

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

MCCAIN-PALIN 2008, INC.; and)
THE UNITED STATES OF AMERICA,)
)
Plaintiffs,)

Case No. 3:08CV709

v.)

JEAN CUNNINGHAM,)
Chairman, Virginia State Board of Elections;)
HAROLD PYON, Vice-Chairman, Virginia State)
Board of Elections; NANCY RODRIGUES,)
Secretary, Virginia State Board of Elections;)
COMMONWEALTH OF VIRGINIA; and)
VIRGINIA STATE BOARD OF ELECTIONS)

Defendants.)

PLAINTIFF UNITED STATES' FIRST AMENDED COMPLAINT

The United States of America alleges:

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 of 1986 (“UOCAVA”), 42 U.S.C. §§ 1973ff to 1973ff-6, which provides, *inter alia*, that certain uniformed services voters and overseas voters shall be permitted “to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” 42 U.S.C. § 1973ff-1.

2. The United States files this action to intervene in the case McCain-Palin 2008, Inc. v. Cunningham, et al, 3:08cv709.

3. This Court has jurisdiction over the United States’ claims pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

4. Defendant Commonwealth of Virginia is obligated to comply with UOCAVA and ensure that certain eligible absent uniformed services voters and overseas voters (“UOCAVA voters”) are given sufficient time to receive, cast and return their absentee ballots.

5. Defendant Virginia State Board of Elections is the chief election authority in the Commonwealth of Virginia and is responsible for supervising and coordinating elections; ensuring that registrars are properly trained to carry out their duties; issuing rules and regulations regarding the administration of elections; and ensuring that elections are conducted in accordance with the law. Va. Code Ann. § 24.2-103. In addition, Defendant Virginia State Board of Elections is charged with ascertaining the results of elections, *id.* § 24.2-679, and certifying the results of elections, *id.* § 24.2-680.

6. On November 4, 2008, the Commonwealth of Virginia conducted a general federal election in which voters participated in the selection of candidates for, *inter alia*, President of the United States.

7. Local election officials in the Commonwealth of Virginia have received timely requests for absentee ballots from qualified UOCAVA voters for the November 4, 2008 general federal election.

8. In order to provide qualified UOCAVA voters a fair opportunity to vote by absentee ballot, election officials in Virginia were required to mail the ballots to the voters sufficiently in advance of election day to allow the voters to receive, cast and return their absentee ballots by the deadline established under Virginia law. 42 U.S.C. § 1973ff-1(a).

9. Under Virginia law, absentee ballots must be received on the day of the election to be counted. Va. Code Ann. § 24.2-709. For the federal election held on Tuesday, November

4, 2008, the deadline for receipt of absentee ballots was the close of the polls on election day, namely, 7:00 p.m. Eastern Standard Time.

10. Based on data from the United States Postal Service, the Department of State, and the Military Postal Service Agency, the Federal Voting Assistance Program (“FVAP”) of the Department of Defense has determined that states must provide no less than thirty days for the round-trip mail transit of a ballot to overseas locations to ensure that voters have a reasonable opportunity to return the ballot in time to be counted. FVAP recommends that states allow forty-five days for the round-trip transit of overseas ballots.

11. Defendants’ own UOCAVA records reveal that there were, at a minimum, 656 UOCAVA voters who requested an absentee ballot in a timely manner but whose absentee ballot envelope labels were not printed until October 7, 2008 or later – 28 days or less before the November 4, 2008 election. Defendants’ records also demonstrate that at least 125 military servicemembers and overseas citizens who requested a timely absentee ballot did not have their absentee ballot envelope labels printed until two weeks (or less) before the November 4, 2008 election.

12. The failure of election officials in Virginia to mail absentee ballots to qualified UOCAVA voters sufficiently in advance of November 4, 2008 to allow the voting and return of ballots by the close of the polls on election day deprived United States citizens of an opportunity to vote in a federal election, contrary to the provisions of UOCAVA.

13. An order of this Court is necessary requiring Defendants to take corrective action for the November 4, 2008 general federal election in order to protect the rights guaranteed by UOCAVA.

WHEREFORE, Plaintiff prays that this Court hear this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. § 1345; issue a declaratory judgment under 28 U.S.C. § 2201 that the failure of election officials to send absentee ballots to UOCAVA voters in sufficient time to be received, cast, and returned by the Commonwealth's deadline in the November 4, 2008 general federal election violates UOCAVA; and enter injunctive relief ordering the Defendants, their agents and successors in office, and all persons acting in concert with them:

- (1) to take such steps as are necessary to ensure that appropriate election officials count as validly cast ballots any absentee ballots from UOCAVA voters that were executed by November 4, 2008 and are received by 7:00 p.m. on November 14, 2008, provided that they otherwise satisfy the requirements of Virginia law;
- (2) to take such steps as are necessary to inform Virginia local election officials of this Court's order;
- (3) to provide a report to this Court concerning the number of UOCAVA ballots, including Federal Write-in Ballots, by locality, received and counted for the November 4, 2008 general federal election within forty-five days after the election; and
- (4) to take such steps as are necessary to afford voters eligible to vote in Virginia under UOCAVA a fair and reasonable opportunity to participate in future elections for federal office.

The United States of America further prays that this Court order such other relief as the interests of justice may require, together with the costs and disbursements of this action.

Date: November 26, 2008

Respectfully submitted,

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/s/

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