

LAW REVIEW¹ 44

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Military Voting Rights—Continued

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

7.7—Proposed Reforms for Military Voters

Most ROA members probably recall the brouhaha about military absentee ballots in Florida during the contentious aftermath of the 2000 presidential election. The disenfranchisement of overseas military personnel is not limited to Florida, however, and it did not begin in 2000. Military personnel have often been disenfranchised for as long as they have been permitted to vote (since World War II). The problem is most severe for those personnel who serve at sea or at isolated overseas duty stations, where mail service is slow and intermittent.

One year ago (9 May 2001), I testified on behalf of ROA before the Senate Committee on Government Reform and Oversight and the Personnel Subcommittee, House Armed Services Committee. The next month, RADM Stephen Yusem, USNR (Ret.), then ROA national president,

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.

testified on the same subject before the National Commission on Election Reform, co-chaired by former Presidents Gerald Ford and Jimmy Carter.

I am pleased to report that significant progress has been made. The FY02 National Defense Authorization Act (NDAA) contains a whole title (Title XVI) on uniformed services voting (sections 1601-07). Section 1601(a) states: "It is the sense of Congress that each person who is an administrator of a Federal, State, or local election: (1) should be aware of the importance of the ability of each uniformed services voter to exercise the right to vote; and (2) should perform that person's duties as an election administrator with the intent to ensure that: (A) each uniformed services voter receives the utmost consideration and cooperation when voting; (B) each valid ballot, cast by such a voter, is duly counted; and (C) all eligible American voters, regardless of race, ethnicity, disability, the language they speak, or the resources of the community in which they live, should have an equal opportunity to cast a vote and to have that vote counted."

These words are eloquent but not self-executing. We need to get this message out to the nation's 5,000 local election officials. I hope that ROA departments and chapters can assist in this effort.

Section 1602 focuses on getting the Department of Defense (DoD) and the services to do a better job of appointing, training, and motivating voting assistance officers (VAOs). This section requires effectiveness and compliance reviews by the service Inspectors General (IG), to be submitted to the DoD IG and thence to Congress. It also requires unannounced IG assessments of the voting assistance program at the unit level, as well as regular military department assessments.

Section 1602 further provides that appointing qualified VAOs is the responsibility of commanders at all levels. If a service member has served as a VAO, his or her performance evaluation must comment on his or her performance as a VAO.

You will recall the brouhaha about the overseas military absentee ballots arriving late in Florida, and without the required postmarks showing that they had been mailed overseas. Section 1602 requires regular assessments of mail delivery from overseas, especially in the weeks leading up to the election.

Improving the mail service can help, but the real long-range solution is electronic voting. As we enter the 21st century, most states still conduct absentee voting essentially as they did in the 19th century: by mail. As you can imagine, there are three time-consuming steps in the absentee voting process. First, the absentee ballot request must travel from the voter to the election official. Second, the unmarked ballot must travel from the election official to the voter. Finally, the marked ballot must travel from the voter to the election official. Each of these steps can take weeks if "snail mail" must be used, but only seconds if secure electronic means are used.

With regard to electronic voting, I suggest you look at "A Call To Arms: Defending the Military Vote," page 48 of the December 2001 The Officer. The author is Jim Adler, chief executive officer of VoteHere, Inc., an online and electronic voting company conducting Internet elections for military and overseas voters. The company also does elections for private companies, unions, universities, and internationally. You may also want to view the VoteHere Web site, www.votehere.net.

Section 1604 requires DoD to conduct an electronic voting demonstration project in conjunction with the November 2002 general election. The project "shall be carried out with the participation of sufficient numbers of uniformed services voters so that the results are statistically relevant." DoD conducted such a demonstration project in the 2000 presidential election, but fewer than 100 voters participated.

Each year, DoD's Federal Voting Assistance Program (FVAP) sends a letter to each state's chief state election official (usually the secretary of state) and to leaders in the state legislature. Those letters make very specific suggestions as to the steps that the state should take to facilitate the enfranchisement of the brave young men and women who are away from home and prepared to lay down their lives in defense of our country. Most of those FVAP letters are ignored year after year.

Section 1605(a)(1) requires each governor to report back to the secretary of defense within 90 days after receiving one of these FVAP recommendation letters. The governor's report must state the steps that the state has taken to implement the DoD proposals. This new reporting requirement applies for three years (December 2001 to December 2004). I hope that this new reporting requirement will cause the states to pay more attention to this issue.

Section 1606 requires each state to accept a single Federal Post Card Application (FPCA) as a simultaneous absentee ballot request for all the federal elections (including primaries) to be held in the state in that calendar year. Currently, almost half the states require the submission of a separate FPCA for each primary or election. This new streamlined procedure will be most helpful.

Finally, section 1607 provides that the secretary of defense and the secretaries of the military departments "may not ... prohibit the designation or use of a qualifying facility under the jurisdiction of the Secretary as an official polling place for local, State, or Federal elections." This provision can be waived in those instances where local security considerations make it inadvisable to have a polling place in a military facility. ROA

Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May–July 2001), including 40 days in Bahrain. Please see his July 2001 "Law Review" article.

Update – April 2022

Electronic means available

Since this article was written, states have begun embracing technology for absentee voting. Many states allow applications by email (usually with a scanned application).³ There are at least 18 states that offer an electronic alternative to requesting absentee/mail ballot.⁴

Additionally, there are four states that allow some voters to return ballots using a web-based portal.⁵ One state has a mobile voting app.⁶ Nineteen states and DC allow some voters to return ballots via email or fax.⁷ 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.⁸ The bill has not been passed yet.

Please join or support ROA

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.

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.

³Table 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>.

⁴*Id.*

⁵*Id.* The states that allow voters to return ballots using a web-based portal are Arizona, Colorado, Missouri, and North Dakota.

⁶*Id.* the state that has a mobile voting app is West Virginia.

⁷*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.

⁸Nikki 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>.

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:

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