

## Military Absentee Ballots 2008

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

On the day before the 2008 presidential election, one party's campaign filed a federal lawsuit alleging that Virginia had not sent absentee ballots to military personnel overseas in time for the voters to return the ballots in time to be counted. The district court ordered an extension of time for accepting absentee ballots from overseas so long as they were cast before the polls closed.

*Subject:* Absentee and early voting. *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); military ballots; absentee ballots; intervention.

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.<sup>1</sup> McCain claimed that many Virginia jurisdictions, in violation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),<sup>2</sup> had not sent absentee ballots to military personnel with sufficient time for them to be returned by the November 4 closing of the polls.<sup>3</sup> With the complaint, McCain filed motions for a temporary restraining order and a preliminary injunction.<sup>4</sup> 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.<sup>5</sup>

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

On Friday, November 14, the Justice Department moved to intervene in the case, seeking more comprehensive enforcement of UOCAVA than the plaintiff was seeking.<sup>8</sup> On Monday afternoon, Judge Williams held a hearing<sup>9</sup>

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

2. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, *Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act* (Federal Judicial Center 2016).

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 Article III Federal Judges, [www.fjc.gov/history/judges](http://www.fjc.gov/history/judges).

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; Intervention Motion, *id.* (Nov. 14,

on the Justice Department's motion to intervene, as well its motion for a temporary restraining order and a preliminary injunction.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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

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.<sup>16</sup>

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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.

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").

Judge Dohnal died on May 10, 2015. Judicial Milestones, [www.uscourts.gov/judicial-milestones/dennis-w-dohnal](http://www.uscourts.gov/judicial-milestones/dennis-w-dohnal).

13. Opinion, *id.* (Oct. 15, 2009), D.E. 57, 2009 WL 3350028; *see* Reagan, *supra* note 2, at 13; 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, *Cunningham*, No. 3:08-cv-709 (E.D. Va. Dec. 14, 2010), D.E. 75.