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Absentee Ballots MUST be Mailed 45 Days before Election

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 Oct. 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. The 2010 NDAA made several welcome amendments to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Those amendments go into effect for this year's general election.

UOCAVA is a federal statute enacted in 1986. It is codified in title 42, United States Code, sections 1973ff and following. You can find the complete text of UOCAVA at http://www.fvap.gov/resources/media.uocavalaw.pdf.

UOCAVA gives "absent uniformed services voters" (AUSVs) and "overseas voters" (OVs) the *right* to vote in primary, general, special, and runoff elections for federal office (President,

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[1]I 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.

[2]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.

United States Senator, and United States Representative). An AUSV is a member of the uniformed services (Army, Navy, Air Force, Marine Corps, Coast Guard, PHS commissioned corps, or NOAA commissioned corps) on active duty or a member of the merchant marine or the voting-age spouse or family member of a uniformed service or merchant marine member. AUSVs are protected by UOCAVA regardless of whether they are currently located within or outside the United States. An OV is a U.S. citizen of voting age outside the U.S. temporarily or indefinitely.

Until now, UOCAVA has not mentioned a specific number of days of required ballot transmission time, but it has been held that if the ballots are not available sufficiently early to enable UOCAVA voters to mark and return their ballots in time for them to be counted UOCAVA has been violated.

Section 105(a) of UOCAVA provides, "The Attorney General [of the United States] may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this title." When a state violates UOCAVA, by failing to have ballots printed and mailed sufficiently early so that UOCAVA voters can cast ballots that get counted, the Attorney General sues the state. The usual remedy sought and obtained is a court order extending the deadline for the receipt of absentee ballots mailed in from outside the U.S., including but not limited to APO and FPO addresses. For example, the United States District Court for the Eastern District of Virginia ordered Virginia to count for federal offices absentee ballots from outside the U.S. that were received up to 30 days after the November 2008 general election. I invite the reader's attention to Law Review 0950 and 0950 Update.

As amended in 2009, section 102(a)(8) of UOCAVA now explicitly requires each state to "transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter—(A) except as provided in subsection (g), in the case where the request is received at least 45 days before an election for Federal office, *not later than 45 daysbefore the election*." (Emphasis supplied.)

Section 102(g)(1) provides, "If the chief State election official determines that the State is unable to meet the requirement under subsection (a)(8)(A) [mailing out absentee ballots 45 days before Election Day] with respect to an election for Federal office due to an *undue hardship* described in paragraph (2)(B), the chief State election official shall request that the Presidential designee [currently the Secretary of Defense] grant a waiver to the State of the application of such subsection." (Emphasis supplied.)

Section 107 of UOCAVA defines eight terms used in this law, but the term "undue hardship" is not one of the defined terms. Black's Law Dictionary defines "hardship" as follows, "The severity with which a proposed construction of the law would bear upon a particular case, founding, sometimes, an argument against such construction." Black's Law Dictionary, Revised Fourth Edition, page 847. Black's defines "undue" as, "More than necessary; not proper; illegal." Id., at page 1697. A "hardship" is much more than an inconvenience, and an "undue hardship" even more so.

The Americans with Disabilities Act (ADA) requires employers to make accommodations in employment for qualified persons with disabilities. The employer is excused from the obligation to make an accommodation if doing so would impose an "undue hardship" on the employer. *See* 42 U.S.C. 12111(10)(B). An Equal Employment Opportunity Commission publication stresses the heavy burden that an employer must meet to show such an "undue hardship":

"An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility."

http://www.eeoc.gov/policy/docs/accommodation.html#undue

It is most difficult for an employer to demonstrate that making an accommodation for a disabled person (including a disabled veteran) would impose an "undue hardship" on the employer. Similarly, it will be most difficult for a state to demonstrate that moving the primary back to earlier in the year, for the benefit of overseas military and civilian voters, would impose an "undue hardship" on the state. When Congress enacted UOCAVA in 1986, and when Congress amended UOCAVA in 2009, it was well aware that making it possible for overseas military and civilian citizens to vote will require the states to make certain adjustments in the conduct of elections, including the timing of primaries. Congress determined that these are small accommodations for the states to make to facilitate the enfranchisement of those who protect the rights that we all enjoy, including the right to vote.

States that hold primaries in September, barely 45 days before Election Day, cannot meet the requirement to have absentee ballots printed and ready to mail by the 45th day before Election Day. Until the results of the primary have been officially certified, the local election official cannot *print* general election ballots, much less mail them out. The 13 states and territories that are scheduled to hold primaries in September 2010 will need to move those primaries back to

earlier in the year, in order to comply with the federal law requirement to mail ballots 45 days before the general election.

A state is eligible for *consideration* of its waiver request only if the state can show that moving the primary back to earlier in the year will cause an *undue hardship.* I contend that moving the primary back causes, at worst, a minor inconvenience—not a hardship and certainly not an *undue* hardship. Congress has decided that imposing that inconvenience upon the states is a small price to pay to ensure that military personnel will be able to vote, no matter where the service of our country has taken them.

Why do these states hold late primaries? A late primary benefits incumbents—if you are running for reelection it helps you to have your potential opponents fighting among themselves for as long as possible, and to delay for as long as possible the date when the opposite party has settled upon its general election nominee to run against you. The legislators who set the election schedule are by definition incumbents. Denying these incumbents' their desire to maximize their chance of reelection does not constitute a "hardship" and certainly not an "undue hardship."

In recent years, several states have moved their primaries back to earlier in the year, in order to facilitate the enfranchisement of the brave young men and women who serve in our nation's armed forces. Moving the primary to the summer or the spring has not caused any "undue hardship" in those states that have made this change. It is long past time for the 13 remaining states and territories to move back their primary dates.

Even if a state seeking a waiver somehow gets past the "undue hardship" hurdle, it must meet another difficult hurdle. To get the requested waiver, the state's application must include (among other required items) "A comprehensive plan to ensure that absent uniformed services voters and overseas voters are able to receive absentee ballots which they have requested and submit marked absentee ballots to the appropriate State election official in time to have that ballot counted in the election for Federal office, which includes—(i) the steps the State will undertake to ensure that absent uniformed services voters and overseas voters have time to receive, mark and submit their ballots in time to have those ballots counted in the election; (ii) why the plan provides absent uniformed services voters and overseas voters sufficient time to vote as a substitute for the requirements under that subsection; and (iii) the underlying factual information which explains how the plan provides such sufficient time to vote as a substitute for such requirements." Section 102(g)(1)(D).

Section 102(g)(4) provides that a waiver is only valid for a specific federal election, like the 2010 general election. Thus, if a state obtains a waiver for 2010, based on a late primary that cannot be changed this year, the state will need to apply for and obtain a new waiver in 2012, unless in the meantime the legislature has moved the primary to earlier in the year. Ideally, a "hardship waiver" for 2010 should be nothing more than a bridge to 2012, when a long-term solution is implemented. For the time being, the only conceivable solution is an earlier primary.

On June 26 and July 1, 1952 the Subcommittee on Elections, Committee on House Administration, U.S. House of Representatives conducted hearings on absentee voting for military personnel fighting the Korean War. You can find a copy of the committee hearing report at https://www.roa.org/page/lawcenter. 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 and other problems most military personnel fighting in Korea would be unable to vote in the 1952 presidential election.

The 1952 congressional report includes a copy of a March 28, 1952 letter to Congress from President Harry S. Truman, one of the founders of ROA in 1924. In his letter, he called upon the *states* to fix this problem and he called upon Congress to enact *temporary* federal legislation for the 1952 election year. He wrote, "Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954."

Well, it did not work out that way. Today, 58 years later, military personnel are still all too often disenfranchised through no fault of their own. Congress has been far too patient in waiting for the states to make the necessary changes in election calendars, such as moving primaries to earlier months. Don't let the states have another 58 years to dawdle.

I invite the reader's attention to the most eloquent opening paragraph of President Truman's 1952 letter:

> About 2,500,000 men and women in the Armed Forces are of voting age at the present time. Many of those in uniform are serving overseas, or in parts of the country distant from their homes. They are unable to return to their States either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in this election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve.

I respectfully submit that President Truman's eloquent words about the young men and women fighting the Korean War in 1952 apply equally to their grandsons and granddaughters, and great-grandsons and great- granddaughters, fighting the Global War on Terrorism today. President Truman's words need to be redirected to today's Governors, legislators, and election officials. With their help, America's sons and daughters in our Armed Forces will not have to wait another 58 years to enjoy a basic civil right that the rest of us take for granted.

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-1—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:

Section 102 discussing state responsibilities can be found at 52 U.S.C. § 20302.

Section 105 discussing enforcement can be found at 52 U.S.C. § 20307.

Section 107 discussing the definitions can be found at 52 U.S.C. § 20310.

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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 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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