendants as a consequence of this Order is insignificant.

WHEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED THAT:

[a] The defendants, their agents, officers, and employees, and all those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are restrained from failing or refusing to take such steps as are necessary to ensure that the following ballots for federal offices in the April 26, 1988 primary general election are counted as validly cast ballots: ballots cast pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, by persons outside the United States on

election day which are received on or before May 6, 1988, by the appropriate election officials, so long as the ballots would have been counted if they had been received by 5 p.m., Friday, April 22, 1988.

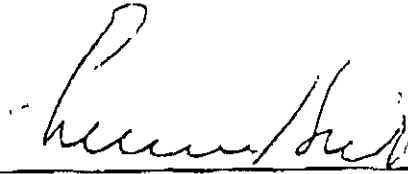
[b] It is further ORDERED that while the aforementioned ballots cannot be challenged or counted at the appropriate election district level, as required by Title 25 P. S. Section 3146.8(a), they shall be available for challenges and counting by appropriate county boards of election at a time to be appointed by said boards as part of the regular public canvassing process provided for under Title 25 P. S. Section 3154 and in a manner similar to that provided for processing challenged absentee ballots under Section 3146.8(e); all to be accomplished without unnecessarily delaying certification of the election to the Secretary of the Commonwealth.

[c] It is further ORDERED that defendants shall immediately inform all local election officials in the state of the provisions of this Order.

[d] It is further ORDERED that the court sets Friday, April 29, 1988 at 10:30 a.m., United States Court, Scranton, Pennsylvania, as the time for the defendants' to be heard, if they deem necessary, to consider dissolution or modification.

[e] It is further ORDERED that the defendants shall notify the Director of the United States Department of Defense's Federal Voting Assistance Program (FVAP) as soon as this Order has been signed and request that the FVAP take such action as is necessary to notify overseas voters of the extension of time for

receipt by Pennsylvania election officials of such ballots. The state shall assist the FVAP in whatever way necessary to publicize such extension of time.



Edwin M. Kosik
United States District Judge

DATED: April 25, 1988

Certified from the record

Date 4-25-88

Donald R. Berry, Clerk

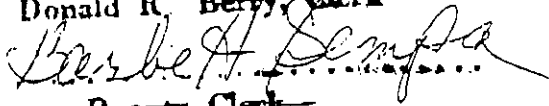
or 
Deputy Clerk

EXHIBIT “4”
to United States’
Amicus Curiae Brief

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

FILED

SEP 12 2002

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____, DEPUTY

UNITED STATES OF AMERICA,
Plaintiff,

CIV - 02 - 1273 L

v.

STATE OF OKLAHOMA;
OKLAHOMA STATE ELECTION
BOARD; and MICHAEL CLINGMAN,
as Secretary of the
Oklahoma State Election
Board,
Defendants.

Civil Action No.

CONSENT DECREE

A. STIPULATIONS OF THE PARTIES

The United States of America, plaintiff, and defendants State of Oklahoma, Oklahoma State Election Board, and Michael Clingman, Secretary of the Oklahoma State Election Board, stipulate and agree, for the purpose of the September 17, 2002, federal primary runoff election, that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff to 1973ff-6 ("UOCAVA" or "the Act").

2. This Court has jurisdiction of this action pursuant to

42 U.S.C. § 1973ff-4 and 28 U.S.C. § 1345.

3. The Uniformed and Overseas Citizens Absentee Voting Act provides, inter alia, that absentee 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.

4. The United States, by this action, seeks injunctive relief under UOCAVA to assure that citizens living abroad, who are qualified to vote in the September 17, 2002, federal primary runoff election of the State of Oklahoma, and who have filed timely applications for absentee ballots, will have their ballots counted.

5. The Defendant State of Oklahoma is charged with the responsibility of assuring that Oklahoma election laws, as applied, comply with the provisions of UOCAVA.

6. Defendant Michael Clingman is the Secretary of the Oklahoma State Election Board, and in that capacity has supervisory authority over Oklahoma's county election boards and responsibility for the administration of state laws affecting voting.

7. In the September 17, 2002, federal primary runoff election, the voters of the State of Oklahoma will select or participate in the selection of nominees for, inter alia, the

office of United States Senator.

8. County election officials of the State of Oklahoma have received timely requests for absentee ballots from overseas voters, who are entitled to vote pursuant to the provisions of UOCAVA.

9. Under Oklahoma law, absentee ballots received after 7:00 p.m. on the date of the election are not counted with respect to any office. Okla. Stat. tit. 26, § 14-104.

10. In order to allow overseas citizens a fair opportunity to vote by absentee ballot, election officials in Oklahoma must mail the ballots to the voters on a date sufficiently in advance of election day to allow the voter to receive the ballot, cast his or her vote, and return the ballot to the office of the election official by the deadline established by state law (7:00 p.m. on election day). The United States Postal Service estimates that a period of 10 to 14 days is a reasonable benchmark from the time of posting to the time of delivery of international mail and that a period of 20 to 28 days is a reasonable benchmark for a round trip if the addressee responds on the day he or she receives the letter. The United States Department of State has estimated that 10 to 14 days is a reasonable one-way international benchmark. The Military Postal Service Agency estimates that approximately 30 days are necessary for mail to military personnel to make a complete round trip to

and from overseas locales. This estimate takes into account the fact that some military personnel are stationed in remote areas. The defendants do not stipulate to the accuracy of these estimates.

11. Because the 2002 Oklahoma statewide primary election was held August 27, 2002, and its results were not certified until August 30, 2002, election officials in Oklahoma counties could not mail absentee ballots to military and civilian overseas voters on a date sufficiently in advance of the September 17, 2002, primary runoff election to allow such voters to receive the ballot, cast a vote, and return the ballot to election officials by the deadline established by state law (7:00 p.m. on election day).

12. The failure of county election authorities in Oklahoma to mail absentee ballots to military and civilian overseas voters on a date sufficiently in advance of September 17, 2002, to allow the voting and return of ballots by the deadline established by state law, will deprive United States citizens of an opportunity to vote in the September 17, 2002, federal primary runoff election contrary to the provisions of the Uniformed and Overseas Citizens Absentee Voting Act.

13. To ensure that all citizens abroad who are protected under the Act, are eligible to vote in the State of Oklahoma, and have made timely requests for absentee ballots, have a reasonable

opportunity to have ballots counted in the September 17, 2002, federal primary runoff election, it is appropriate for this Court to enter an order extending by fourteen (14) days the deadline for receipt of absentee ballots from overseas citizens and military personnel. Under this extension, absentee ballots from overseas citizens and military personnel received by the close of business on October 1, 2002, will be accepted and tabulated in the final election results for the federal primary runoff election of September 17, 2002. However, this will not prevent defendant Oklahoma State Election Board from declaring the successful candidate in a federal primary runoff contest prior to the final tabulation of those absentee ballots if the total number of such ballots sent to military personnel and overseas citizens would be mathematically unable to affect the outcome of the election.

14. This consent decree is final and binding as to all issues resolved herein.

B. ORDER

WHEREFORE, the parties having freely given their consent, and the terms of the decree being fair, reasonable, and consistent with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The defendants shall take all steps necessary to ensure

that all ballots cast in the September 17, 2002, federal primary runoff election and received by the close of business on October 1, 2002, are counted as validly cast ballots with respect to all federal offices, if they are cast by citizens abroad who are protected under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff to 1973ff-6, and who made timely applications for absentee ballots.

2. The defendants will not be prevented from declaring the successful candidate in a federal primary runoff contest prior to the final tabulation of the ballots that are to be counted pursuant to Paragraph B.1 of this decree, if the number of absentee ballots mailed to military personnel and overseas citizens would be mathematically insufficient to affect the outcome of the election.

3. The defendants shall notify the Director of the Federal Voting Assistance Program (FVAP) of the United States Department of Defense as soon as this decree has been signed and request that the FVAP take such action as is necessary to notify overseas voters of the extension of time for receipt by Oklahoma election officials of such ballots. The defendants shall assist the FVAP in whatever way may be reasonably necessary to publicize this extension of time.

4. Within 45 days after September 17, 2002, the defendants shall file a report with this Court, with respect to the

September 17, 2002, federal primary runoff election, which sets forth the following information:

(a) the dates on which each county in the State of Oklahoma began and completed the process of mailing ballots to citizens located abroad;

(b) the number of valid absentee ballots received by each county before 7:00 p.m., Tuesday, September 17, 2002, from citizens living abroad;

(c) the number of absentee ballots, by county, received and counted after 7:00 p.m. September 17, 2002, but prior to the close of business October 1, 2002, from citizens living abroad; and

(d) the number of absentee ballots, by county, received from citizens located abroad later than the close of business October 1, 2002, and for that reason not counted.

5. The Court retains jurisdiction of this action to enter such further relief as may be necessary for the effectuation of the terms of this Decree.

ORDERED this 12 day of September, 2002.


United States District Judge

The undersigned agree to the entry of this Decree.


For the Plaintiff
United States of America:

RALPH F. BOYD, JR.
Assistant Attorney General for
Civil Rights



JOSEPH D. RICH
STEPHEN B. PERSHING
TIMOTHY C. LAMBERT
Attorneys, Voting Section
Civil Rights Division--NWB
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 305-1238
(202) 307-3961 (facsimile)

ROBERT G. McCAMPBELL
United States Attorney for the
Western District of Oklahoma

BY: 
TOM MAJORS
Assistant U.S. Attorney
210 Park Avenue, Suite 400
Oklahoma City, OK 73102
(405) 553-8814
(405) 553-8885 (facsimile)

For Defendants State of
Oklahoma, Oklahoma State
Election Board and the
Secretary of the Election
Board of the State of
Oklahoma:



JANIS W. PRESLAR
Assistant Attorney General
State of Oklahoma
4545 N. Lincoln Blvd.
Suite 260
Oklahoma City, OK 73105
(405) 522-4387
(405) 528-1867 (facsimile)

EXHIBIT “5”
to United States’
Amicus Curiae Brief

STATE BOARD OF ELECTIONS



From the desk of.... Mark Mossman, Director of Election Information
Phone: 217-557-0855
Email: mmossman@elections.il.gov

To: 14th Congressional District Election Authorities
Re: Special Primary Election
Date: December 12, 2007

This is a follow-up to some issues raised at the phone conference on Monday, December 10 between SBE staff and the election authorities in the 14th Congressional District concerning the Special Primary Election scheduled for February 5th, 2007.

Q. May a jurisdiction use one tabulator for both the General Primary and Special Primary Elections?

A. Even though these elections are considered as two separate elections that happen to occur on the same day, a jurisdiction may use one tabulator for tabulating the results for both elections, provided the total number of votes cast indicated by party and the number of votes received by each candidate at the Special Primary can be determined separately from other results that may appear on the results tape.

Pursuant to our discussion at Monday's phone conference, a separate ballot and application for the Special Primary should be used.

Q. May referenda appear on the ballot for the Special Primary and Special Elections?

A. No. A referendum would be placed on the General Primary ballot only. Under 10 ILCS 5/2A-1.2; 2A-1.4; 28-2, referenda would not be available at any Special Election unless done as an emergency election with a court order.

Q. May paper ballots be used for a special election?

A. No. Under 10 ILCS 5/24-1.2, there is no authority for the use of paper ballots for a special Congressional primary or election. In addition, Section 301 of HAVA requires voting systems to "provide the voter with the opportunity to change the ballot or correct any error before the ballot is cast and counted." Since this is a federal election, accessible equipment for the disabled community becomes an issue as well.

Q. Is early voting required for special Congressional elections?

A. 10 ILCS 5/19A-15 does not reference special elections. However, it is not strictly prohibited either. The SBE would encourage all election authorities in the 14th Congressional District to consult with one another in deciding whether or not to provide this service for the sake of uniformity throughout the district. I have already received calls from some campaigns as to whether or not early voting would be available for the special election.

Q. May a “special write-in ballot” be used for the Special Congressional Elections?

A. Both 10 ILCS 5/16-5.01 and 42 USC 1973 provide for the use of a “write-in absentee ballot” for uniformed and overseas voters in general elections when federal officers are elected, provided ballots are not available within certain timeframes. The SBE would take the position that the Special Write-in Absentee Voter’s Blank Ballot may be utilized for both Special Congressional Elections (Primary and General) provided ballots are not available in sufficient time and this is the only way for uniformed and overseas voters to participate in the special election.

Q. Does grace period registration and voting apply to Special Congressional Elections?

A. Yes. 10 ILCS 5/4-50, 5-50 and 6-100 provide for grace period registration and voting from the close of registration until the 14th day before “a primary or election”.

Q. How can we canvass shortly after the February 5th Special Primary when we may receive absentee ballots within the 14 day period after the election that should be tabulated?

A. February 11th was selected as the date for the appropriate canvassing board to canvass the special election results and to transmit them to the SBE. This date was selected for various reasons. Voters, who cast a ballot provisionally, have until the close of business on Thursday, February 7th to present you with additional information as to why his/her provisional ballot should be tabulated. Most absentee ballots will have been tabulated election night except for those that are rejected and those that are not returned until sometime within the 14 day period after the election.*

10 ILCS 5/19-8 (g-5) requires the election authority to notify an absentee voter within 2 days after rejecting his/her absentee ballot providing them with the opportunity to appear before you before the 14th day after the election to present evidence to you supporting their contention that the ballot should be counted.

The SBE suggests that the canvass be conducted on February 11th and that the number of rejected absentees as well as the number of absentees that haven’t been returned to your office be provided so as to give some indication as to whether or not the outcome of the race may be affected. After the February 11th canvass, we ask you amend your canvass as necessary to reflect the tabulation of any absentees arriving during the 14th day after the election as well as any rejected absentees that may be counted during this time.

This decision was made to provide the election authorities with as much time as possible in preparing for the Special General on Saturday, March 8th. To that end, the State Board of Elections is planning to meet on February 15th with the intention of certifying the final canvass of results I’m sure this date can be changed if you feel it would be more beneficial to you. Please let me know.*

I am currently working on the Special General Election calendar and will forward it to you for your input when it is completed.

* Dates for conducting the canvass mentioned during the phone conference were February 8th and 13th. It is being proposed that the dates be changed to February 11th and the 15th.