



U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

November 9, 2004

**VIA FACSIMILE**

The Honorable Alan S. Gold  
United States District Court  
Southern District of Florida  
301 North Miami Avenue, 10<sup>th</sup> Floor  
Miami, Florida 33128

Re: *Friedman v. Snipes et al.*, Case No. 04-22787-CIV-Gold/Brown

Dear Judge Gold:

The United States submits this letter brief to provide the district court with its views regarding the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). The United States is the primary enforcer of UOCAVA. See 42 U.S.C. 1973ff-4. In addition, the administrative rule in question in this matter was promulgated by Florida pursuant to a consent decree secured by the Department of Justice. See *United States v. State of Florida et al.*, TCA-80-1055 (N.D. Fla. Apr. 2, 1982). For these reasons, the United States has a substantial interest in the litigation currently before the court.

Plaintiffs in this matter, a class of registered voters residing within the United States who applied for absentee ballots to be cast in the November 2, 2004, general election, assert that applying Administrative Rule 1S-2.013, which has been in effect since 1984, only to the class of eligible voters covered by UOCAVA violates, *inter alia*, the Equal Protection Clause of the United States Constitution.<sup>1</sup> We disagree and provide the following for your consideration.

Background

In 1980, the United States brought suit against the State of Florida to enforce the Overseas Citizens Voting Rights Act, 42 U.S.C. 1973dd *et seq.*, and the Federal Voting Assistance Act, 42 U.S.C. 1973cc *et seq.*, the predecessors to UOCAVA,<sup>2</sup> in the Northern

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<sup>1</sup> We take no position on plaintiffs' other claims.

<sup>2</sup>UOCAVA was intended to "update and consolidate provisions of current law relating to absentee registration and voting in elections for Federal office by members of the uniformed services and by citizens of the United States who reside abroad." H. Rep. No. 765, 99th Cong.,

District of Florida. These sections guaranteed to United States citizens who were living abroad, both military and civilian, the right to register and vote absentee in any federal election conducted by the State in which they last resided. The complaint alleged that Florida had mailed absentee ballots to overseas citizens on a date too late to permit sufficient time for the ballots to be transmitted, received, voted, and returned by U.S. mail before the deadline, 7 p.m. on election day, November 4, 1980. In numerous instances, county supervisors of elections had mailed absentee ballots to overseas voters less than 20 days prior to election day.<sup>3</sup>

The United States filed suit on November 6, 1980. The same day, the district court entered a temporary restraining order, requiring that absentee ballots cast by overseas voters signed and dated on or before election day, November 4, 1980, and received on or before November 14, 1980, be counted as valid votes to the extent that they otherwise complied with the law. This 10-day extension of the deadline for receipt of voted ballots was ordered so that overseas voters whose ballots had been mailed late would have a reasonable opportunity to have their ballots counted.

On April 5, 1982, the Court entered a consent decree that created interim procedures for the 1982 federal elections, and required Florida elections officials to develop a remedial plan for future federal elections. For purposes of the 1982 federal elections only, the Court required the State to mail absentee ballots to those qualified overseas voters who had timely requested a ballot for the primary election at least 35 days prior to the primary, and to extend the deadline for receipt of ballots from overseas voters for the general election by ten days.

With respect to future federal elections, the Court ordered the defendants to submit a Plan of Compliance within 60 days of the close of the 1983 regular session of the Florida legislature. The Plan was required to "effect such measures as are necessary and appropriate to permit American citizens located abroad a reasonable opportunity to return their ballots for federal primary \* \* \* and general elections prior to the deadline for receipt of such ballots." Consent Decree, *United States v. Florida*, No. 80-1055 (N.D. Fla. Apr. 2, 1982).

The State of Florida subsequently submitted a Plan of Compliance which authorized the Florida Department of State to issue a rule regarding mailing procedures for absentee ballots to overseas voters, and the rule itself, Florida Administrative Code Rule 1C-7.13 (1984) (later re-designated as 1S-2.013). See 1983 Fla. Laws ch. 83-251. The Administrative Rule required

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2d Sess. 5 (1986).

<sup>3</sup> The Complaint included allegations and supporting evidence indicating that 35 days was the *minimum* time necessary for round-trip mailing of election materials to overseas voters. This estimate was based on evidence of international mail procedures provided by the United States Postal Service, the United States Military Postal Service, and the United States Department of State.

county supervisors of election to: (1) mail overseas ballots that listed the names of all candidates for federal offices in the first primary not later than 35 days before the first primary election; (2) mail overseas ballots for the second primary that included the names of all candidates for the first primary where three or more candidates had qualified not less than 35 days prior to the second primary election; (3) mail supplemental ballots to overseas voters for the second primary when available; (4) mail presidential preference primary ballots not less than 35 days before the presidential preference election, and extend the deadline for receipt of such ballots to 10 days after the election as long as the ballot was postmarked or signed and dated on or before election day and was otherwise proper; (5) mail general election ballots not less than 30 days prior to the general election, and extend the deadline for receipt of such ballots to 10 days after the election as long as the ballot was postmarked or signed and dated on or before election day and was otherwise proper.

On August 20, 1984, with the concurrence of the United States, the Court entered an order approving Florida's remedial plan. The procedures set forth in Administrative Rule 1C-7.13 (and its successor 1S-2.013) were followed in federal elections from 1984 through 2000. See *Harris v. Florida Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1323 (N.D. Fla.), cert. denied, 531 U.S. 1062 (2001). Since UOCAVA's enactment, the United States has obtained similar orders in other jurisdictions. See, e.g., *United States v. Georgia et al.*, Case No. 1:04-CV-2040-CAP (N.D. Ga. July 15, 2004) (obtaining a 3-day extension of time in Georgia for the primary and primary runoff election for all federal ballots cast by UOCAVA voters); *United States v. Pennsylvania et. al.*, C.A. No. 1:CV-04-830 (M.D. Penn. April 16, 2004) (obtaining a 21-day extension of time in Pennsylvania for the primary election for all federal ballots cast by UOCAVA voters).

### Discussion

Plaintiffs allege, *inter alia*, that Florida's Administrative Rule 1S-2.013, which requires election officials to count as valid those ballots cast pursuant to UOCAVA if signed and dated, or postmarked, by November 2, 2004, and received on or before November 12, 2004, violates the Equal Protection Clause. Specifically, plaintiffs contend that they are "similarly situated to overseas voters whose ballots, for what ever reason, are received by a supervisor of elections within 10 days after election day." First Am. Compl. at ¶ 33. According to plaintiffs, Florida election officials are denying them the right to equal protection by rejecting their ballots if received after 7 p.m. on November 2, 2004, but on or before November 12, 2004. We write to convey two points regarding UOCAVA.

First, voters covered by UOCAVA have been identified, both by Congress and in numerous court decisions, as a unique class of voters who are *routinely* subjected to lengthy delays in mail transit times given their residence overseas. These same lengthy delays in delivery of mail (and thus absentee ballots) do not routinely exist for voters located within the United States, and most certainly do not exist for voters who are absent from their home counties but are still located in neighboring Florida counties.

The unique problem experienced by overseas voters has not changed in the almost 20 years since UOCAVA was passed. At that time, Congress reported:

Mail delivery is a problem for overseas voters. Members of the military may be in locations where mail service is sporadic, or they may be away for days or weeks at a time on temporary duty or on maneuvers. Among civilians overseas, missionaries and Peace Corps Volunteers in particular often work in remote areas where mail delivery is slow. Citizens working on oil rigs or on remote construction sites regularly encounter mail delays. Based on surveys of the U.S. Postal Service and of military postal authorities, ballots should be mailed to overseas addresses *at least* 45 days prior to an election in order to ensure adequate time for a ballot to reach a voter and be returned.

H. Rep. No. 765, 99th Cong., 2d Sess. 10-11 (1986) (House Report). A July 21, 2004, letter (attached as Exhibit "A") that was sent to all of the chief state election officials in the United States, including Secretary of State Hood, by the Department of Justice and the Department of Defense reiterates this point, noting that "it is particularly important to allow at least a 45-day transit time" from a state's mailing of absentee ballots to the state's deadline for receiving voted absentee ballots because of the "uncertain mail delivery in many parts of the world." This fact was also emphasized recently by the United States Election Assistance Commission ("EAC") in a report it released in September on the best practices for facilitating voting by overseas citizens covered by UOCAVA. The EAC's first recommendation in the Executive Summary is that states should "[m]ail absentee ballots at least 45 days prior to the deadline for receipt of voted absentee ballots." Report of the U.S. Election Assistance Commission, *Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act* (2004). See <http://www.eac.gov/fvap.asp?format=none>. Moreover, special rules for overseas voters are particularly important given that most overseas voters are members of the armed forces, many of whom are based in the war zones of Iraq and Afghanistan.

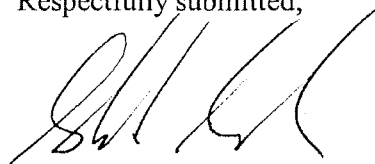
Second, states are not precluded from treating voters covered by UOCAVA differently. In fact, there is considerable case law to support the distinctions drawn by the UOCAVA between overseas voters and voters residing within the United States and its territories. In *Igartua De La Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995), residents of Puerto Rico brought an action alleging that UOCAVA violated their equal protection rights because it permitted United States citizens residing outside the United States to vote via absentee ballot in United States presidential elections, but did not permit United States citizens residing in Puerto Rico to do so. The First Circuit easily dismissed this challenge, reasoning that UOCAVA merely drew a distinction between citizens living abroad and citizens who move anywhere within the United States. *Id.* at 10. The court further reasoned that this distinction neither affected a suspect class nor infringed a fundamental right, noting that although the distinction between the classes "affects the right to vote, [UOCAVA] does not *infringe* that

right but rather limits a state's ability to restrict it." *Id.* at 10 n.2 (emphasis added). As such, the court reasoned that the distinction need only be supported by a rational basis. *Id.* at 10.

Similarly, the Second Circuit has also held that UOCAVA's distinctions between citizens residing abroad and citizens residing within the United States and its territories is not subject to strict scrutiny. See *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001) (holding that Congress acted in accordance with the Equal Protection Clause in requiring States and territories to extend voting rights in federal elections to former resident citizens residing outside the United States, but not to former resident citizens residing in either a State or territory of the United States).

The United States respectfully suggests that plaintiffs' Equal Protection claims be dismissed and that Rule 1S-2.013 not be changed or extended. Indeed, a contrary ruling would call into question the constitutionality of UOCAVA and a number of orders obtained by the Department of Justice throughout the country. See, e.g., *United States v. Georgia et al.*, Case No. 1:04-CV-2040-CAP (N.D. Ga. July 15, 2004) (obtaining a 3-day extension of time in Georgia for the primary and primary runoff election for all federal ballots cast by UOCAVA voters); *United States v. Pennsylvania et. al.*, C.A. No. 1:CV-04-830 (M.D. Penn. April 16, 2004) (obtaining a 21-day extension of time in Pennsylvania for the primary election for all federal ballots cast by UOCAVA voters). If called upon by the court, the United States will provide any other information requested concerning the prior litigation and the enforcement of UOCAVA in general.

Respectfully submitted,



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Principal Deputy Assistant Attorney General

cc: (via facsimile)

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PERSONNEL AND  
READINESS

UNDER SECRETARY OF DEFENSE  
4000 DEFENSE PENTAGON  
WASHINGTON, D.C. 20301-4000



July 21, 2004

The Honorable Glenda Hood  
Secretary of State  
R. A. Gray Building  
500 S. Bronough  
Tallahassee, FL 32149

Dear Secretary Hood:

As we approach the 2004 federal election, the Department of Defense and the Department of Justice seek your cooperation in ensuring that Uniformed Services members and overseas citizens will have a full opportunity to vote. Especially at this time when so many of our military personnel are deployed to combat areas and serving their country around the world, we are certain you share our concern for guaranteeing that requested ballots for qualified overseas voters will be transmitted without delay and that voters will have a meaningful opportunity to return them in time to be counted.

The Secretary of Defense is responsible for administering the Federal responsibilities of the *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)*. That authority is delegated to the Director, Federal Voting Assistance Program (FVAP). The Department of Justice is charged with enforcing *UOCAVA*.

We have been working closely together to find solutions to absentee ballot transit problems and delays exacerbated by uncertain mail delivery in many parts of the world. We will continue to work with state and local officials to address potential problems and it is our hope to avoid unnecessary litigation to enforce the rights of voters protected by *UOCAVA*.

The FVAP and the Department of Justice support and encourage state-sponsored initiatives to facilitate effective voting opportunities for their residents who are absent overseas. Since many of our Uniformed Services personnel are deployed to combat areas in Iraq and Afghanistan or are serving in remote regions, it is particularly important to allow at least a 45-day transit time from your mailing of ballots to your state's deadline for receiving voted absentee ballots. In addition, a number of states are using electronic means to send and/or receive Federal Post Card Application forms as well as ballots. We urge you, as the state's chief election official, to:

- Encourage election officials to use expedited postal or courier methods to deliver absentee ballots to *UOCAVA* citizens.



EXHIBIT A

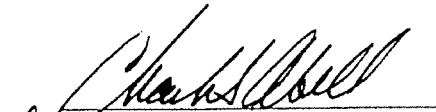
- Review your existing options if regular ballots cannot be mailed 45 days prior to the ballot receipt deadline (*e.g.*, the use of back-up or special write-in ballots) and seek the necessary authority to put in place such emergency procedures.
- Seek the legislative or regulatory authorization to permit overseas voters protected by *UOCAVA* to apply for, receive and return absentee ballots by facsimile or electronic mail methods, in addition to traditional mail delivery. Procedures to consider include:
  - Allow the voter to fax the FPCA to election officials.
  - Allow election officials to fax or email the blank ballot to the voter.
  - Consider a faxing/email option for return of voted ballots. If your state currently does not allow voting materials to be transmitted via email, but does allow faxing, FVAP has enhanced its electronic transmission service to receive faxed voting materials and forward them as email attachments. This option will provide a viable alternative to mailing voting materials by Uniformed Services members stationed in Iraq and Afghanistan and other overseas areas. Due to the security measures taken by the military, the capability for unclassified fax transmissions is not available to most of our men and women serving this region, but email transmissions are an option for many. After receiving an email from Uniformed Services members and other overseas voters, FVAP can forward the transmission to the states as a fax document to comply with state law.
  - FVAP's toll-free electronic transmission service for faxing of election materials is available to election officials at 1.800.368.8683.


Adoption of these instantaneous methods of transmittal such as faxing and email, with appropriate safeguards to protect the integrity and security of ballots, will ensure that overseas voters are not disenfranchised due to mail delays, especially in combat areas. (Enclosed are statutory provisions recently enacted in Oklahoma and Florida that might serve as a useful model for these procedures).


We appreciate your prompt attention to this important issue. Please advise us what actions you intend to take to help our Uniformed Services personnel, their family members, and overseas citizens register and vote in the 2004 elections.


The FVAP point of contact is John Godley. His email address is [godleyj@fvap.ncr.gov](mailto:godleyj@fvap.ncr.gov) and his phone number is 1.800.438.8683 or 703.588.1584. The Department of Justice contact is Rebecca Wertz. Her email address is [rebecca.j.wertz@usdoj.gov](mailto:rebecca.j.wertz@usdoj.gov) and her phone number is 1.800.253.3931.

Sincerely,

  
Dr. David S.C. Chu  
Under Secretary of Defense  
for Personnel and Readiness  
Department of Defense

  
Robert D. McCallum, Jr.  
Associate Attorney General  
Department of Justice

  
Polli Brunelli  
Director, Federal Voting  
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Department of Defense

  
R. Alexander Acosta  
Assistant Attorney General  
Civil Rights Division  
Department of Justice

Enclosures

cc: Governor Jeb Bush  
Attorney General Charles Crist  
Ms. Dawn Roberts, Director, Division of Elections