

Last-Minute Change to Ballot-Petition Due Date and Interference with Write-In Votes

Swanson v. Alabama (2:02-cv-644) and Campbell v. Bennett (2:02-cv-784) (Myron H. Thompson) and Swanson v. Bennett (2:02-cv-1244) (W. Harold Albritton) (M.D. Ala.)

Two lawsuits, one initially filed pro se, challenged the constitutionality of a last-minute moving up of the due date for independent candidates' ballot-petition signatures. The change had to be pre-cleared pursuant to section 5 of the Voting Rights Act, and it was not known until a week before the new date that it would be pre-cleared in time for the pending elections. The district judge denied temporary restraining orders but issued preliminary injunctions placing aggrieved candidates who otherwise had submitted sufficient numbers of signatures on the ballot. A postelection action by the original pro se candidate and plaintiff was unsuccessful. On summary judgment after the election, the judge found the sudden change in due date to be a moot issue and other constitutional claims to be without merit.

Subject: Getting on the ballot. *Topics:* Getting on the ballot; pro se party; enjoining certification.

On June 4, 2002, the day ballot-petition signatures were due, Johnny Swanson, who wished to be an independent candidate for the U.S. Senate, filed a pro se federal complaint against the State of Alabama in the Middle District of Alabama complaining that he was incorrectly told that the due date would be July 1 because a new law moving up the due date would not be in effect until the 2004 election.¹ On June 14, Judge Myron H. Thompson denied the request for a temporary restraining order included in the complaint.²

Judge Thompson initially referred the case to Magistrate Judge Susan Russ Walker for pretrial matters,³ but Judge Thompson withdrew the referral once counsel appeared for Swanson.⁴

Ray Campbell, who wished to be a candidate for Alabama's house of representatives and who was represented by counsel, filed a similar complaint on July 11 against state election officials.⁵ Six days later, the court reassigned this case to Judge Thompson.⁶ On July 31, Campbell filed a motion for a

1. Complaint, *Swanson v. Alabama*, No. 2:02-cv-644 (M.D. Ala. June 4, 2002), D.E. 1; *Swanson v. Worley*, 490 F.3d 894, 897 (11th Cir. 2007); *Swanson v. Bennett*, 219 F. Supp. 2d 1225, 1227-28 (M.D. Ala. 2002).

2. Order, *Swanson*, No. 2:02-cv-644 (M.D. Ala. June 14, 2002), D.E. 6.

3. Order, *id.* (June 14, 2002), D.E. 7.

4. Order, *id.* (July 18, 2002), D.E. 16.

5. Complaint, *Campbell v. Bennett*, No. 2:02-cv-784 (M.D. Ala. July 11, 2002), D.E. 1.

6. Docket Sheet, *id.* (July 11, 2002).

temporary restraining order and a preliminary injunction.⁷ On August 1, Judge Thompson denied the temporary restraining order and set the case for hearing on August 5.⁸

On August 8, Judge Thompson issued a preliminary injunction placing Campbell on the ballot.⁹ The signature-deadline change moved the deadline for independent candidates from six days after the last primary election to the date of the first primary election.¹⁰ The purpose of the change was to prevent primary-election losers from running in the general election.¹¹ Because the change in the signature due date had to be precleared pursuant to section 5 of the Voting Rights Act,¹² and because it was not submitted for preclearance until March 29, election officials told candidates that it would not go into effect until 2004.¹³ Upon its May 28 preclearance, however, one week before the new deadline, election officials announced that it would go into effect immediately.¹⁴ Judge Thompson held the short notice to be probably unconstitutional.¹⁵

In the earlier case, with the court's permission,¹⁶ Swanson amended his complaint on August 13 to add two additional candidates as plaintiffs and to substitute state officers for the state so as to avoid Eleventh Amendment difficulties.¹⁷ On August 30, Judge Thompson issued a preliminary injunction in favor of the two new plaintiffs.¹⁸ Swanson, however, never submitted enough signatures, and Judge Thompson found the signature requirement itself to be probably constitutional.¹⁹

On summary judgment in 2004, Judge Thompson determined that the deadline-change issue was moot and the signature requirement was indeed

7. Motion, *id.* (July 31, 2002), D.E. 5.

8. Order, *id.* (Aug. 1, 2002), D.E. 9.

9. *Campbell v. Bennett*, 212 F. Supp. 2d 1339 (M.D. Ala. 2002).

10. *Swanson v. Worley*, 490 F.3d 894, 897 (11th Cir. 2007); *Swanson v. Bennett*, 219 F. Supp. 2d 1225, 1227 (M.D. Ala. 2002); *Campbell*, 212 F. Supp. 2d at 1341.

11. *Campbell*, 212 F. Supp. 2d at 1341.

12. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

13. *Swanson*, 490 F.3d at 897; *Swanson*, 219 F. Supp. 2d at 1227–28; *Campbell*, 212 F. Supp. 2d at 1341–43.

14. *Swanson*, 490 F.3d at 897; *Swanson*, 219 F. Supp. 2d at 1228; *Campbell*, 212 F. Supp. 2d at 1342.

15. *Campbell*, 212 F. Supp. 2d at 1343–47.

16. Order, *Swanson v. Alabama*, No. 2:02-cv-644 (M.D. Ala. Aug. 13, 2002), D.E. 44.

17. Amended Complaint, *id.* (Aug. 13, 2002), D.E. 45; *Swanson*, 490 F.3d at 897; *see* Order, *Swanson*, No. 2:02-cv-644 (M.D. Ala. July 18, 2002), D.E. 17 (encouraging the candidate to amend the complaint to avoid Eleventh Amendment difficulties).

18. *Swanson*, 219 F. Supp. 2d at 1225; *Swanson*, 490 F.3d at 898–99; *see Independents Put on Ballot*, *Montgomery Advertiser*, Sept. 4, 2002, at C3.

19. *Swanson*, 219 F. Supp. 2d at 1227, 1231–34; *Swanson*, 490 F.3d at 899.

constitutional.²⁰ In 2006, Judge Thompson resolved in favor of the defendants an issue that the Swanson plaintiffs argued remained pending: that the new deadline unconstitutionally prevented independent candidates from collecting signatures at primary-election polling places.²¹ The court of appeals affirmed this decision on June 29, 2007.²²

In the November 5, 2002, general election, Swanson ran as a write-in candidate. On the Friday after the election, he filed a pro se federal complaint and a motion for a temporary restraining order alleging that voters were improperly prevented from voting for him because of intimidation, equipment malfunction, and other improprieties.²³ On the day the complaint was filed, Judge W. Harold Albritton set the matter for hearing on November 13.²⁴

In a time-pressured case with lawyers on both sides, the judge usually could efficiently conference with the lawyers, frequently by telephone, to work out scheduling issues.²⁵ With a pro se plaintiff, however, scheduling issues were more often addressed with arms-length formal orders.²⁶

On November 18, Judge Albritton denied Swanson immediate relief because claimed injuries to voters were not his injuries and there was no reason to believe that the alleged wrongs changed the outcome of the election.²⁷

On February 18, 2003, Judge Albritton granted the defendants' motion to dismiss the complaint:

In this case, the Plaintiff argues that he is neither contesting the election nor seeking a "recanvass" or "recount." Instead, he insists that he is only requesting "an audit to determine the accuracy of the count." Semantics aside, the Plaintiff is directly contesting the number of votes he received. . . . Because such an action, regardless of how it is characterized, conflicts with the Constitution's express textual mandate that the Senate shall have the power to judge the elections and returns of its members, the court is without jurisdiction to proceed.²⁸

20. *Swanson v. Bennett*, 340 F. Supp. 2d 1295 (M.D. Ala. 2004); *Swanson*, 490 F.3d at 899–900; see *Campbell v. Bennett*, 340 F. Supp. 2d 1301 (M.D. Ala. 2004); Opinion, *Campbell v. Bennett*, No. 2:02-cv-784 (M.D. Ala. Aug. 24, 2004), D.E. 33.

21. *Swanson v. Worley*, 432 F. Supp. 2d 1262 (M.D. Ala. 2006); *Swanson*, 490 F.3d at 900–01.

22. *Swanson*, 490 F.3d 894; see Phillip Rawls, *Court Upholds State's Ballot Access Laws*, *Mobile Press-Reg.*, July 6, 2007, at B2.

23. Complaint, *Swanson v. Bennett*, No. 2:02-cv-1244 (M.D. Ala. Nov. 8, 2002), D.E. 1.

24. Order, *id.* (Nov. 8, 2002), D.E. 3; Minutes, *id.* (Nov. 13, 2002), D.E. 10; see Order, *id.* (Nov. 12, 2002), D.E. 7 (moving the hearing from 2:00 p.m. to 10:00 a.m.).

Tim Reagan interviewed Judge Albritton for this report by telephone on June 18, 2013.

25. Interview with Hon. W. Harold Albritton, June 18, 2013.

26. *Id.*

27. Opinion, *Swanson*, No. 2:02-cv-1244 (M.D. Ala. Nov. 18, 2002), D.E. 11.

28. Opinion at 6, *id.* (Feb. 18, 2003), D.E. 18 (citation omitted).