

Congress Enacts Important Protections for Military and Overseas Voters

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.

On October 29, 2009, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2010. This massive new law contains hundreds of separate provisions, some favorable and some unfavorable. This article addresses the excellent new provisions that the NDAA makes for military and overseas voters, by amending the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

UOCAVA is a federal statute enacted in 1986. It gives the right to vote by absentee ballot to two groups of persons: "absent uniformed services voters" and "overseas voters." The federal statute gives these folks the right to vote by absentee ballot in primary, general, special, and runoff elections for federal office (President, United States Senator, and United States Representative). Many of these folks (especially servicemembers) are also eligible to vote by

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.

absentee ballot for Governors, state legislators, and other non-federal offices, but that is a matter of state law and varies greatly.

The big problem for UOCAVA voters (and especially for military voters overseas) has always been a lack of ballot transit time. As you can imagine, there are three time-consuming steps in absentee voting. 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, after the voter marks the ballot it must travel back to the election official. Each of these steps can take weeks if snail mail must be used, but only seconds if secure electronic means were authorized.

With only a handful of exceptions, secure electronic means have not been authorized for use in absentee voting. As a nation, we are still conducting absentee voting essentially as it was conducted during World War II and the Korean War, by shipping pieces of paper across oceans and continents by snail mail. Electronic means have not been authorized because of fear of hacking or other criminal manipulation.

Until the ballot has been finalized, with all candidates identified and the wording of all ballot propositions agreed upon, the local election official cannot print absentee ballots, much less mail them out. Remember that there is only one absentee ballot per voter, not one ballot for each office or question.

In June 1952, the Subcommittee on Elections, Committee on House Administration, United States House of Representatives conducted hearings on absentee voting for military personnel fighting the Korean War. The Honorable C.G. Hall (Secretary of State of Arkansas and President of the National Association of Secretaries of State) testified that because of late primaries, ballot access lawsuits, and other problems most of the military personnel in Korea were likely to be disenfranchised in the 1952 Presidential election. There just would not be enough time for the ballots to get to the voters and back in time for those ballots to be counted.

The 1952 congressional report also includes a March 1952 letter to Congress from President Harry S. Truman. He called upon the states to fix this problem, and he called upon Congress to enact temporary legislation for the 1952 Presidential election. He wrote, "Any such legislation by Congress should be temporary, since it should be possible to get all the states to enact corrective legislation before the congressional elections of 1954." It did not work out that way, and not much has changed in the intervening 57 years. At least nine states are currently scheduled to hold primaries in September 2010.

As amended by the Fiscal Year 2010 NDAA, UOCAVA now explicitly requires each state to mail absentee ballots at least 45 days before Election Day or to get a waiver from the Department of Defense (DOD). To obtain the waiver, a state will be required to demonstrate that it has made a satisfactory alternative arrangement to ensure that military personnel and other UOCAVA voters will be able to cast ballots that really do get counted.

As of July 2009, the new Director of DOD's Federal Voting Assistance Program (FVAP) is Bob Carey, a Captain in the Navy Reserve and a life member of ROA. I am most impressed with his leadership. I am confident that Mr. Carey will resist political and bureaucratic pressures to grant waivers without satisfactory alternative arrangements, including long-term arrangements to change primary dates or other systematic causes preventing compliance with the 45-day prior requirement.

Please remember that there are 7,838 local election offices that administer absentee voting for federal elections. Only Alaska and the District of Columbia conduct absentee voting on a statewide basis. There is often a considerable variation, within the same state in the same election, as to when absentee ballots are in fact mailed out to overseas voters.

Readers, please contact your local election official-County Clerk, County Auditor, County Supervisor of Elections, Town Clerk, etc. The titles vary, but you can figure it out. In most states, the local election official is also an elected official. That means the official is likely to be very attentive to your contact.

Please contact your local election official about 90-120 days in advance of the 2010 general election. Ask the official to print and mail absentee ballots to overseas voters at least 45 days in advance of Election Day, and remind him or her that 45 days of ballot transit time is now explicitly required by federal law. If your local election official does not in fact mail out ballots by the 45th day preceding the election, for whatever reason, contact FVAP Director Bob Carey. His e-mail is Robert.Carey@fvap.ncr.gov. You may not get a direct reply from him, but I believe he will likely forward it to one of the FVAP staff to investigate quickly and thoroughly. I would also recommend copying the general email address at FVAP (vote@fvap.ncr.gov), in case Director Carey is out of the office.

Update – April 2022

Electronic Means of Voting

In the over 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).³ There are at least 18 states that offer an electronic alternative to requesting absentee/mail ballot.⁴ Additionally, there are four states allow some voters to return ballots using a web-based portal.⁵ One state has mobile voting app.⁶ Nineteen states and DC allow some voters to

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.

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.

Director of FVAP

Mr. David Beirne currently serves as Director of the Federal Voting Assistance Program.⁹

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at <https://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.

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

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>.

⁹*FVAP Leadership*, FVAP.Gov, <https://www.fvap.gov/info/about/leadership> (last visited Apr. 19, 2022).

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
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