

## LAW REVIEW<sup>1</sup> 09058

### Military Voting—What about State Election

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

7.1—Election officials must get the absentee ballots out in time for the service member to vote.

7.3—Voting in Non-Federal Elections

**Q: I read with great interest your Law Review 0955 (November 2009). I think that it is great that federal law now explicitly requires that absentee ballots be mailed at least 45 days before Election Day, so that military personnel will have time to vote, no matter where the service of our country has taken them. I am wondering how this new law applies to our mayoral election here in Atlanta.**

**Atlanta conducted its election for Mayor on November 3, 2009. Georgia law requires that the winning candidate receive a majority (not just a plurality) of all votes cast. There were many candidates, so no candidate received a majority. On December 2, Atlanta will conduct a run-off between the top two vote-getters. The run-off is just 29 days after the election, so there is**

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup>BA 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](mailto:SWright@roa.org).

**no way to mail the ballots 45 days before the run-off. How does this new federal law apply to this sort of situation?**

**A:** The federal law does not apply to Atlanta's 2009 mayoral election, because there is no federal office on the ballot. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) accords the right to vote to two classes of persons: absent uniformed services voters and overseas voters. This federal law gives these people the right to vote by absentee process in primary, general, special, and runoff elections for federal office (President, United States Senator, and United States Representative).

UOCAVA as currently written is limited to federal elections because it is based on Article I, Section 4, Clause 1 of the Constitution, which reads: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations." Article I, Section 4, Clause 1 does not address non-federal elections.

**Q: There are several thousand men and women from Atlanta serving in our Armed Forces in Iraq, Afghanistan, and all over the world. If even one of them wants to vote in the 2009 mayoral election and is prevented from doing so by the circumstances of his or her service, that is an injustice, in my opinion. Would it be constitutional for Congress to amend UOCAVA to make it apply to non-federal as well as federal elections?**

**A:** In my opinion, yes. I believe that Congress has the constitutional authority to mandate the effective enfranchisement of servicemembers, in non-federal as well as federal elections, under Article I, Section 8, Clauses 11-16 (the war powers and military clauses), plus Article I, Section 8, Clause 18 (the "necessary and proper" clause), but as of yet Congress has not done so. The effort continues.

As I explained in Law Review 0917 (Apr. 2009), the Supreme Court has upheld the constitutionality of a federal law that protects members of the Armed Forces from duplicative state taxation of their personal property and income. See *Dameron v. Brodhead*, 345 U.S. 322 (1953). *See also Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) (upholding the constitutionality of federal legislation requiring educational institutions to grant access to military recruiters).

I favor an amendment to UOCAVA protecting the voting rights of military personnel in non-federal as well as federal elections, and I believe that such a statute would pass constitutional muster. I would also include military family members and overseas U.S. Government employees (DOD civilians, State Department, Peace Corps, Central Intelligence Agency, Drug Enforcement Administration, etc.). These folks are also overseas on the nation's business, not their own, and their service can involve significant personal risk. Please recall that three Drug Enforcement Administration agents were recently killed in action in Afghanistan.

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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 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](https://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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