

LAW REVIEW¹ 10055

DOD Acts on MOVE Act Waiver Requests

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.

For as long as military personnel have had the right to vote at all (since World War II), a substantial minority and in some cases a majority of them have been unable to cast ballots that really do get counted. In June 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. The Honorable C.G. Hall, Secretary of State of Arkansas and President of the National Association of Secretaries of State, testified that most military personnel in Korea were likely to be disenfranchised in the 1952 presidential election.

Secretary Hall testified that because of late primaries, ballot access lawsuits, and other problems many local election officials would not have absentee ballots printed and ready to mail until a few days before the election. Military personnel in Korea would not have time to receive their ballots, mark them, and return them on time to be counted. We have the same

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.

problems today, 58 years later, because absentee voting is still being conducted by shipping pieces of paper across oceans and continents by snail mail.

The 1952 congressional report includes a letter to Congress from President Harry S. Truman, calling upon the states to fix this problem and calling upon Congress to enact *temporary* federal legislation for the 1952 presidential election. 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. The Korean War ground to an inconclusive halt in 1953, and this issue dropped off our national radar screen until 2000, when late-arriving military absentee ballots played a crucial role in determining the outcome of the excruciatingly close presidential election in Florida.

Congress has nibbled at this problem through the enactment of the Federal Voting Assistance Act of 1955, the Overseas Citizens Voting Rights Act of 1975, and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986. Finally, in 2009, Congress really got serious about enforcing military and overseas voting rights, when it enacted the Military and Overseas Voter Empowerment Act (MOVE Act), as part of the National Defense Authorization Act for Fiscal Year 2010.

The MOVE Act made several amendments to UOCAVA. The most important amendment is that UOCAVA now explicitly *requires* each state to mail absentee ballots to military personnel and family members and U.S. citizens abroad at least 45 days before the election. Alternatively, a state can ask the Secretary of Defense (SECDEF) for a one-time waiver from the 45-day requirement. To obtain the waiver, the state must show *both* that an undue hardship (like a late primary) precludes the state from mailing ballots by Saturday, September 18, 2010 (45 days before this year's general election) *and* that the state has made satisfactory alternative arrangements (satisfactory to SECDEF) to ensure that overseas voters (military and civilian) have a reasonable opportunity to cast ballots that really do get counted.

By regulation, SECDEF provided for an August 6, 2010 deadline for states to submit these waiver requests. Ten states, the District of Columbia, and the Territory of the Virgin Islands submitted timely waiver requests. The SECDEF regulation also provided for an August 27 deadline for SECDEF to act upon the requests. Please go to www.fvap.gov to read all the waiver requests and the SECDEF responses.

SECDEF met the deadline and acted upon the waiver requests on Friday, August 27, granting 5 (Delaware, Massachusetts, New York, Rhode Island, and Washington) and denying 6 (Alaska, Colorado, District of Columbia, Hawaii, Virgin Islands, and Wisconsin). Maryland withdrew its waiver request, and that situation is discussed in Law Review 1056. The denials were generally based on the state's failure to show satisfactory alternative arrangements, not a failure to show that a late primary precluded mailing ballots by September 18.

Where does this leave us? We need to ensure that the Department of Justice (DOJ) comes down hard on the states that applied for waivers but did not get them. In those states, the deadline for the receipt of absentee ballots mailed in from outside the United States should be extended to sometime in December, in order to ensure that these voters are provided a minimum of 45 days of round-trip ballot transit time, as Congress has now explicitly required. We also need to ensure that the 5 states that were granted waivers live up to their commitments as to when unmarked ballots will be mailed and when marked ballots will be accepted.

Bob Carey is the new (as of July 2009) Director of the Federal Voting Assistance Program in DOD. Bob is a Captain in the Navy Reserve and a life member of ROA. He has successfully resisted pressures to grant waivers without adequate alternative arrangements to ensure that overseas voters' ballots will in fact be counted.

The general news media has reported this story to some extent, focusing on the states that applied for waivers. I am frankly more concerned about the 40 states that did not apply for waivers. Many counties and municipalities in those states will miss the September 18 deadline, for various reasons. Some of those states have chosen the "cover-up" strategy instead of the "disclose and seek a solution" strategy.

Please contact your own local election official—County Clerk, County Auditor, County Election Board, Town Clerk, etc. The titles vary, but you can figure it out. Remind the local election official that absentee ballots *must* be printed and mailed out by Saturday, Sept. 18, 2010. Check again on Monday, September 20 to see if the ballots have been mailed. Excuses and alibis are no longer acceptable.

If the local election official misses the September 18 deadline, for whatever reason, the election official needs to make a full and timely report to DOD. The report can be made to FVAP Director Bob Carey at Robert.Carey@fvap.gov or 703-588-8118. The local election official needs to work with the FVAP and the state election official to find a solution, such as an extension on the deadline for the receipt of absentee ballots mailed from outside the United States.

As President Truman's 1952 letter to Congress states: "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."

President Truman's words about the brave young men and women fighting the Korean War in 1952 apply equally to their grandsons and granddaughters, fighting today. Please share these words with your local election official. With that official's help, military personnel from your community will not have to wait another 58 years to enjoy a basic civil right that the rest of us

take for granted. Please tell your local election official that we recognize that mailing out ballots by Sept. 18 will require a special effort in the election office, but this is a small accommodation to make for the young men and women from your community who protect the rights that we all enjoy.

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 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
Washington, DC 20002