

December 2014

Elections and Primaries Generally HB 310

Georgia State University Law Review

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Georgia State University Law Review, *Elections and Primaries Generally HB 310*, 31 GA. ST. U. L. REV. (2014).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol31/iss1/6>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

ELECTIONS

Elections and Primaries Generally: Amend Title 21 of the Official Code of Georgia Annotated, Relating to Elections, so as to Revise the Dates for Primaries and Elections and Runoffs Resulting Therefrom; Revise Times for Qualifying for Office; Revise the Time for Calling Certain Special Elections; Revise the Times for Filing Certain Campaign Financing Disclosure Reports; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 21-2-132, -150, -153, -172, -187, -385, -501, -540 (amended); 21-5-34 (amended)

BILL NUMBER: HB 310

ACT NUMBER: 343

GEORGIA LAWS: 2014 Ga. Laws 1

SUMMARY: The Act addresses issues set forth by the United States District Court for the Northern District of Georgia in *United States v. Georgia* by extending the dates for Georgia's qualifying, primary, primary runoff, and general election dates to be in compliance with the Uniformed Overseas Citizens Absentee Voting Act.

EFFECTIVE DATE: January 21, 2014

History

Legislative remedies addressing the ability of military servicemen and women to vote in federal and state elections can be traced back to the Soldier Voting Act of 1942 (Soldier Voting Act).¹ The Soldier

1. Soldier Voting Act of 1942, Pub. L. No. 77-712, 56 Stat. 753-57 (amended 1944); see also *Problems for Military and Overseas Voters: Why Many Soldiers and Their Families Can't Vote*, Hearing Before the S. Comm. on Rules and Admin., 111th Cong., 1st Sess. (May 13, 2009) (opening statement of Sen. Saxby Chambliss, Member, S. Comm. on Rules and Admin) [hereinafter *Hearings*], http://www.rules.senate.gov/public/?a=Files.Serve&File_id=fcb96f23-960d-4e3a-bcd4-84afe4e3b3f5.

Voting Act guaranteed that overseas, active members of the military could vote via absentee ballot in future federal elections.² After subsequent amendments and further legislation that produced unacceptable results,³ President Ronald Reagan signed the Uniformed Overseas Citizens Absentee Voting Act (UOCAVA) in an effort to ensure that uniformed service members had the ability to participate in federal and state elections.⁴ Specifically, UOCAVA sought consistency among the procedures and forms pertaining to voter registration and absentee ballots through state compliance.⁵ Unfortunately, UOCAVA did not effectively ease the voting process for overseas service members.⁶

In 2009, Congress again sought to ensure overseas military voting rights by passing the Military and Overseas Voters Empowerment

2. Jessica Leval, *Finish the Fight for Our Soldiers' Right to Vote*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES. (Nov. 18, 2008), <http://www.aei.org/article/society-and-culture/finish-the-fight-for-our-soldiers-right-to-vote/>.

3. See Soldier Voting Act of 1942; Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584 (1955); KEVIN J. COLEMAN, THE UNIFORMED OVERSEAS CITIZENS ABSENTEE VOTING ACT: BACKGROUND AND ISSUES (Cong. Research Serv., CRS Report for Congress Order Code RS20764) (Jan. 30, 2003), (citing OFFICE OF THE ASSISTANT SEC'Y OF DEF., DEP'T OF DEF., THE FEDERAL VOTING ASSISTANCE PROGRAM, ELEVENTH REPORT, (1977) available at <http://fpc.state.gov/documents/organization/22715.pdf> (noting that although "[t]he law provided for the use of postage-free, federal post card application to request an absentee ballot The law 'had almost no impact at all' as it was enacted on September 16, only weeks before the November general election."); Donna Miles, *Servicemembers to Follow Long Absentee Voting Tradition*, AM. FORCES PRESS SERVICE (Sept. 16, 2008), <http://www.defense.gov/news/newsarticle.aspx?id=51200> (stating that "President Harry S. Truman was concerned that the [previous] law hadn't gone far enough."); Hans A. von Spakovsky, *Voting by Military Personnel and Overseas Citizens: the Uniformed and Overseas Citizens Absentee Voting Act*, FEDERALIST SOC'Y FOR LAW & PUB. POL'Y STUDIES 1, http://www.fec.gov/members/former_members/von_Spakovsky/articles/article002.pdf (last visited Aug. 5, 2014) (finding that the reason for passing new legislation was "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.") (quoting H.R. Rep. No. 765 99th Cong., 2d Sess. 5 (1986)).

4. Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).

5. *Id.*; See also *Hearings*, *supra* note 1 ("UOCAVA sought to alleviate the difficulty of navigating the voting process for uniformed personnel and overseas citizens by standardizing the forms required of military voters to register to vote and request absentee ballots. Additional provisions ensured that the states would accept these standardized forms") (statement of Senator Chambliss).

6. *Hearings*, *supra* note 1 ("Unfortunately it seems that our soldiers are not participating at anywhere near the levels that we would and this is unacceptable. . . . [A] 2006 survey, conducted by the Defense Manpower Data Center, found that only 22 percent of the estimated UOCAVA population participated in the 2006 election.") (statement of Senator Chambliss).

Act (MOVE).⁷ Co-sponsored by Georgia Senator Saxby Chambliss (R), MOVE amended UOCAVA to ensure that absent uniformed services voters and overseas voters have time to receive, mark, and submit their ballots in time to have those ballots counted in the election.⁸ Importantly for Georgia, this amendment requires states to transmit a timely requested absentee ballot forty-five days, instead of thirty, prior to the election.⁹ Further, it mandates that if a state holds a runoff election for a federal office, a written plan must be in place to provide the absentee ballots in a manner that affords “sufficient time” for the ballots to be returned.¹⁰ Regarding absentee ballots, MOVE amended UOCAVA to expand the acceptance of Federal Write-In Absentee Ballots (FWAB), which are “back up” ballots that “may be cast by voters covered by the Act who have made timely application for, but have not yet received, their regular ballot from their state.”¹¹

On June 27, 2012, the Department of Justice (DOJ) filed suit against Georgia and the Secretary of State alleging that Georgia’s procedures were “inadequate to ensure that its eligible military and overseas voters [could] participate fully in the state’s Aug. 21, 2012, federal primary runoff election, should one be necessary.”¹² The lawsuit sought declaratory and injunctive relief against Georgia to enforce the rights of voters covered by UOCAVA.¹³ Prior to this suit, Georgia had enacted legislation to comply with UOCAVA, but it did

7. Military and Overseas Voters Empowerment Act, Pub. L. No. 111-84, § 575, 123 Stat. 2190, 2318 (2009).

8. *See id.* § 579, 123 Stat. at 2322.

9. 52 U.S.C. § 2032(a)(8) (West, Westlaw through Pub. L. No. 113-145 (excluding Pub. L. Nos. 113-121, 113-128, and 113-143) approved Aug. 4, 2014) (“[T]ransmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter (A) except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election.”).

10. *Id.* § 2032(a)(9) (providing “if the State declares or otherwise holds a runoff election for Federal office, establish a written plan that provides absentee ballots are made available to absent uniformed service voters and overseas voters in [a] manner that gives them sufficient time to vote in the runoff election.”).

11. *Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/activ_uoc.php (last visited Sept. 26, 2014).

12. Press Release, Dep’t of Justice, Justice Dep’t Announces Lawsuit to Protect Rights of Military and Overseas Voters in Georgia (June 27, 2012), <http://www.justice.gov/opa/pr/2012/June/12-crt-820.html>.

13. *United States v. Georgia*, 892 F. Supp.2d 1367, 1369 (N.D. Ga. 2012).

not provide “for a forty-five day transmittal period for official absentee primary runoff ballots.”¹⁴

Under then-current law, Georgia sent official runoff absentee ballots “as soon as possible prior to a runoff” by either mail or electronic delivery.¹⁵ If a UOCAVA voter chose to receive a ballot by mail, a State Write-In Ballot (SWAB) was included with the official absentee ballot, but it failed to include a list of runoff candidates.¹⁶ To discover the list of runoff candidates, UOCAVA voters had to electronically access the applicable ballot once prepared and made available.¹⁷ Further, a UOCAVA voter could choose between a SWAB, FWAB, or official absentee ballot to vote in the federal runoff election.¹⁸

The dispute in *United States v. Georgia* focused on the interpretation of two UOCAVA provisions: Section 102(a)(8)(A) and 102(a)(9).¹⁹ Georgia claimed that Section 102(a)(8)(A)’s forty-five day requirement did not apply to runoff elections.²⁰ Rather, Georgia argued that Section 102(a)(9)’s provision that the ballot must be transmitted in “sufficient time” applied to runoff ballots, which did not mandate forty-five day transmittal.²¹

Ultimately, the district court found in favor of the United States.²² The court found that both FWABs and SWABs were “intended as . . . emergency back-up measure[s] rather than as . . . replacement[s] for the regular ballot.”²³ Further, the court determined that in the best-case scenario, UOCAVA voters would

14. *Id.* at 1370, 1381 n.1; *See generally* Uniformed and Overseas Citizens Absentee Voting Act of 1986.

15. O.C.G.A. § 21-2-384(a)(2) (2008); *Georgia*, 892 F. Supp.2d at 1370.

16. O.C.G.A. § 21-2-384(a)(2) (2008); *Georgia*, 892 F. Supp.2d at 1370.

17. *Georgia*, 892 F. Supp.2d at 1370.

18. *Id.*

19. *Id.*

20. *See* Defendants’ Reply Brief in Support of Motion for Summary Judgment, *United States v. Georgia*, 892 F. Supp. 2d 1367 (N.D. Ga. 2012) (No. 1:12-CV-2230), 2013 WL 1178638.

21. Defendants’ Brief in Opposition to Plaintiff’s Motion for Summary Judgment, *United States v. Georgia*, 892 F. Supp. 2d 1367 (N.D. Ga. 2012) (No. 1:12-CV-2230), 2013 WL 861587.

22. *Georgia*, 892 F. Supp.2d at 1378; *see also* Jim Galloway & Daniel Malloy, *Your Daily Jolt: By Federal Order, Georgia’s 2014 Primary Will be Earliest in State History*, ATLANTA J.-CONST. (July 12, 2013), <http://www.ajc.com/weblogs/political-insider/2013/jul/12/your-daily-jolt-federal-order-georgias-2014-primar/> (noting that Judge Steve Jones “would have preferred for the state to have dealt with the problem on its own. However . . . the Georgia General Assembly failed to act in its 2013 session and the Court ha[d] not received reasonable assurance that there will be legislative action in 2014.”).

23. *Georgia*, 892 F. Supp.2d at 1372–73.

have “fourteen days to vote rather than the forty-five days required by UOCAVA.”²⁴ With regards to which section applied to Georgia’s primary runoff, the district court found that the “sufficient time” requirement was not a “carve-out from the forty-five day requirement,” and even if it were, Georgia’s procedures did not provide sufficient time.²⁵

Upon this ruling, the court set forth a final order setting the dates for Georgia’s federal qualification periods, primary elections, runoffs, and general elections.²⁶ In moving Georgia’s federal election dates, the order created separate dates for state and federal elections.²⁷ The Georgia legislature deemed this separation too expensive and unworkable because abiding by the court’s order would have required the state to hold two different primaries, demanding additional funding from the state and counties.²⁸ Also, Secretary of State Brian Kemp found that the court order would have caused confusion among voters due to having one primary for federal elections and another for state primaries.²⁹ Thus, Representative Joe Wilkinson (R-52nd) introduced House Bill (HB) 310 during the 2013 General Assembly session.³⁰

Bill Tracking of HB 310

Originally, Representative Wilkinson introduced HB 310 with the intent of addressing ethics issues, such as filing times and methods for disclosure reports, notification of late fees, and the elimination of grace periods for paying late fees.³¹ After the bill was assigned to the

24. *Id.* at 1374.

25. *Id.*

26. Order Granting Motion to Alter Judgment, *United States v. Georgia*, 892 F. Supp.2d 1367 (2012) (No. 1:12-CV-2230).

27. See Telephone Interview with Sen. Butch Miller (R-49th) (Apr. 8, 2014) [hereinafter Miller Interview].

28. *Id.*; see also Alice Queen, *Kemp: Primary Date Will Mean Extended Runoff Campaigns*, NEWTON CITIZEN (Jan. 22 2014), <http://www.newtoncitizen.com/news/2014/jan/21/kemp-new-primary-date-will-mean-extended-runoff/> (quoting Secretary of State Kemp: “[i]t would have been a nightmare for us to have two different primaries. It would have been obviously very expensive for the counties and the state.”).

29. Queen, *supra* note 28 (Secretary of State Brian Kemp noting that two different primaries “would have been an administrative nightmare . . . and it would have been very confusing for the voters.”).

30. HB 310, as introduced, 2013 Ga. Gen. Assem.

31. See HB 310 (LC 28 6545ER), 2013 Ga. Gen. Assem.

House Committee on Ethics and substitutes were made,³² the House passed the bill by a vote of 164 to 0.³³ In the Senate, Senator Butch Miller (R-49th) sponsored HB 310 and the bill was first read on March 5, 2013.³⁴ Lieutenant Governor Casey Cagle (R) assigned the bill to the Senate Ethics Committee on March 5, 2013.³⁵ Ultimately, HB 310 did not reach a Senate vote in the 2013 session.³⁶

Thereafter, the Senate recommitted the bill with HB 310's current language on January 13, 2014, thus gutting HB 310's prior language and using it as a vehicle to address the July 2013 federal court order that required Georgia to change its federal primary runoff dates.³⁷ The Committee favorably reported the bill by substitute and the bill was read a third time on January 14, 2014.³⁸ Following a successful 36 to 17 motion to engross, the Senate passed the bill by a vote of 38 to 15 on January 14, 2014.³⁹ The House agreed to the Senate substitute on January 17, 2014, and thereafter the bill was sent to the Governor and signed into law on January 21, 2014.⁴⁰

The Act

The Act amends Title 21 of the Official Code of Georgia Annotated for the purpose of revising the dates for primaries (as well as elections and runoffs resulting therefrom), the times for qualifying for office, the time for calling certain special elections, and the times for filing certain campaign financing disclosure reports.⁴¹

Section One of the Act amends Code subsections 21-2-132(c), (d), (e), and (i) by providing new general primary qualifying times.⁴² Qualifying for the general primary begins at 9:00 a.m. on Monday of

32. HB 310 (LC 28 6643ERS), 2013 Ga. Gen. Assem.

33. See Georgia General Assembly, HB 310, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/display/20132014/HB/310>.

34. *Id.*

35. *Id.*

36. *Id.*

37. State of Georgia Final Composite Status Sheet, HB 310, May 1, 2014. Compare HB 310, as introduced, 2013 Ga. Gen. Assem., with HB 310 (LC 28 6918-ECS), 2014 Ga. Gen. Assem.

38. Georgia General Assembly, HB 310, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/display/20132014/HB/310>.

39. Georgia Senate Voting Record, HB 310 (Jan. 14, 2014).

40. *Id.*

41. See O.C.G.A. §§ 21-2-132, -150, -153, -172, -187, -385, -501, -540; 21-5-34 (Supp. 2014).

42. See O.C.G.A. § 21-2-132 (Supp. 2014).

the eleventh week prior to the general primary and ends at 12:00 p.m. on the Friday immediately following said Monday.⁴³ Candidates for nonpartisan offices in the nonpartisan general election, which is held in conjunction with the general primary, must qualify at the same time.⁴⁴ The former version of the Act provided a start time of 9:00 a.m. on the fourth Monday in April and an end time of 12:00 p.m. on the Friday immediately following in April.⁴⁵

Section One further amends the requisite notice requirements concerning the placement of candidates' names on the election ballot.⁴⁶ Each candidate for federal, state, or county office desiring to have his or her name placed on the election ballot must file a notice of his or her candidacy with the Secretary of State's office either during the period starting at 9:00 a.m. on the Monday of the thirty-fifth week immediately prior to the election and ending at 12:00 p.m. on the Friday immediately thereafter or, in the case of a general election, during the period beginning at 9:00 a.m. on the fourth Monday in June immediately prior to the election and ending at 12:00 p.m. on the Friday following said Monday.⁴⁷ In the case of a special election to fill a federal office, each candidate must file a notice of his or her candidacy with the Secretary of State no earlier than the date of the call of the special election and no later than sixty days prior to the special election.⁴⁸

Section Two of the Act amends Code section 21-2-150 and revises the start date of the general primary as follows:

Whenever any political party holds a primary to nominate candidates for public offices to be filled in the ensuing November election, such primary shall be held on the Tuesday of the twenty-fourth week prior to the November general election in each even-numbered year or, in the case of municipalities, on the third Tuesday in July in each odd-numbered year.⁴⁹

43. *Id.*

44. *Id.*; *see also* Miller Interview, *supra* note 27.

45. *See* O.C.G.A. § 21-2-132 (2008).

46. *See generally* O.C.G.A. § 21-2-132 (Supp. 2014).

47. O.C.G.A. § 21-2-132(d) (Supp. 2014).

48. O.C.G.A. § 21-2-132(d)(1) (Supp. 2014).

49. O.C.G.A. § 21-2-150 (Supp. 2014).

The former version of the Act stipulated a start date for the general primary beginning on the third Tuesday in July.⁵⁰ The Act further amends the statute by removing subsection (b)'s provisions relating to conflicts with political party conventions.⁵¹ This provision prompted a lawsuit claiming the discrimination of minority voters due to the date chosen for the primary.⁵²

Section Three of the Act amends Code subsections 21-2-153(c) and (f) to provide that, in relation to a general state or county primary, candidates must commence qualifying at 9:00 a.m. on the Monday of the eleventh week immediately prior to the state or county primary and terminate said qualifying at 12:00 p.m. on the Friday immediately following thereafter.⁵³ All qualifying for federal and state offices is conducted in the state capitol.⁵⁴ Candidates for the office of presidential elector must qualify beginning at 9:00 a.m. on the Monday of the thirty-fifth week prior to the November general election in the year in which a presidential election is held and terminate said qualifying at 12:00 p.m. on the Friday immediately following such Monday.⁵⁵ All qualifying for the office of presidential elector is conducted in the state capitol.⁵⁶ Lastly, in the case of a special primary for a federal office, candidates must qualify no later than sixty days immediately prior to the date of the special primary.⁵⁷ The former version of the Code provided that candidates must qualify

50. O.C.G.A. § 21-2-150 (2008).

51. *Compare* O.C.G.A. § 21-2-150 (Supp. 2014), *with* O.C.G.A. § 21-2-150 (2008). The former version of the Act provided:

(b)(1) Whenever the primary occurs during the same week of the national convention of either the political party whose candidates received the highest number of votes or the political party whose candidates received the next highest number of votes in the last presidential election, the general primary shall be conducted on the second Tuesday in July of such year. This paragraph shall not apply unless the date of the convention of the political party is announced by the political party prior to April 1 of the year in which the general primary is conducted.

(2) For general primaries held in the even-numbered year immediately following the official release of the United States decennial census data to the states for the purpose of redistricting of the legislatures and the United States House of Representatives, the general primary shall be conducted on the next-to-last Tuesday in August.

O.C.G.A. § 21-2-150 (2008).

52. *Howard v. Augusta-Richmond County*, No. 1:14-CV-97 (S.D. Ga. May 13, 2014).

53. O.C.G.A. § 21-2-153(c)(1)(A) (Supp. 2014).

54. *Id.*

55. O.C.G.A. § 21-2-153(f) (Supp. 2014).

56. *Id.*

57. O.C.G.A. § 21-2-153(c)(1)(C) (Supp. 2014).

no later than twenty-five days prior to the date of the special primary.⁵⁸

Section Four of the Act amends Code subsection 21-2-172(e) by removing the exception pertaining to nomination conventions.⁵⁹ Section Five of the Act amends Code section 21-2-187 by removing the exception relating to elections held subsequent to the release of decennial census data.⁶⁰ Section Six of the Act amends Code subsection 21-2-385(d) by increasing the number of periods for advance voting.⁶¹ Periods of advance voting commence on the fourth Monday immediately prior to each primary or election, on the fourth Monday immediately prior to a runoff from a general primary, on the fourth Monday immediately prior to a runoff from a general election in which there are candidates for a federal office on the ballot in the runoff, and as soon as possible prior to a runoff from any other general election in which there are only state or county candidates on the ballot in the runoff.⁶²

Section Seven of the Act amends Code subsection 21-2-501(a) by revising and inserting new runoff dates.⁶³ In the case of a runoff from a general primary, or a special primary or special election held in conjunction with a general primary, the runoff is held on the Tuesday of the ninth week following the general primary.⁶⁴ In the case of a runoff from a general election for a federal office, or a runoff from a special primary or special election for a federal office held in conjunction with a general election, the runoff is held on the Tuesday of the ninth week following said general election.⁶⁵ In the case of a

58. O.C.G.A. § 21-2-153 (2008).

59. O.C.G.A. § 21-2-172 (Supp. 2014). The Act previously stipulated:

(e) A convention for the purpose of nominating candidates shall be held at least 150 days prior to the date on which the general election is conducted; provided, however, that, in the case of a general election held in the even-numbered year immediately following the official release of the United States decennial census data to the states for the purpose of redistricting of the legislatures and the United States House of Representatives, the convention shall be held at least 120 days prior to the date on which the general election is conducted.

O.C.G.A. § 21-2-172 (2008).

60. O.C.G.A. § 21-2-187 (Supp. 2014).

61. O.C.G.A. § 21-2-385 (Supp. 2014).

62. O.C.G.A. § 21-2-385(d)(1) (Supp. 2014).

63. O.C.G.A. § 21-2-501 (Supp. 2014).

64. O.C.G.A. § 21-2-501(a)(2) (Supp. 2014).

65. O.C.G.A. § 21-2-501(a)(3) (Supp. 2014).

runoff from a general election for an office other than a federal office, or a runoff from a special primary or special election for an office other than a federal office held in conjunction with a general election, the runoff is held on the twenty-eighth day after the day of holding the preceding general election.⁶⁶ In the case of a runoff from a special primary or special election for a federal office not held in conjunction with a general primary or general election, the runoff is held on the Tuesday of the ninth week following such special primary or special election.⁶⁷ Finally, in the case of a runoff from a special primary or special election for an office other than a federal office not held in conjunction with a general primary or general election, the runoff is held on the twenty-eighth day after the day of holding the preceding special primary or special election.⁶⁸

Section Eight of the Act amends Code subsection 21-2-540(b) by inserting the following language to the end of said subsection: “[n]otwithstanding any provision of this subsection to the contrary, special elections which are to be held in conjunction with the state-wide general primary or state-wide general election in 2014 shall be called at least [sixty] days prior to the date of such state-wide general primary or state-wide general election.”⁶⁹ Section Nine of the Act amends Code subsection 21-5-34(c) by inserting March 31 in subsection (2)(A)’s language pertaining to campaign contribution disclosure reports.⁷⁰

Analysis

The controversy surrounding HB 310 derives from its imposition of a nine-week runoff for federal primary elections. Further dispute lies in its mandate to hold these elections on the twenty-fourth week preceding the November general election, a date that some claim discriminates against minority voters.

66. O.C.G.A. § 21-2-501(a)(4) (Supp. 2014).

67. O.C.G.A. § 21-2-501(a)(5) (Supp. 2014).

68. O.C.G.A. § 21-2-501(a)(6) (Supp. 2014).

69. O.C.G.A. § 21-2-540(b) (Supp. 2014).

70. O.C.G.A. § 21-5-34(c)(2)(A) (Supp. 2014).

Impact on Minority Turnout

The sole no vote in the House of Representatives against HB 310 came from Representative Earnest Smith (D-125th).⁷¹ Representative Smith points to the potential effect on minority voter turnout and a previous DOJ ruling for his opposition to HB 310.⁷² Representative Smith represents parts of the consolidated Augusta-Richmond County, which for years held its municipal elections in November when voter turnout is high due to the popularity of statewide general elections.⁷³

In 2012, Representative Barbara Sims (R-123rd) sponsored legislation that required local elections for consolidated municipalities, like Augusta, to be treated as county elections that are held in conjunction with state primary election in even number years.⁷⁴ This legislation moved the local elections for Augusta-Richmond County from November to July.⁷⁵ However, the DOJ blocked this date-change through the preclearance requirements of Section Five of the Voting Rights Act.⁷⁶ Specifically, the DOJ cited data showing that moving the elections to July would negatively affect minority voter turnout in Augusta-Richmond County.⁷⁷

But one year later, in *Shelby County, Alabama v. Holder*, the United States Supreme Court invalidated Section Five, no longer requiring states to submit election calendars to the Federal Government for preclearance, rendering the DOJ's blockage of July

71. Georgia House of Representatives Voting Record, HB 310 (Jan. 17, 2014).

72. See Interview with Rep. Earnest Smith (D-125th) (April 15, 2014) [hereinafter Smith Interview].

73. Zachary Roth, *Georgia GOP Dusts Off Jim Crow Tactics: Changing Election Date*, MSNBC (Feb 2, 2014), <http://www.msnbc.com/msnbc/gop-revives-jim-crow-tactic>.

74. HB 776 (LC 28 5907), 2012 Ga. Gen Assem.; Roth, *supra* note 73; Sandy Hodson and Susan McCord, *Legal Challenge Raised Over Change in Election Dates for Augusta Local Races*, AUGUSTA CHRON. (Apr. 22, 2014), <http://chronicle.augusta.com/news/government/elections/2014-04-21/legal-challenge-raised-over-change-election-dates-augusta-local>.

75. HB 776 (LC 28 5907), 2012 Ga. Gen Assem.; Hodson, *supra* note 74.

76. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973to 1973bb-1 (2006)); See Smith Interview, *supra* note 72; Roth, *supra* note 73.

77. For example, the DOJ noted that in 2012, 74.5 percent of registered African Americans voted in the November election, while in July, their turnout was 33.2 percent. On the other hand, 72.6 percent of whites voted in the November election and 42.5 percent voted in July. The voting records from 2010 also show a similar pattern. See Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Dennis R. Dunn, Esq., Deputy Attorney Gen., State of Ga. (Dec. 21, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/1_121221.php; see also Smith Interview, *supra* note 72; Roth, *supra* note 73.

voting ineffective.⁷⁸ Thus, when the order in *United States v. Georgia* did not return the voting dates to November and the General Assembly took to the task of passing a uniform elections bill, Representative Smith strongly opposed having the elections moved to May based on the data voter turnout provided by the DOJ for July.⁷⁹

In fact, when the Georgia legislature passed HB 310, the American Civil Liberties Union (ACLU) brought a lawsuit in the United States District Court for the Southern District of Georgia on behalf of Representative Smith, Representative Wayne Howard (D-124th), Representative Gloria Frazier (D-126th), and other local candidates (hereinafter Plaintiffs).⁸⁰ The Plaintiffs sought a preliminary injunction contending that *Shelby* could not be applied retroactively and thus, the DOJ's 2012 objection to moving elections from November to July continued to prevent HB 310 from moving the election to May.⁸¹ Specifically, Plaintiffs argued that because *Shelby* left Section Five of the Voting Rights Act intact and held that the formula can no longer be used, it did not hold that past rulings were improper.⁸² Therefore, Plaintiffs alleged that they would suffer irreparable harm if the court condoned the retroactive use of *Shelby* by imposing "substantial inequities upon racial minorities in Richmond County."⁸³

Ultimately, the court dismissed the lawsuit based on the Supreme Court's decision in *Shelby*.⁸⁴ The court reasoned that the U.S.

78. *Shelby County, AL v. Holder*, 133 S. Ct. 2612, 2627, 2631 (2013) (reasoning that the preclearance requirement was "based on decades-old data and eradicated practices," but noted that "Congress [could] draft another formula based on current conditions."); see also Order Granting Defendants' Motion to Dismiss and Denying Plaintiffs' Motions for a Preliminary Injunction and Appointment of a Three-Judge Court, *Howard v. Augusta-Richmond County*, No. 1:14-CV-97 (S.D. Ga. May 13, 2014) [hereinafter *Howard Order*] ("Because Congress did not update the coverage formula when it reauthorized the Voting Rights Act in 2006, the Court held that the formula could no longer be used as a basis for subjecting jurisdictions to preclearance." (internal quotations omitted)).

79. Order Granting Motion to Alter Judgment, *United States v. Georgia*, 892 F. Supp.2d 1367 (2012) (No. 1:12-CV-2230); see also Smith Interview, *supra* note 72.

80. Sandy Hodson, *Lawsuit Challenging May 20 election date for Augusta Mayor and Commission on Fast Track*, AUGUSTA CHRON. (April 22, 2014, 9:15 PM), <http://chronicle.augusta.com/news/government/elections/2014-04-22/lawsuit-challenging-may-20-election-date-augusta-mayor-and>.

81. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 3, *Howard v. Augusta-Richmond County*, No. 1:14-CV-97 (S.D. Ga. Mar. 22, 2014).

82. *Id.* at 5.

83. *Id.* at 8.

84. *Howard Order*, *supra* note 79; Sandy Hodson, *City Wins Lawsuit Over Change in Election Date for Local Offices*, AUGUSTA CHRON. (May 13, 2014, 8:56 PM), <http://chronicle.augusta.com/news/government/elections/2014-05-13/city-wins-lawsuit-over-change-election-date-local-offices>.

Supreme Court in *Shelby* “found that Congress’ reauthorization of the Voting Rights Act in 2006 was constitutionally infirm,” and that “the coverage formula is unconstitutional in all its applications,” including the DOJ’s 2012 objection.⁸⁵ Thus, the court held that “Georgia is not a ‘covered’ jurisdiction subject to the preclearance requirements of Section 5 and thus need not obtain preclearance,” making the “2012 DOJ objection is inescapably unenforceable under Section 5.”⁸⁶ Although the suit was dismissed, the issue of how HB 310 affects minority voter turnout will be heavily watched across the country after the 2014 elections, leaving the possibility of future changes to Georgia’s election calendar.

The Nine-Week Runoff

Another concern regarding HB 310 is the potential impact of its nine-week runoff. Currently, ten states require the use of some form of primary runoff election, eight of which are located in the South.⁸⁷ These laws were passed “during the era of one-party politics that characterized the region from the Reconstruction period through the early 1960s.”⁸⁸ Georgia’s primary run-off was adopted in 1917, when the “electoral outcomes were determined by the winner of the Democratic primary, as there was essentially no Republican opposition in the general election.”⁸⁹ With the passage of HB 310, the General Assembly will now closely watch HB 310’s effects to determine what, if any, future changes must be made to Georgia’s election process, specifically its nine-week primary runoff elections.

The most glaring consequence of HB 310’s extension of the primary runoff is its effect on the cost of running for office. The extension will most likely increase the cost of running for all candidates⁹⁰ because of Georgia’s requirement that a candidate

85. *Howard Order*, *supra* note 79, at 6–7.

86. *Id.* at 7.

87. M.V. Hood III, *Hood: Georgia Is One of Few States with Primary Runoff Balloting*, ATHENS BANNER-HERALD (July 19, 2014, 2:13PM), <http://onlineathens.com/election/2014-07-19/hood-georgia-one-few-states-primary-runoff-balloting>.

88. *Id.*

89. *Id.*

90. *See* Galloway & Malloy, *supra* note 22.

receive fifty percent of the primary vote to avoid a runoff.⁹¹ Prior to HB 310, the three-week runoff in place subjected candidates to a minimal amount of attack ads and required a relatively small amount of funds.⁹² Now, candidates making the runoff must spend two months campaigning for their party's vote, increasing both the costs and the exposure to negative ads.⁹³

Using the 2014 elections as an example, Republicans have voiced disfavor with the extension because most of the GOP ballots contained numerous candidates almost ensuring runoffs.⁹⁴ In contrast, the longer runoff has implicated potential benefit for the Democratic Party, whose ballots contained few candidates vying for political office, by allowing them to raise money for the general election while Republican candidates have been forced to continue spending campaign funds to attack each other.⁹⁵ Thus, although HB 310 aimed to decrease Georgia's costs by aligning state and federal elections, it has increased the cost for individuals seeking election.⁹⁶ In fact, former Republican Governor Sonny Perdue publicly expressed concern about HB 310's effects upon Republicans.⁹⁷ Instead of having a nine-week runoff, he surmised that one option could be to eliminate the federal runoff.⁹⁸ Additionally, if no change was made to avoid the nine-week runoff, he felt that the Republican Party should at least "re-establish some ground rules about ethics and allegations there that are reasonable."⁹⁹

Another potential effect of HB 310 is its impact on the legislative session prior to elections. Given a nine-week runoff, lawmakers will be eager to return to their districts to have more time to campaign, resulting in a shorter legislative session.¹⁰⁰ Prior to HB 310, the

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. See Galloway & Malloy, *supra* note 22.

97. Greg Bluestein, *As Polls Close, Ex-Gov. Sonny Perdue Calls for 'Ground Rules' in GOP Runoffs*, ATLANTA J-CONST. (July 22, 2014), <http://politics.blog.ajc.com/2014/07/22/as-polls-close-ex-gov-sonny-perdue-calls-for-ground-rules-in-gop-runoffs/>.

98. *Id.*

99. *Id.*

100. Eric Sturgus, *Cagle: State Saves Money with Shorter Session*, ATLANTA J-CONST. (Mar. 4, 2014), <http://www.politifact.com/georgia/statements/2014/mar/04/casey-cagle/cagle-state-saves-money-shorter-session/>.

traditional forty-day Georgia legislative session usually ended around the end of March or early April.¹⁰¹ In contrast, the first session after HB 310's passage ended March 20, 2014.¹⁰²

Although cutting the time legislators have to debate and pass legislation may seem unwise, it could end up saving the state money.¹⁰³ In other words, “a [forty]-day legislative session stretched over [ninety] days would be more expensive than a [forty]-day session stretched over [sixty] days.”¹⁰⁴ Ultimately, the costs associated with paying lawmakers for travel and other expenses, as well as reducing the amount of paychecks for interns and temporary workers, are decreased by the shorter legislative session.¹⁰⁵ Given this result, HB 310 leaves the General Assembly another factor to weigh in deciding how to move forward with its election calendar.

Alternatives for Georgia

Plurality Voting

One way Georgia could avoid having the nine-week runoff is to do away with runoffs and implement plurality voting. Plurality voting, the most common electoral system currently used in the U.S.,¹⁰⁶ is a system where the candidate with the greatest number of votes wins, regardless of whether they receive fifty percent of the vote.¹⁰⁷ Proponents of plurality elections defend its use on the grounds of simplicity, and its ability to elect representatives bound to designated geographic areas.¹⁰⁸ They also cite its ability to exclude extremist parties from representation in the legislature, while providing the

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Single Member Plurality Systems, FAIRVOTE, <http://www.fairvote.org/reforms/fair-representation-voting/comparing-choice-voting-and-winner-take-all-elections/single-member-plurality-systems/> (last visited Aug. 13, 2014).

107. Comparing IRV with Plurality Voting, FAIRVOTE, <http://www.fairvote.org/reforms/instant-runoff-voting/irv-and-the-status-quo/comparing-irv-with-plurality-voting/> (last visited Aug. 13, 2014).

108. Electoral Systems, ACE PROJECT, <http://aceproject.org/ace-en/topics/es/esd/esd01a/esd01a01> (last visited Aug. 13, 2014).

voters an opportunity to vote on an individual candidate, rather than a list of candidates provided by a political party.¹⁰⁹

On the other hand, critics claim that plurality elections lead to the prospect of minority rule due to the fact that it lacks a majority threshold requirement.¹¹⁰ Thus, “a plurality race with three or more candidates can see a winner elected with far less than half of the vote,” which can mean that the real winner may have been disliked by a majority of the population.¹¹¹ This problem is particularly alarming in primary runoffs because in a crowded primary, a small fraction of the party’s supporters can elect a candidate that will ultimately represent a much larger and diverse constituency in the general election.¹¹² Thus, no second election would exist that required the state to meet UOCAVA’s forty-five day requirement, avoiding the nine-week runoff.

Instant Runoffs

Another potential solution is the creation of an instant runoff system, as opposed to Georgia’s current traditional two-round runoff system. Instant runoffs use ranked-choice voting where voters are sent two ballots, one for indicating their single choice, and one for ranking the candidates in case of a runoff.¹¹³ Specifically concerning UOCAVA voters, advocates claim that “because both ballots are returned simultaneously, a short delay between elections does not hurt the ability of military and overseas voters to participate in both rounds.”¹¹⁴ Mississippi currently uses the instant runoff system.¹¹⁵ Mississippi’s use of instant runoffs came after a DOJ order to change its voting process for violating UOCAVA.¹¹⁶

109. *Id.*

110. FAIRVOTE, *supra* note 106.

111. *Id.*

112. *Id.*

113. *Id.*

114. Comparing IRV with Balloting for Overseas Absentee Voters, FAIRVOTE, <http://www.fairvote.org/reforms/instant-runoff-voting/irv-and-the-status-quo/comparing-irv-with-balloting-for-overseas-absentee-voters/> (last visited Aug. 13, 2014).

115. Greg Bluestein et al., *Brian Kemp Tries to Tamp Down Envy For Mississippi’s Three-Week Runoff*, ATLANTA J.-CONST. (June 17, 2014), <http://politics.blog.ajc.com/2014/06/17/brian-kemp-tries-to-tamp-down-envy-of-mississippi-three-week-runoff/>.

116. Dania N. Korkor & Rob Richie, *Overseas Voters from 5 States to Use Ranked Choice Voting Ballots in 2014 Congressional Election*, FAIRVOTE (Apr. 17, 2014), <http://www.fairvote.org/research->

Although a seemingly simple fix, such a system cannot be used until after Georgia's 2014 elections due to the federal court order. Further, Secretary of State Brian Kemp informed proponents of instant runoff voting that Georgia's voting equipment could not currently facilitate such a proposal and that Mississippi would have to re-visit their voting procedures, as Mississippi's deal was only for one year.¹¹⁷ Even though instant runoff voting cannot be used at the moment, it does provide Georgia a viable option for preventing the nine-week runoff if the General Assembly decides to legislatively alter the current format and budget the revamping of Georgia's voting equipment, which could cost millions.¹¹⁸

Nonpartisan Blanket Primary

Nonpartisan Blanket Primaries could be another alternative for Georgia to consider. In a nonpartisan blanket primary, the top two candidates who receive the most votes advance to the next round, similar to a runoff election.¹¹⁹ "However, there is separate nomination process for candidates before the first round, and parties cannot narrow the field."¹²⁰ This system would allow for the state and local governments to save money and allow Georgia to pick its own primary dates.¹²¹ But it could also lead to the possibility that two candidates of the same party advance to the second round, leaving an entire political party without someone to vote for on the ballot.¹²² For this reason, moving towards this system would require both the Republican and Democratic parties to entertain the idea of having their power reduced, making it difficult to legislatively approve.¹²³ Currently, Washington, Louisiana, and California use a version of

and-analysis/blog/overseas-voters-from-5-states-to-use-ranked-choice-voting-ballots-in-2014-congressional-election/.

117. See Bluestein et al., *supra* note 115.

118. Rep. Buzz Brockway (R-102), *Should Georgia Ditch Runoffs in Favor of A "Jungle Primary?"*, PEACH PUNDIT (August, 13, 2014), <http://www.peachpundit.com/2014/08/13/should-georgia-ditch-runoffs-in-favor-of-a-jungle-primary/>.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.*

this system.¹²⁴ Georgia legislators can examine these states' elections for potential use in the future.

Electronically Transmitted Ballots

Like Georgia, other states face the unique challenges in obtaining and returning absentee ballots within state deadlines.¹²⁵ Because of this growing problem, the idea of transmitting ballots electronically is gaining traction. Although it seems to be a relatively easy fix, states must weigh the policy and budget considerations that come with it.

For example, Alaska was the first state to offer all voters the option of submitting an absentee ballot electronically in 2012.¹²⁶ Based on Alaska's particularly mobile voting population, Alaska allows its UOCAVA voters to apply for an electronically transmitted absentee ballot.¹²⁷ In creating the ballot delivery system, the Alaska Division of Elections (ADOE) set out four requirements that the system would need to meet.¹²⁸ Particularly, the ADOE wanted a system that could "[m]ake it easy to return ballots through mail, fax, or online[,] [a]llow for an automated ballot duplication process utilizing 2D bar code technology[,] [p]rovide easy to use on-screen marking with detailed information for ballot return[,] [and e]nsure voter privacy, voter integrity and a high level of security."¹²⁹

After creating a system that met ADOE's needs, Alaska now implements a relatively easy process for electronic voting. First, upon receiving an application and verifying the voters' registration and eligibility, the election official sends an e-mail to the voter containing links and instructions that ultimately allow the voter to submit a ballot through an established online system.¹³⁰ Then, the voter must print a "voter certificate" and "identification sheet" that has to be signed by the voter and a witness.¹³¹ Once the electronic ballot is

124. Rep. Brockway, *supra* note 118.

125. See *Electronic Transmission of Ballots*, NCSL, <http://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx> (last updated June 26, 2014).

126. *Id.*

127. *Id.*

128. STATE OF ALASKA DIV. OF ELECTIONS, THE STATE OF ALASKA ONLINE BALLOT DELIVERY AND RETURN (Feb. 12, 2014) (on file with Georgia State University Law Review).

129. *Id.*

130. *Id.*

131. *Id.*

digitally transmitted and received by the elections office, it is printed on the official ballot paper and counted identically as the other official paper ballots.¹³²

Overall, Alaska's electronic voting system has been a success. In its first year of implementation, "[o]ver 7,000 ballots were requested through the new system, and 70% of the online ballots requested were returned."¹³³ Additionally, the state "received a lot of positive feedback from voters who used it," and "fully expect[s] to see an increase in its usage."¹³⁴ In addition to Alaska, several other states allow certain absentee voters to either receive their absentee ballots electronically or return them electronically.¹³⁵ Twenty-three states and Washington, D.C. allow some voters to return ballots via e-mail or fax, and six states allow some voters to return ballots via fax.¹³⁶

In moving towards electronic absentee ballots, Georgia would have to consider multiple policy and budget considerations before acting. The major concern with electronic transmission of ballots is ensuring security. Electronic absentee ballots expose states to the risk of hacking or other cyber-attacks that could disrupt or moot an election.¹³⁷ Such threats also increase the difficulty of authentication because electronic transmission does not allow a voter to verify that the ballot sent matches the ballot received.¹³⁸ For example, Connecticut has shown interest in legislatively implementing electronic absentee ballots since 2011.¹³⁹ However, the Secretary of State found that no system existed to ensure a secure method, and the Governor vetoed the legislative attempt based on these security concerns.¹⁴⁰

132. *Id.*

133. *Id.* at 6.

134. STATE OF ALASKA DIV. OF ELECTIONS, *supra* note 128, at 6, 8.

135. *See* NCSL, *supra* note 125.

136. *Id.* The states that allow some voters to return ballots via email or fax are: Alaska, Arizona, Colorado, Delaware, District of Columbia, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Utah, Washington and West Virginia. *Id.* The six states that allow some voters to return ballots via fax are: California, Florida, Hawaii, Louisiana, Rhode Island and Texas. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* In July 2011, "the Connecticut legislature directed the Secretary of State to conduct a study of Internet voting and recommend a method to permit UOCAVA voters to submit their ballots online." *Id.*

140. *Id.*

Another concern is the privacy given to the voting process.¹⁴¹ Because the electronically submitted ballots require identification and verification, election officials can see who sends the ballots, defeating the anonymity aspect in the voting process.¹⁴² Connecticut's Secretary of State was also bothered by this concern, even recommending that the Connecticut legislature take legislative action to provide a waiver of the constitutional right to a secret ballot.¹⁴³ Overall, the Georgia legislature would have to consider multiple policy aspects before being able to transmit absentee ballots electronically, some of which may be too difficult to overcome.

Wayne Satterfield & Andrew Barksdale

141. NCSL, *supra* note 125.

142. *Id.*

143. *Id.*