

LAW REVIEW¹ 1005
(Updated April 2022)

Does the New Federal Law on Military Voting Apply to Special Elections

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.

Q: I read with great interest your Law Reviews 0955 and 0958, about the new federal law on absentee voting rights for military and overseas citizens. You wrote that the new law explicitly requires that local election officials have absentee ballots printed and ready to mail by the 45th day before Election Day or obtain a waiver from the Secretary of Defense, after demonstrating that they have made satisfactory alternative arrangements to ensure that military and overseas citizens have a reasonable opportunity to receive, mark, and return their ballots in time for those ballots to be counted.

Here in Massachusetts, we recently conducted a special election to fill a vacancy in the United States Senate. I checked with my Town Clerk, and he did not have absentee ballots available 45 days before the special election. Does this new law apply to special elections?

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.

A: The federal law applies to special elections (as well as primary and general elections) for federal office, but the 45-day requirement only applies after Nov. 1, 2010. Moreover, the law is ambiguous as to whether the 45-day rule applies to special federal elections that are held after Nov. 1, 2010.

The relevant federal statute is the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), enacted by Congress in 1986 and amended several times, most recently by the National Defense Authorization Act for Fiscal Year 2010 (signed into law by President Obama on Oct. 29, 2009). UOCAVA is codified in title 42, United States Code, sections 1973ff through 1973ff-6.

Under UOCAVA as most recently amended (Oct. 2009), each state is required to mail absentee ballots to military personnel and family members (within or outside the United States) and to civilian voters outside the United States “not later than 45 days before the election.” 42 U.S.C. 1973ff-1(a)(8)(A). (This assumes that the voter’s application for an absentee ballot was received more than 45 days before Election Day.)

Until the very recent amendment (which has not yet gone into effect), UOCAVA did not mention a specific number of days of required ballot transmission time, but the law did give military and overseas citizens the *right* to vote by absentee ballot in primary, general, special, and runoff elections for federal office. UOCAVA gives the Attorney General of the United States the authority and responsibility to “bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this title.” The Department of Justice (DOJ) has brought many such lawsuits since UOCAVA was enacted in 1986, in cases where the printing and mailing of absentee ballots has been delayed by late primaries, ballot access lawsuits, or other problems.

The usual remedy sought and obtained has been a federal court order requiring the election official to extend the deadline for the return of absentee ballots mailed in from outside the United States, including but not limited to APO and FPO addresses. Several local election officials in Virginia were late in mailing out ballots for the 2008 general election. To remedy this violation, the United States District Court for the Eastern District of Virginia ordered Virginia to count absentee ballots from outside the United States that were received up to 30 days after the 2008 general election. Please see Law Review 0950 and 0950 Update. All previous Law Review articles (more than 600) are available at www.roa.org/page/lawcenter.

Several years ago, DOJ announced that its interpretation of UOCAVA is that a minimum of 30 days of ballot transmission time is required for military and overseas voters. That 30-day standard remains in effect until the 45-day standard goes into effect in November.

Massachusetts law provides for absentee ballots received up to seven days after the election to be counted. The Massachusetts Secretary of the Commonwealth has claimed that all local election officials mailed ballots at least 23 days before the recent special election, thus meeting

the 30-day standard, but there are almost 500 local election offices in Massachusetts and I doubt that anyone has comprehensively monitored them.

Massachusetts readers: Please contact your city or town clerk and ask when absentee ballots for the recent special election were mailed out. Also ask: How many absentee ballots were mailed to military personnel and family members within the United States? How many ballots were mailed to military personnel and family members outside the United States? How many ballots were mailed to civilian voters outside the United States? For each category, how many of those ballots came back as marked ballots by Election Day or within seven days thereafter and were counted? How many ballots came back on time but were rejected for other reasons? How many ballots came back too late and were not counted? How many ballots never came back at all? How many unmarked ballots did the United States Postal Service return as undeliverable? All readers: Please contact your local election official and ask these questions with respect to the 2010 primary and general election in your state. Please report your findings to me at SWright@roa.org.

Update – April 2022

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.

The relevant sections cited throughout the article can be found at:

42 U.S.C. § 1973ff-1 discussing state responsibilities can be found at 52 U.S.C § 20302.

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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.

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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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