Timely Overseas Ballots in Alabama

United States v. Alabama
(Myron H. Thompson, M.D. Ala. 2:12-cv-179)

The U.S. Department of Justice filed a federal complaint in the Middle District of Alabama on Friday, February 24, 2012, alleging violations of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[1] as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act),[2] respecting timely distribution of absentee ballots for the March 13 primary election.[3] On Monday, the Department filed a motion for a temporary restraining order and a preliminary injunction.[4] Judge Myron H. Thompson scheduled a telephone conference for 7:00 the following morning.[5]

At a hearing on Tuesday, Judge Thompson concluded that Alabama had failed to meet the requirement of sending absentee ballots overseas at least 45 days before a federal election.[6] Judge Thompson ordered the parties to submit to the court within four days a remedy plan.[7] On March 7, Judge Thompson issued a preliminary injunction extending the deadline for submission of overseas absentee ballots, requiring Alabama to issue a press release notifying overseas voters about ways of receiving absentee ballots other than through the mail—including electronically—and requiring from Alabama an accounting of when and how many absentee ballots would be received from overseas voters.[8] He issued a published opinion five days later.[9] Among his legal rulings,

1. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311, *formerly* 42 U.S.C. §§ 1973ff to 1973ff-7 (2013).

2. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

3. Complaint, United States v. Alabama, No. 2:12-cv-179 (M.D. Ala. Feb. 24, 2012), D.E. 1; United States v. Alabama, 778 F. 3d 926, 928, 930–31 (11th Cir. 2015); United States v. Alabama, 998 F. Supp. 2d 1283, 1287 (M.D. Ala. 2014); United States v. Alabama, 857 F. Supp. 2d 1236, 1237–38 (M.D. Ala. 2012); *see Feds Sue Alabama Over Absentee Ballot Issues*, Mobile Press-Register, Feb. 25, 2012, at A6; Scott Johnson, *US Sues Ala. Over Military, Overseas Ballots Sent Late*, Montgomery Advertiser, Feb. 27, 2012.

4. Motion, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Feb. 27, 2012), D.E. 5.

5. Docket Sheet, *id.*, (Feb. 24, 2012); *see* Transcript, *id.* (Feb. 28, 2012, filed Feb. 11, 2013), D.E. 56.

6. Opinion, *id.* (Feb. 28, 2012), D.E. 8, *available at* 2012 WL 642312.

7. *Id.* at 11; *United States v. Alabama*, 857 F. Supp. 2d at 1238; *see* Jeremy Gran, *Judge Orders State to Report Details on Overseas Ballots*, Birmingham News, Feb. 29, 2012, at 2; *Judge Issues Restraining Order Over Late Ballots*, Montgomery Advertiser, Feb. 29, 2012.

8. Preliminary Injunction, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Mar. 7, 2012), D.E. 21; *United States v. Alabama*, 857 F. Supp. 2d at 1238; *see* Scott Johnson, *Judge Extends Absentee Ballot Deadline*, Montgomery Advertiser, Mar. 8, 2012.

9. *United States v. Alabama*, 857 F. Supp. 2d 1236; Order, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Mar. 9, 2012), D.E. 22 (announcing forthcoming opinion).

Judge Thompson concluded, "Alabama's contention that it is not its responsibility to ensure compliance with UOCAVA, especially where local county officials transmit ballots and administer an election, is meritless."[10]

Because of a resignation from Congress effective August 2, 2013, Alabama strove to establish a special election schedule to fill the seat that would have the replacement seated by January 2014.[11] The dates set for the special election—September 24 for a primary, November 5 for a primary runoff, and December 17 for the general election—were separated by only 42 days, intervals not long enough to send overseas voters their ballots 45 days in advance of each election without judicial modification of procedures.[12] Judge Thompson resolved the difficulty by ordering instant runoff ballots.[13] Judge Thompson also ordered Alabama's secretary of state to assume the counties' responsibilities for transmitting, receiving, and counting overseas ballots.[14]

(1) Overseas voters would receive for the primary election ballots that permitted them to rank-order their choices so that their preferences for any runoffs would be known.[15] (2) Overseas voters would also receive standard runoff ballots, although not as timely as otherwise required by law, which they could use to override their instant runoff ballots or use if they did not vote in the initial primary election.[16] Alabama would provide for express delivery.[17] (3) Overseas voters would receive timely absentee ballots for the general election, but the ballots would contain all candidates certified for the general election as well as all candidates certified for the primary runoff; for parties with more than one candidate in the runoff, voters could vote by party.[18] (4) In addition, overseas voters would receive standard absentee ballots, although not as timely as otherwise required by law.[19]

On Friday, January 14, 2014, not quite five months in advance of the June 3 primary election, the parties submitted to Judge Thompson a negotiated proposed order permanently establishing deadlines consistent with UOCAVA.[20]

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10. *United States v. Alabama*, 857 F. Supp. 2d at 1238; *see* United States v. Alabama, 998 F. Supp. 2d 1283, 1286 (M.D. Ala. 2014); *see also* Scott Johnson, *State, County Officials Blame Each Other for Absentee Ballot Fiasco*, Montgomery Advertiser, Mar. 1, 2012.

11. Opinion at 1–6, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. July 26, 2013), D.E. 71 [hereinafter July 26, 2013, Opinion]; *see* George Talbot, *Bonner Moves Up Resignation to Aug. 2*, Mobile Press-Register, July 24, 2013, at A8.

12. July 26, 2013, Opinion, *supra* note 11, at 1–3.

13. *Id.* at 2, 6.

14. *Id.* at 5–6, 8–12.

15. *Id.* at 6.

It turned out that only two candidates ran for the Democratic nomination, so a runoff for the Democratic primary would not be necessary. Notice, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Aug. 6, 2013), D.E. 72; *see* Order, *id.* (Aug. 8, 2013), D.E. 74.

16. July 26, 2013, Opinion, *supra* note 11, at 6–7.

17. *Id.*

18. *Id.* at 7–8.

19. *Id.* at 8.

20. Joint Motion, United States v. Alabama, No. 2:12-cv-179 (M.D. Ala. Jan. 14, 2014), D.E. 110; *see* Transcript, *id.* (Jan. 15, 2014, filed Apr. 24, 2014), D.E. 136.

The proposed order moved the ballot-qualifying deadline from April 4 to February 7, three weeks after the filing of the proposed order.[21] Although Judge Thompson was "deeply troubled by the last-minute nature of this proposed remedy," he was "firmly convinced that, absent the proposed remedial changes, including the qualifying-date change, the rights of UOCAVA voters would almost certainly be seriously and substantially compromised."[22] He signed the remedial order on Monday, January 17.[23]

On February 11, Judge Thompson resolved the case's one remaining claim by holding that Alabama's provision for runoff elections 42 days after a primary election violated UOCAVA, because the schedule did not allow for absentee ballots to be sent to runoff voters at least 45 days in advance of the election.[24] On March 14, Judge Thompson ordered that beginning with the 2016 election cycle primary elections for federal offices must allow for runoffs nine weeks later.[25] For 2014, because election officials had not yet provided for that timing, overseas voters in the one federal primary election that might require a runoff would receive instant runoff ballots, in which voters rank order their preferences.[26] The court of appeals affirmed Judge Thompson's summary judgment on February 12, 2015.[27]

On October 5, 2015, Judge Thompson granted Alabama a partial modification of injunctive requirements in light of a statute signed on August 14 providing for ranked voting, also known as instant runoffs, in federal primary elections for overseas voters.[28] Judge Thompson retained jurisdiction to supervise implementation of the statute.[29]

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21. Opinion at 4, *id.* (Jan. 17, 2014), D.E. 117, *available at* 2014 WL 200668.

22. *Id.* at 7.

23. Order, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Jan. 17, 2014), D.E. 119; United States v. Alabama, 998 F. Supp. 2d 1283, 1287 (M.D. Ala. 2014); *see* Order, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Nov. 25, 2015), D.E. 168 (modifying deadlines to accommodate Martin Luther King's birthday holiday in 2016).

24. *United States v. Alabama*, 998 F. Supp. 2d 1283; United States v. Alabama, 778 F. 3d 926, 931 (11th Cir. 2015).

25. Consent Order, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Mar. 14, 2014), D.E. 127.

26. *Id.*

27. *United States v. Alabama*, 778 F. 3d 926.

28. Judgment, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Oct. 5, 2015), D.E. 164; *see* Ala. Code 1975 § 17-13-8.1 (codifying Ala. Act No. 2015-518).

29. Judgment, *supra* note 28.