

LAW REVIEW¹ 10056

Maryland Will Meet the 45-Day Standard, But Only for Federal Offices

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.

In Oct. 2009, Congress 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 makes several amendments to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). As amended, UOCAVA now explicitly requires each state to mail absentee ballots at least 45 days before Election Day to military personnel and family members (within or outside the United States) and to U.S. citizens outside the U.S. This year, the 45th day preceding the election is Saturday, September 18.

Alternatively, a state can apply for a one-time waiver from the Department of Defense (DOD). To obtain the waiver, the state must show both that an undue hardship (like a late primary) prevents the state from meeting the 45-day deadline and that the state has made satisfactory

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.

alternative arrangements (satisfactory to DOD) to ensure that military and overseas citizens have a reasonable opportunity to cast ballots that really do get counted.

On July 28, 2010, the Maryland State Board of Elections applied to DOD for a waiver from the 45-day standard. Maryland's 2010 primary will be held on Sept. 14, just 49 days before the November 2 general election. Certifying the primary winners and printing the general election absentee ballots will require much more than four days, so Maryland will not be able to meet the September 18 deadline for mailing general election ballots.

On August 25, 2010, the Maryland State Board of Elections sent a new letter to DOD, withdrawing the waiver request. In the August 25 letter, the State Board assured DOD that Maryland counties and the City of Baltimore will mail general election ballots *for federal offices only* on September 18. Separate state ballots (Governor and other statewide offices, Maryland Senate, Maryland House of Delegates, and county offices) will be mailed when those ballots are available, likely sometime in October. Because UOCAVA only applies to federal elections, DOD was forced to accept that mailing federal ballots on Sept. 18 complies with the 45- day standard.

In 2010, Maryland will elect a United States Senator and eight United States Representatives. The Senate seat is not realistically considered to be "in play." Senator Barbara Mikulski was last reelected with 65% of the vote in 2004 and will likely receive a similar percentage this year. Among the state's eight congressional districts, only the First District is really in play this year. But the Maryland gubernatorial election is likely to be very close this year, and there will no doubt be close elections for some seats in the state legislature and county offices. Maryland's military and overseas voters are likely to be disenfranchised with respect to the races where their votes are mostly likely to be outcome determinative.

UOCAVA accords to absent uniformed services voters (including military family members of voting age) and overseas voters the right to vote by absentee ballot in primary, general, special, and run-off elections for federal office (President and Vice President, U.S. Senator, and U.S. Representative). Unfortunately, this federal statute is silent as to the right of these folks to vote in non-federal elections, such as the 2010 gubernatorial election in Maryland.

In Law Review 0958 (Dec. 2009), I urged Congress to amend UOCAVA to give active duty military personnel, their family members, and U.S. Government civilian employees overseas the right to vote in state and local elections, as well as federal elections. I believe that Congress has the constitutional power to expand the right to vote to include non-federal offices under Article I, Section 8, Clauses 11-16 (the war powers and military clauses) and under Article I, Section 8, Clause 18 (the "necessary and proper" clause).

In 1917, when the United States entered World War I, Congress enacted the Soldiers' and Sailors' Civil Relief Act (SSCRA). In 2003, Congress comprehensively updated that law, and the new law is called the

Servicemembers Civil Relief Act (SCRA). Under the SSCRA and SCRA, the active duty service member is protected from a default judgment in a civil case, if military service precludes the member from filing a timely answer. This protection applies in state court as well as federal court proceedings. Including state court proceedings is vital, because the number of civil lawsuits in state courts far exceeds the number in federal courts.

Congress has the constitutional power to raise and support armies and to maintain a navy. Obtaining personnel for the armed forces can be done through conscription or by providing incentives for young men and women to volunteer and for some of them to remain for an entire career. Our nation has relied entirely on volunteers since 1973, when Congress abolished the draft.

In order to encourage recruiting and retention in the armed forces, Congress can and has enacted legislation to address concerns that might otherwise dissuade individuals from enlisting or reenlisting. One such concern could be the concern of being disenfranchised in elections back home. Congress has the power to prevent such disenfranchisement in non-federal as well as federal elections. I invite your attention to *Dameron v. Brodhead*, 345 U.S. 322 (1953) (upholding the constitutionality of the SSCRA, against a challenge brought by the State of Colorado) and *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) (upholding the constitutionality of the “Solomon Amendment” requiring colleges and universities to grant access to military recruiters).

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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.

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