

# LAW REVIEW 950-update

## Update (web only)

### 7.0—Military Voting Rights

#### Military Voting Rights in Virginia-Continued

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

In Law Review 0950 (October 2009), I reported on the lawsuit that the United States Department of Justice (DOJ) initiated against the Virginia State Board of Elections (VSBE), concerning the untimely mailing of absentee ballots in the 2008 general election. Now is time for "the rest of the story." The court has ruled.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) gives "absent uniformed services voters" and "overseas voters" the right to vote by absentee ballot in primary, general, special, and run-off elections for federal office (President, United States Senator, and United States Representative). UOCAVA also gives DOJ the authority and responsibility to sue states, seeking declaratory and injunctive relief as necessary to implement and enforce this law.

Most of Virginia's 134 counties and independent cities do a good job of mailing absentee ballots 45 days or more before Election Day, but in the fall of 2008 several localities were late in printing and mailing of ballots. One county did not start mailing out ballots until just 14 days before the election.

DOJ sued the VSBE in November 2008, seeking (among other relief) a court-ordered extension on the deadline for the receipt of ballots mailed in from outside the United States, including APO and FPO addresses. The VSBE objected, and the issue was joined. Almost a year after the election, Judge Richard Williams made a most favorable decision. *See United States v. Cunningham*, Civil Action No. 3:08cv709 (Eastern District of Virginia Oct. 15, 2009).

Judge Williams wrote, "The right to vote is 'a fundamental political right.' *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Indeed, 'no right is more precious' and 'other rights, even the most basic, are illusory if the right to vote is undermined.' *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). 'For our citizens overseas, voting by absentee ballot may be the only practical means to exercise the right to vote. For members of our military, the absentee ballot is a cherished mechanism to voice their political opinion.' *Bush v. Hillsborough County Canvassing Board*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000). Given that how and where our servicemembers conduct their lives is dictated by the government, their right to vote is 'their last vestige of expression and should be provided no matter what their location.' *Id.* By failing to mail absentee ballots to certain UOCAVA voters thirty days or more prior to the November 4, 2008 general election, the Commonwealth of Virginia prevented these voters from having an opportunity to vote in a federal election in violation of UOCAVA. Though these votes will not affect the outcome of the election, the Court will order the Commonwealth of Virginia to count as validly-cast all timely-requested absentee ballots received within thirty days of the close of the polls on November 4, 2008 so as to uphold and give meaning to the dearest of individual rights."

The VSBE correctly pointed out that UOCAVA, as currently written, does not mention a specific number of days of ballot transmission time that the states must provide for overseas voters. Virginia argued that in the absence of an explicit requirement to mail ballots at a specific time, Virginia's election officials have no obligation to mail the ballots in time for overseas voters to mark and return them in time for them to be counted. Judge Williams forcefully rejected this argument, "UOCAVA requires that the States 'permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.' 42 U.S.C. 1973ff-1(a)(1). If States fail to mail absentee ballots to military and overseas voters in time to be received, marked, and returned by the election deadline, they have not permitted such voters 'to vote by absentee ballot.' UOCAVA, therefore, exists to protect overseas citizens' right to vote. The right to vote means a right to cast a ballot that will be counted. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). If even a single voter was deprived of that right solely as a result of Defendants' tardy-mailing of absentee ballots, then Defendants unquestionably violated UOCAVA."

The VSBE pointed out that Virginia law provides that a mailed-in absentee ballot (whether mailed by a nursing home resident within the same county or a Soldier in Afghanistan) must be *received* (not just postmarked) by the close of the polls on Election Day. The VSBE argued that the federal court has no power to order the VSBE to ignore state law. Judge Williams forcefully rejected that argument, "The Supremacy Clause provides that 'the Laws of the United States ... shall be the supreme Law of the Land. U.S. Const. art. VI, cl. 2. States have an 'obligation under the Supremacy Clause to protect federally guaranteed civil rights as zealously as would a federal court.' *Rachel v. Georgia*, 342 F.2d 336, 342 (5th Cir. 1965). In this case, therefore, the Commonwealth of Virginia has an obligation under the Supremacy Clause to protect the federally-guaranteed civil right of UOCAVA voters to vote by absentee ballot in federal elections. To the extent that protecting that right conflicts with Virginia law, Virginia law must give way. *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). ... Additionally, Federal courts are authorized to order States to comply with Federal law, and States have a duty to obey such orders. See *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). Therefore, the Court has the authority to order the Commonwealth of Virginia to comply with UOCAVA, and the Commonwealth of Virginia has a duty to obey such order."

Judge Williams also forcefully rejected the VSBE's contention that the availability of the Federal Write-in Absentee Ballot, for overseas voters who do not receive their regular absentee ballots in time, means that election officials are not required to mail out regular absentee ballots in a timely manner. " ... the Court finds that the Federal write-in ballot is only an imperfect emergency measure available to UOCAVA voters as a rudimentary remedy when States fail to send absentee ballots timely. It exists as a last-ditch effort to salvage one's franchise, but its existence by no means authorizes States to mail absentee ballots belatedly. Accordingly, the Court rejects Defendants' argument that the Federal write-in ballot is the exclusive remedy available when States fail to send absentee ballots timely."

The Court also directed the VSBE and DOJ to continue their discussions, with a view toward ensuring that this problem does not recur in future federal elections. We will keep the readers informed of developments.

On November 3, 2009, Virginia will be conducting an election for Governor, Lieutenant Governor, and Attorney General, as well as the lower house of the state legislature and many county and municipal offices. UOCAVA does not apply to this election, because there are no federal offices on the ballot, but those who serve in our military certainly deserve to have the right to vote in this election.

My home county (Arlington) mailed out ballots on September 18, 2009 (46 days before Election Day) to all military and overseas voters who had applied by that date. For many years, Arlington has gotten ballots mailed in a timely manner, in federal and non-federal elections, under the leadership of Registrar of Voters Linda Lindberg and her predecessor Charlotte Cleary. The county that includes Arlington National Cemetery understands that freedom is not free and goes out of its way for military personnel.

On September 17, 2009, the VSBE sent out a press release, announcing that all 134 of Virginia's local election officials would be mailing absentee ballot the very next day to military and overseas voters. On October 22, the VSBE corrected itself, acknowledging that 16 localities had missed the deadline. The VSBE did not identify the counties and independent cities failed to meet the standard. See "Board finds noncompliance on absentee ballots", *Washington Times*, October 23, 2009, page A15.

Nationwide, there are 7,838 local election offices that administer absentee voting for federal elections. There is often a considerable variation, within the same state in the same election, as to when absentee ballots are printed and mailed. Readers: Please contact your own local election official. Please ask him or her to make every effort to get the ballots mailed out at least 45 days before the election, so that those who serve in our nation's military will have the opportunity to vote, no matter where the service of our country has taken them.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at [swright@roa.org](mailto:swright@roa.org) or 800-809-9448, ext. 730.