

**ORIGINAL**

FILED IN CLERK'S OFFICE  
U.S. DIST. COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

JUL 13 2004

LUTHER D. [Signature]  
By: [Signature] Clerk  
Deputy Clerk

SARA LARIOS, et al., )  
)  
Plaintiffs, )  
)  
v. )  
)  
CATHY COX, in her official )  
capacities as Secretary of State and )  
Chair of the State Election Board, )  
)  
Defendant. )

CIVIL ACTION  
NO. 1:03-CV-693-CAP  
(Three-Judge Court)

**MOTION TO ALTER METHOD, TIMING AND RECEIPT  
OF ABSENTEE BALLOTS OF UNIFORMED  
AND OVERSEAS CITIZENS**

COMES NOW Cathy Cox, Secretary of State and Defendant in the above-styled action, and submits this motion to alter the method, timing, and receipt of absentee ballots of uniformed and overseas citizens in the upcoming July 20, 2004, primary election, by showing and stating the following:

1.

On February 10, 2004, this Court issued its judgment finding that the then-current House and Senate plans for the Georgia General Assembly were unconstitutional. The Court thereafter appointed a Special Master to draw new

plans and then adopted the Special Master's proposals as the Court's interim plans in its March 25 and April 15 orders, respectively.

2.

In the course of these proceedings the Secretary of State presented to the Court a request to alter Georgia's deadline for the issuance of absentee ballots, altering the deadline of O.C.G.A. § 21-2-384(a), so that Georgia's counties would issue absentee ballots by 30 days prior to the July 20 primary rather than the 45 days provided by that statute.

3.

In its March 30 order granting that and other requests related to the election process, the Court noted:

Any further inquiry or requests for modification or suspension of any such statutes or regulations that are necessary and will assist the Secretary of State in providing the citizens of the State of Georgia a fair, efficient, effective and constitutional election may be reported to this court as necessary. The court stands ready to assist as necessary to provide constitutional, effective, fair and accurate elections.

(Order, March 30, 2004, p. 4, § 4.)

4.

It has come to the Secretary's attention that a significant number of absentee voters who fall within the protections of the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. 1973ff *et seq.*, have not been sent their absentee ballots by the election officers of some Georgia counties within the 30 day period prior to the July 20 primary. The Secretary has also been informed that the United States Department of Justice is considering filing an enforcement action under UOCAVA to address this issue.

5.

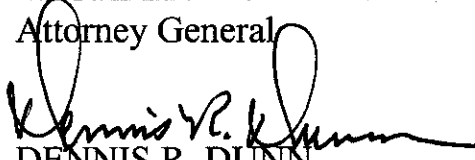
Given this Court's familiarity with the facts and circumstances underlying the current Georgia election cycle and the Court's March 30 Order as noted above, the Secretary believes that it is most appropriate to present this Court with a request to impose remedial procedures to address the problem at hand. The Secretary details in the brief filed in support of this Motion her proposals for assisting the voters in question and urges the Court to adopt these proposals as soon as possible.

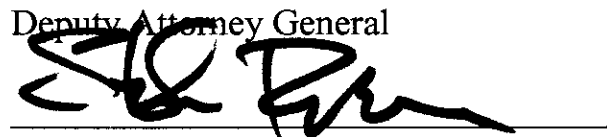
**CONCLUSION**

WHEREFORE, for all of the above and foregoing reasons, the Secretary of State requests this Court to provide these specific accommodations to UOCAVA protected absentee voters eligible to vote in Georgia's upcoming July 20 primary election.

Respectfully submitted,

THURBERT E. BAKER                      033887  
Attorney General

  
DENNIS R. DUNN                      234098  
Deputy Attorney General

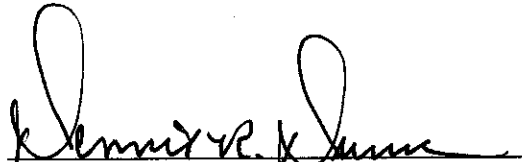
  
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Senior Assistant Attorney General

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*Attorneys for Defendant*

**Local Rule 7.1D Certification**

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

  
DENNIS R. DUNN

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served or caused to be served a copy of the within and foregoing **MOTION TO ALTER METHOD, TIMING AND RECEIPT OF ABSENTEE BALLOTS OF UNIFORMED AND OVERSEAS CITIZENS**, prior to filing the same, by email transmission and by first class mail, with adequate postage addressed thereon, properly addressed to:

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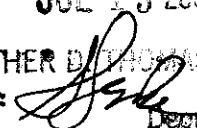
This 13 th day of July, 2004.

  
\_\_\_\_\_  
DENNIS R. DUNN

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LUTHER D. THOMAS, Clerk  
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capacities as Secretary of State and	)	
Chair of the State Election Board,	)	
	)	
Defendant.	)	

**BRIEF IN SUPPORT OF THE SECRETARY OF STATE'S  
MOTION TO ALTER METHOD, TIMING AND RECEIPT  
OF ABSENTEE BALLOTS OF UNIFORMED  
AND OVERSEAS CITIZENS**

A. STATEMENT OF THE CASE

On February 10, 2004, this Court issued its judgment finding that the then-current House and Senate plans for the Georgia General Assembly were unconstitutional. The Court thereafter appointed a Special Master to draw up new plans and adopted the Special Master's proposals as the Court's interim plans in its March 25 and April 15 orders, respectively.

In the course of those proceedings the Secretary of State presented to the Court a request for alterations of Georgia's deadline for the issuance of absentee ballots, altering the deadline of O.C.G.A. § 21-2-384(a) so that Georgia's counties

would issue absentee ballots by 30 days prior to the July 20 primary rather than the 45 days provided by that statute. The Secretary had raised this point because she recognized that the changes in the House and Senate plans, and the timing in which they occurred, would create a myriad of problems in preparing the regular and absentee ballots for the July 20 primary elections.

The Court granted the Secretary's requested changes for the election process and further noted in its March 30 order that:

Any further inquiry or requests for modification or suspension of any such statutes or regulations that are necessary and will assist the Secretary of State in providing the citizens of the State of Georgia a fair, efficient, effective and constitutional election may be reported to this court as necessary. The court stands ready to assist as necessary to provide constitutional, effective, fair and accurate elections.

(Order, March 30, 2004, p. 4, § 4.)

The Secretary now has returned to this Court for additional assistance in the absentee ballot process for the upcoming primary elections because a significant number of absentee voters who fall within the protections of the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. 1973ff *et seq.*, may not have been sent their absentee ballots within the 30 day period prior to the

July 20 primary because a number of counties were unable to complete the printing of their absentee ballots before the 30-day deadline arrived.<sup>1</sup>

Additionally, the U.S. Department of Justice has now indicated that they too believe that efforts must be taken to address the problems presented for UOCAVA protected voters in Georgia. The DOJ, though, has declined to return to this Court to address these issues, notwithstanding the Court's March 30 order and has instead indicated its intention to file a separate UOCAVA enforcement action. In doing so, the DOJ has indicated that it has a much more far ranging view of the legal abilities of the Secretary of State to control the issuance and return of absentee ballots and has proposed remedies which far exceed the scope of the problem presented.

Given this Court's familiarity with the facts and circumstances underlying the current Georgia election cycle and the Court's March 30 Order as noted above, the Secretary believes that it is most appropriate to present this Court with a request to impose remedial procedures to address the problem at hand. The remedies outlined herein are more in keeping with the Secretary's statutory

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<sup>1</sup> The printing of ballots was late in various counties both because the printers responsible for printing the ballots did not complete their work by the 30-day deadline, and in some cases, counties were delayed in proofing initial drafts of the ballot necessary to complete the printing process.

authority and are reasonable under the circumstances, especially in considering the possible effects of any changes in election practices and procedures on the upcoming General Election. The Secretary has detailed in this brief in support of this Motion her proposals for assisting the voters in question and urges the Court to adopt these proposals as soon as possible.

B. ARGUMENT AND CITATION OF AUTHORITY

In 1986, the Congress of the United States adopted the Uniformed and Overseas Citizen Absentee Voting Act (hereinafter UOCAVA), 42 U.S.C. § 1973ff. This statute provides that:

Each State shall –

- (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office;
- (2) accept and process, with respect to any general, special, primary or runoff election for Federal office, any otherwise valid voter registration application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election; and
- (3) permit overseas voters to use Federal write-in absentee ballots (in accordance with section 1973ff-2 of this title in general elections for federal office.

42 U.S.C. § 1973ff-1.

Persons who are protected under this Act include members of the uniformed services, and their spouse and dependents, where the serviceman or woman is on active duty and because of that “is absent from the place of residence where the member is otherwise qualified to vote.” 42 U.S.C. § 1973ff-6 (1) (A, B, C).

Additionally, persons are covered under the Act if they are absent from the United States on the day of the election by reason of their active duty or service or if a non-military citizen who is eligible to vote also resides outside of the country. 42 U.S.C. § 1973ff-6 (5).

Pursuant to this Court’s direction, when requested, absentee ballots were to be distributed to such voters 30 days prior to the July 20 primary. That meant that absentee ballots should have been mailed by the various county voter registrars to the requestors by June 23, 2004.<sup>2</sup> However, the Secretary has learned that this procedure did not uniformly occur, as the printing of ballots for a number of counties had not been completed by that time.

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<sup>2</sup> Georgia law provides that the county registrars have two days from the receipt of a request for an absentee ballot to respond and mail out the ballots, so that if a request was received 30 days prior to the primary (i.e., June 21), the registrar then had the obligation of mailing out that requested ballot by June 23. O.C.G.A. § 21-2-384(a).

As the Court is aware, in Georgia the response to the requests for, distribution of, and counting of absentee ballots is not done on a statewide basis, but is instead assigned by law to each of the State's 159 counties. O.C.G.A. § 21-2-380 *et seq.* It appears that approximately 372 absentee ballot requests<sup>3</sup> were received by 31 counties on or before June 23, 2004, but the ballots were not sent out by the counties until after that date. *See Attachment A to this brief for a summary of the current status of these ballots.*

There are no provisions in either state or federal law which explicitly addresses what is the most appropriate remedy in such a situation. As noted previously before this Court, the Secretary is concerned not only about the conduct of the July 20 General Primary but also in regards to the November 2 General Election and assuring that all voters are permitted to vote in these elections. These concerns are further heightened by the recent pronouncements of the Director of Homeland Security that there are serious and credible threats of terrorist activities designed to disrupt the upcoming General Election. In this environment, the Secretary believes it is incumbent upon her to act responsibly to assure that the

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<sup>3</sup> This relief is requested for a small class of voters, which represents .03% of the 1,153,307 million voters projected to vote in the July 20, 2004 primary. (This projection is developed using the predicted 30% voter turnout and the number of registered voters as of June 1, 2004, -- 3,841,358 voters.)

General Election is not in any way compromised or disrupted by any remedies that are appropriately applied in relation to the July 20 primary.

With these interests in mind, the Secretary proposes that the Court provide the Secretary and the various county registrars with the authority to undertake the following efforts to assist UOCAVA protected voters. These proposed remedies would apply solely to UOCAVA protected voters whose applications for an absentee ballot were on file in their counties registrar's office on or before June 23, 2004.

1. Facsimile Ballots

The Secretary proposes that the registrars of the various counties be given the authority to send by facsimile transmission copies of the requested ballots and that the voter be given the authority to return their voter oaths and voted ballots to a single secure facsimile machine, under the supervision of the Secretary of State. The Secretary would place said ballot in a sealed unmarked envelope and place that envelope within a second envelope containing the voter's oath. The Secretary would then transmit those ballots by expedited or personal delivery to each of the election superintendents in the various counties for verification, counting and inclusion within the other absentee ballots. The

Secretary proposes that any such ballot returned by facsimile transmission prior to 7:00 p.m. EDT on July 20, the date of the General Primary Election, would be properly handled, tabulated and incorporated into the final certified tally of results. Ballots received after 7:00 p.m. on July 20 would be forwarded to the appropriate county registrar, where they would be preserved but not counted or incorporated into the certified results.

2. Use of the Federal Write-In Absentee Ballot

Congress has provided a form for use by UOCAVA protected voters desiring to vote in Federal general elections. 42 U.S.C. § 1973ff-2. A copy of that form is attached to this brief. The criteria for use of this form under UOCAVA are:

1. The voter must be located overseas;
2. The voter must have applied for the absentee ballot at least 30 days before the election; and,
3. The voter must not have received their requested ballot.

42 U.S.C. § 1973ff-2(a)(1-3).

Clearly many of the voters in the current circumstances would meet these criteria. However, Congress has made no provision for the use of this form in primary elections. The Secretary understands this and has concerns as to whether

UOCAVA voters would understand that they could only vote for the candidates of a single party, and could not choose to vote for both Democratic and Republican candidates in different contests, but because of the exigency of the circumstances, the Secretary believes that it would be appropriate to use this form under these circumstances.

The advantages of using this form is that it is, by federal law, required to be made available to UOCAVA voters overseas so those voters would already have the form for use on site, regardless of their location. Additionally, even if the form were not otherwise available, it can be downloaded and printed off of the Federal Voter Assistance Program Website. *See Federal Voting Assistance Program* <[http://www.fvap.gov/pubs/vag/pdfvag/chapter\\_2.pdf](http://www.fvap.gov/pubs/vag/pdfvag/chapter_2.pdf)> (Visited July 12, 2004).

The Secretary would also post this form on her agency's website, [www.sos.state.ga.us](http://www.sos.state.ga.us), along with information related to the candidates for the political parties and the offices on the ballots, including all of the federal offices and the statewide state-level offices. It is also possible for a voter visiting this website, using a feature called "Poll Locator," to determine which Congressional and state House and Senate district they reside in, and the Secretary would propose that the votes of eligible voters in those non-statewide offices also be counted.

The Secretary proposes that, as with other ballots, these federal write-in ballot forms could be then be sent by facsimile transmission to the single, secure location under the direction and control of the Secretary and then distributed to the various appropriate counties in an expedited manner. Any such ballots received by 7:00 p.m. on July 20 would be properly received and could be counted as outlined above. Ballots received after that date and time would be retained, but not counted, by county election officials.

### 3. Extending the Deadline for Receipt of Mailed Absentee Ballots

Under Georgia law, in order for an absentee ballot to be properly received and counted, it must be received by the county voter registrar by 7:00 p.m. on Election Day. O.C.G.A. § 21-2-386. The Secretary proposes extending that deadline two business days so that absentee ballots from the subject voters mailed prior to the July 20 election day and received thereafter by 7:00 p.m., EDT on July 22 would also be deemed valid and would be tabulated and incorporated into the county's final certified results. Ballots received after that date and time would be kept unopened, and preserved in the manner specified by state law. O.C.G.A. § 21-2-386 (a) (1).

The Secretary has considered other possible remedies, including the possibility that the period for accepting and counting such ballots be extended beyond the two additional days after the General Primary the Secretary has proposed. However, as a practical matter, because Georgia law provides for only a 21-day period between the General Primary and the Primary Runoff, any additional extension of time runs the risk of interfering with the conduct of the August 10 Primary Runoff election and likewise may also interfere with all necessary preparations made for the upcoming November 2 General Election. Any further extensions of time would absolutely require that the Primary Runoff election, scheduled for three weeks later on August 10, 2004, be delayed and also would add significantly to the risk of complications in conducting the November General Election and finalizing the results in a timely manner. In sum, any significant modification of the calendar for the General Primary beyond the two days proposed by the Secretary would be highly disruptive to the two extremely important elections that follow in August and November.

4. Other means of Express Delivery

The Secretary proposes that she will make available to UOCAVA protected voters an account with Federal Express and an account with UPS by

which absentee ballots may be returned to her by 7:00 p.m. on July 22, two days after the primary election. The Secretary and the State would bear the cost of such transmittals and would undertake then to convey these ballots to appropriate counties. The Secretary recognizes that this service might not be available to all of the voters who requested ballots, but that the availability of this service to some of the voters, at no expense to these voters, would further assist in assuring their ability to vote.

5. Personal Notification of Affected Voters or their Families

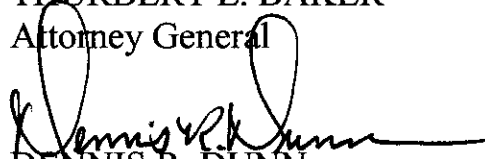
While it is not possible to determine whether such efforts would have a positive effect under these circumstances, the Secretary proposes that this Court instruct the county voter registrars to identify each individual UOCAVA protected voter who requested an absentee ballot on or before June 23rd and that these registrars personally contact that voter's family and/or residence, if known, by the quickest means available, to communicate the accommodations ordered by this Court facilitating the absentee voter's ability to vote and that the registrars undertake all reasonable efforts to assure that these voters are able to vote.


**CONCLUSION**

WHEREFORE, for all of the above and foregoing reasons, the Secretary of State requests this Court to provide these specific accommodations to UOCAVA protected absentee voters eligible to vote in Georgia's upcoming July 20 primary election.

Respectfully submitted,

THURBERT E. BAKER                      033887  
Attorney General

  
DENNIS R. DUNN                              234098  
Deputy Attorney General

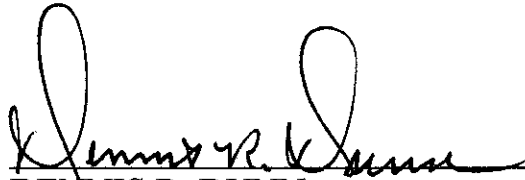
  
STEFAN RITTER                              606950  
Senior Assistant Attorney General

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*Attorneys for Defendant*

**Local Rule 7.1D Certification**

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

  
DENNIS R. DUNN

**UOCAVA ABSENTEE BALLOT REQUESTS RECEIVED AFTER JUNE 23,  
2004**

County	Date completed	Number of Applications	Ballots returned	Ballots Outstanding
Bartow	6/24/2004	13	2	11
Bulloch	6/24/2004	12	0	12
Chatham	6/24/2004	88	2	86
Coffee	6/24/2004	3	1	2
Long	6/24/2004	4	0	4
Spalding	6/24/2004	2	0	2
Walton	6/24/2004	3	0	3
Columbia	6/25/2004	34	0	34
Meriwether	6/25/2004	1	0	1
Paulding	6/25/2004	19	6	13
Telfair	6/25/2004	3	0	3
Early	6/26/2004	4	0	4
White	6/26/2004	5	0	5
Cherokee	6/28/2004	29	1	28
Coweta	6/28/2004	11	0	11
Mitchell	6/28/2004	5	0	5
Toombs	6/28/2004	15	0	15
Effingham	6/29/2004	3	0	3
Habersham	6/29/2004	14	0	14
Liberty	6/29/2004	29	2	27
Colquitt	6/30/2004	4	0	4
Greene	6/30/2004	1	0	1
Talbot	6/30/2004	3	0	3
Ben Hill	7/1/2004	3	0	3
Burke	7/1/2004	3	0	3
Crawford	7/1/2004	2	0	2
Clayton	7/6/2004	55	0	55
Taliaferro	7/6/2004	1	0	1
Calhoun	7/7/2004	1	0	1
Bacon	7/8/2004	4	2	2
Thomas	7/8/2004	14	0	14

**Totals** 388 16 372

**Number of Counties who mailed absentee ballots After 6/23/04** 31

**Number of Applications** 388

**Number of Ballots Returned** 16

**Nubmer of Ballots Outstanding** 372

\*\*\* Pursuant to Larios v. Cox, the absentee balloting period was rescheduled to begin on

**CERTIFICATE OF SERVICE**

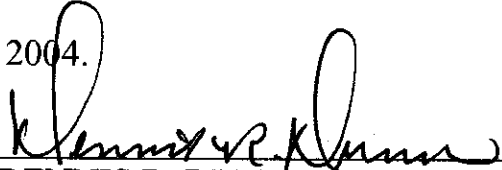
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This 13 th day of July, 2004.

  
\_\_\_\_\_  
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