

Military Absentee Ballots 2008

McCain-Palin 2008, Inc. v. Cunningham
(Richard L. Williams, E.D. Va. 3:08-cv-709)

On November 3, 2008, the day before the presidential election, candidate John McCain filed a federal action in the Eastern District of Virginia to ensure that his Virginia votes by overseas military personnel would be properly counted.¹ McCain claimed that many Virginia jurisdictions, in violation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),² had not sent absentee ballots to military personnel with sufficient time for them to be returned by the November 4 closing of the polls.³ With the complaint, McCain filed motions for a temporary restraining order and a preliminary injunction.⁴ The court set hearing on the motion for the temporary restraining order for 2:00 p.m. on election day before Judge Richard L. Williams.⁵

At the hearing, Judge Williams ordered Virginia to preserve for possible counting all absentee ballots received after the polls close.⁶ A written order followed that day.⁷

On Friday, November 14, the Justice Department moved to intervene in the case, seeking more comprehensive enforcement of UOCAVA than the plaintiff was seeking.⁸ On Monday afternoon, Judge Williams held a hearing⁹ on the Justice Department's motion to intervene, as well its motion for a temporary restraining order and a preliminary injunction.¹⁰ By written order that day, Judge Williams granted the Justice Department's motion to intervene as a plaintiff, dismissed McCain as a plaintiff, and denied the motion for additional immediate injunctive relief.¹¹

1. [Complaint](#), *McCain-Palin 2008, Inc. v. Cunningham*, No. 3:08-cv-709 (E.D. Va. Nov. 3, 2008), D.E. 1.

2. [42 U.S.C. §§ 1973ff to 1973ff-7](#) (2012).

3. [Complaint](#), *supra* note 1.

4. [Motion Brief](#), *McCain-Palin 2008, Inc.*, No. 3:08-cv-709 (E.D. Va. Nov. 3, 2008), D.E. 4; [Preliminary Injunction Motion](#), *id.* (Nov. 3, 2008), D.E. 3; [Temporary Restraining Order Motion](#), *id.* (Nov. 3, 2008), D.E. 2.

5. [Docket Sheet](#), *id.* (Nov. 3, 2008).

Judge Williams died on February 19, 2011. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/history/home.nsf/page/judges.html>.

6. [Minute Entry](#), *McCain-Palin 2008, Inc.*, No. 3:08-cv-709 (E.D. Va. Nov. 4, 2008), D.E. 9.

7. [Temporary Restraining Order](#), *id.* (Nov. 4, 2008), D.E. 10.

8. [Intervenor Complaint](#), *id.* (Nov. 14, 2008), D.E. 17; [Government Motion to Intervene](#), *id.* (Nov. 14, 2008), D.E. 16.

9. [Minute Entry](#), *id.* (Nov. 17, 2008), D.E. 32.

10. [Government Injunction Motion](#), *id.* (Nov. 14, 2008), D.E. 19.

11. [Order](#), *id.* (Nov. 17, 2008), D.E. 31; see Frank Green, *McCain-Palin Out of Va. Lawsuit*, *Richmond Times-Dispatch*, Nov. 18, 2008, at A3.

On December 9, Judge Williams denied Virginia's motion to dismiss the action and referred the matter to Magistrate Judge Dennis W. Dohnal for settlement.¹²

On October 15, 2009, Judge Williams granted summary judgment to the Justice Department.¹³ Judge Williams held that Virginia had violated UOCAVA by mailing out absentee ballots too late.¹⁴ He ordered Virginia to count for the 2008 election all absentee ballots received within 30 days of the polls closing so long as they were timely requested but sent late by Virginia.¹⁵

A December 14, 2010, consent decree brought the case to its final resolution; Virginia agreed to adopt various procedures to ensure its compliance with UOCAVA.¹⁶

12. [Order](#), *United States v. Cunningham*, No. 3:08-cv-709 (E.D. Va. Dec. 9, 2008), D.E. 39; *see* Transcript at 13, *id.* (Dec. 8, 2008, filed Oct. 26, 2010), D.E. 72 (“this situation cries out for a solution created by the parties rather than crafted by The Court”).

13. [Opinion](#), *id.* (Oct. 15, 2009), D.E. 57, *available at* [2009 WL 3350028](#); *see* Tyler Whitley, *Va. Violated Voting Law, U.S. Judge Rules Again*, *Richmond Times-Dispatch*, Oct. 17, 2009, at B1.

14. [Opinion](#), *supra* note 13, at 8–16

15. *Id.* at 16–20.

16. [Consent Decree](#), *id.* (Dec. 14, 2010), D.E. 75.