

LAW REVIEW¹ 023
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Military Voting Rights

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

7.1—Election officials must get the absentee ballots out in time for the service member to vote.
7.2—Service member or military spouse voting and

We continue to receive inquiries about the controversy concerning uncounted military absentee ballots in Florida. For more than 20 years, I have headed up a nationwide effort to reform absentee voting procedures for the benefit of military and overseas citizens. I have recruited more than 1,900 volunteers (mostly military Reservists and retirees), and each state has made at least some progress toward simplifying absentee voting procedures and providing more ballot transmission time. I recently completed a new batch of letters, suggesting specific reforms for each state. For specific information about the reforms that are needed in your state, please send me an e-mail (SWright@roa.org), or write to me at ROA.

Q: Does federal law give members of the Armed Forces the right to vote by absentee ballot?

A: Yes, under a federal law called the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). The UOCAVA can be found in Title 42, United States Code, section 1973ff.

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Members of the Armed Forces, their voting-age family members, and all U.S. citizens overseas have the right to vote by absentee ballot in primary, general, special, and run-off elections for federal offices (President, U.S. Senate, and U.S. House of Representatives). Their right to vote for state and local offices is governed by state law.

Q: Why were mailed-in overseas ballots counted late in Florida last year?

A: The UOCAVA does not mention any particular period of ballot transmission time, but it has been held that this federal law requires local election officials to provide sufficient time for the voter to receive, mark, and return the ballot in time for it to be counted. Generally, a minimum of 35 days must be provided from the date that the local election official has the ballots ready to mail (and in fact starts mailing them out) until the deadline for the return of a mailed-in overseas ballot (military or civilian).

Florida conducts its primary in September and its run-off primary in October, just 35 days before the general election. Even under the best of circumstances, it takes several days to certify the results of the run-off primary. Of course, the Supervisor of Elections cannot print general election ballots until the results of the run-off primary have been officially certified, and that official cannot mail ballots until they are printed.

In 1980, the U.S. Department of Justice (DoJ) sued Florida, at the request of the Department of Defense (DoD). The suit was settled with a 1982 consent decree providing for the counting of mailed-in overseas ballots received within 10 days after Election Day. Because the UOCAVA only applies to federal elections, these late-arriving ballots are only counted for federal offices (President, Senate, and House). Because the Florida Legislature has been unwilling to move its primaries back to earlier in the year, the 1982 consent decree remains in effect.

Q: Do other states count mailed-in absentee ballots received after Election Day?

A: Yes. At the request of DoD, DoJ has sued other states when the untimely mailing of absentee ballots has effectively denied overseas citizens (military and civilian) the right to vote by absentee ballot. The usual remedy is a court-ordered extension on the deadline for the return of mailed-in absentee ballots coming from outside the United States.

State law in New York, Maryland, Washington, Alaska, and a handful of other states has extended the absentee ballot return deadline. In those states, the late-arriving absentee ballots are counted for all offices, not just federal offices.

Q: "Snail mail" seems a hopelessly antiquated communications system in the "Internet age." Have there been efforts to enable overseas military voters to vote by electronic means?

A: Yes. Last year, DoD and certain local election officials in four states (Florida, Texas, South Carolina, and Utah) conducted an Internet voting pilot project involving 350 overseas military personnel and family members. Each participating voter was given an electronic "key" to use to send encrypted messages via the Internet. Participating local election officials were also given the

key. This system provides substantially more security than is provided in traditional absentee voting, by mail.

There are three time-consuming steps in the absentee voting process. First, the voter must send his or her absentee ballot request to the local election official. Second, the official must send the unmarked ballot to the voter. Finally, the voter must return the marked ballot back to the election official. Under the DoD pilot project, all three steps were completed electronically and almost instantaneously.

DoD is still working on its report about this pilot project, but we believe that the system worked without major problems. We want to get all 50 states on board in time for the presidential election of 2004. Electronic voting is the long-range solution to the overseas voting problem, in my view.

Q: Other than inadequate ballot transmission time, do military personnel and family members have other problems when trying to vote by absentee ballot?

A: Yes. The career service member is away from his or her place of domicile for many years, perhaps more than two decades. Upon retirement, he or she will not necessarily return to that place.

A 1997 case [Casarez v. Val Verde County, 957 F. Supp. 847, 853 (W.D. Tex. 1997)] threw into doubt the right of the service member to vote in a jurisdiction if he or she does not currently intend to return to that specific jurisdiction. The upshot is that many career military personnel may lose the right to vote anywhere, if Casarez comes to be generally accepted as the correct interpretation.

Because intent alone is not sufficient to create a new domicile, a change in one's intent about where to live after leaving active duty must not be allowed to destroy a pre-existing domicile. Otherwise, the service member is left without a domicile (or the right to vote) anywhere.

*Note: Captain Wright's military title is used for purposes of identification only. The views expressed in this article should not be attributed to the Department of the Navy or the U.S. Government generally. You may write to him at ROA, or you may send him an e-mail at swright@roa.org.

Update – April 2022

UOCAVA location has changed

The location of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) within the United States Code changed. UOCAVA was previously cited at 42 U.S.C. §§ 1973ff–1973ff-7. After an editorial reclassification, the UOCAVA is now codified at 52 U.S.C. §§ 20301—20311. The changes in codification have not changed the substance or application of the sections.

45-day rule

In 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), which made several important amendments to UOCAVA. One of those amendments included an explicit requirement that each state mail absentee ballots, to UOCAVA voters at least 45 days before Election Day.³ But, there is a hardship exception. If the chief State election official determines that the State cannot meet the 45-day deadline due to an undue hardship, the chief State election official shall request the presidential designee grant a waiver.⁴ If the state meets all the requirements, the waiver will be approved.⁵

Electronic means available

In the roughly ten years since this article was written, states have begun embracing technology for absentee voting. Many states allow applications by email (usually with a scanned application).⁶ There are at least 18 states that offer an electronic alternative to requesting absentee/mail ballot.⁷

Additionally, there are four states that allow some voters to return ballots using a web-based portal.⁸ One state has a mobile voting app.⁹ Nineteen states and DC allow some voters to return ballots via email or fax.¹⁰ For more information on the states' rules, visit <https://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx>.

In 2021, the U.S. Senate joined the House of Representatives in proposing a law that would allow all active-duty service members to cast votes electronically while stationed overseas. The bill is called the Rescuing Barriers for Military Voters Act.¹¹ The bill has not been passed yet.

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This article is one of 1800-plus “Law Review” articles available at www.roa.org/page/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

³52 U.S.C. § 20302(a)(7).

⁴*Id.* § 20302(g).

⁵*Id.*

⁶Table 6: *States With Online Absentee Ballot Application Portals*, NCSL (Jan. 3, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-6-states-with-web-based-and-online-absentee-ballot-applications.aspx>.

⁷*Id.*

⁸*Id.* The states that allow voters to return ballots using a web-based portal are Arizona, Colorado, Missouri, and North Dakota.

⁹*Id.* the state that has a mobile voting app is West Virginia.

¹⁰*Id.* the nineteen states that allow some voters to return ballots via email or fax are Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Utah, and Washington.

¹¹Nikki Wentling, *Federal Bill Would Allow Online Voting for Overseas Military* (July 14, 2021), <https://www.govtech.com/policy/federal-bill-would-allow-online-voting-for-overseas-military>.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002