

LAW REVIEW¹ 10064
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Suit Filed to Protect Military Voting Rights in Maryland

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 September 23, 2010, Officer John Doe³ and the Military Voter Protection Project (MVPP)⁴ filed suit in the United States District Court for the District of Maryland, Greenbelt Division, against the Maryland State Board of Elections (MSBE), its Chairman, its Vice Chairman, its three Members, and its Administrator. The Civil Action Number is 8:10-cv-02646-RWT.⁵

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.

³John Doe is the pseudonym for an officer of the Maryland Army National Guard who is currently serving on active duty in Iraq. John Doe's real name was withheld for reasons of operational security.

⁴The Military Voter Protection Project is a project of the Vets for Freedom Educational Institute in partnership with Families United, both charitable organizations recognized by the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code.

⁵The initials "RWT" signify that this case has been assigned to Judge Roger W. Titus, who was appointed by President George W. Bush and confirmed by the Senate in 2003.

The Executive Director of the MVPP is Eric Eversole. He is a Commander in the Navy Reserve Judge Advocate General's Corps and a member of ROA. I know Eric through the Navy Reserve and also through his years of effort on behalf of military voting rights. The lawsuit contends that the MSBE violated the United States Constitution, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and Maryland law by disenfranchising military personnel and family members with respect to non-federal offices on the ballot in the general election to be held on November 2, 2010.⁶

UOCAVA is a federal statute enacted in 1986 and codified at title 42, United States Code, sections 1973ff through 1973ff-6. UOCAVA gives "absent uniformed services voters" and "overseas voters" the right to vote by absentee ballot in primary, general, special, and runoff elections for federal office.⁷ A year ago (October 2009), Congress enacted the Military and Overseas Vote Empowerment (MOVE) Act, as part of the National Defense Authorization Act for Fiscal Year 2010. The MOVE Act made several most welcome amendments to UOCAVA.

Until recently, UOCAVA did not mention a specific number of days of required ballot transit time, but several courts have held that UOCAVA requires that UOCAVA voters (military and civilian) be given sufficient time to mark and return their absentee ballots in time for them to be counted. When states are late in mailing out absentee ballots, for whatever reason, the usual remedy sought and obtained has been a court order extending the deadline for the receipt of absentee ballots mailed in from outside the United States, including but not limited to APO and FPO addresses.

The MOVE Act amended UOCAVA to make explicit what previously was implicit. As amended, UOCAVA now requires every state to mail ballots to UOCAVA voters by the 45th day before Election Day⁸ so that military personnel and others will have sufficient opportunity to cast ballots that really do get counted, no matter where the service of our country has taken them.

The MOVE Act also provided the states the opportunity to apply to the Secretary of Defense (SECDEF) for one-time waivers of the 45-day rule. To obtain such a waiver, the state was required to show an undue hardship (caused by something like a late primary) that prevented mailing ballots by September 18, and also a satisfactory alternative arrangement (satisfactory to SECDEF) to ensure that UOCAVA voters have a sufficient opportunity to vote despite the state having missed the 45-day deadline.

In non-presidential even-numbered years, Maryland conducts its primary in September. This year's primary was held on September 14, 2010, just four days before the deadline for mailing

⁶Maryland has a unique electoral system. Both houses of the Legislature and all the statewide elected officials serve four-year terms that end in the non-presidential even-numbered year, like 2010. In the November 2 general election, Maryland voters will elect a Governor, a Lieutenant Governor, an Attorney General, and other statewide officials, as well as members of the Maryland Senate and Maryland House of Delegates and many county officials. Voters will also elect a United States Senator and eight United States Representatives.

⁷UOCAVA is silent as to their right to vote for non-federal offices.

⁸This year, the 45th day preceding was Saturday, September 18, 2010.

out general election ballots. As I explained in Law Review 1056 (available at www.roa.org/law_review), the MSBE applied to SECDEF for a waiver on July 28, 2010. On August 25, 2010, the MSBE wrote to the SECDEF again and withdrew its waiver request. You can find both letters at www.fvap.gov, the website of the Federal Voting Assistance Program (FVAP).

In withdrawing its waiver request, the MSBE promised to send out ballots *for federal offices only* on September 18, and the MSBE apparently did this.⁹ The full ballot, including non-federal offices, will go out much later, probably on Monday, October 18, just 15 days before Election Day.¹⁰ Under a state law enacted a quarter century ago, Maryland counts overseas ballots received up to ten days after Election Day, but even with those ten days added Maryland falls 20 days short of the MOVE Act's 45-day standard.

There are 27,051 active duty military members and 16,934 voting-age military family members who are Maryland voters.¹¹ These folks are paying Maryland state income tax, through withholding from their salaries, no matter where the service of our country has taken them, and it is only because of their sacrifices that all of us have the opportunity to vote in free elections. I think that it is unconscionable that Maryland can reach out to military Marylanders to collect state income tax but not to enable them to vote for Governor, state legislator, and other non- federal offices.

I strongly support the MVPP's lawsuit and wish them success. Also, next year, we will push Congress to amend UOCAVA to give military personnel and family members the explicit statutory right to vote by absentee ballot in non-federal as well as federal elections.

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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.

⁹In Maryland's 8th Congressional District, the Republican Primary was very close and its result was not determined until several days after September 18. The ballot that was mailed to UOCAVA voters on September 18 contained the names of both Republican candidates for United States Representative, leaving it to the voter to figure out which candidate ended up getting the nomination. Military personnel in Afghanistan and elsewhere have very limited time and Internet bandwidth to figure out this critical information. If the voter marked his or her ballot for the wrong Republican candidate for the House of Representatives, the voter will be disenfranchised as to that office.

¹⁰In Montgomery County, there are two lawsuits pending about two separate proposed ballot questions. Both questions were rejected by the County Board of Elections based on an insufficient number of valid voter signatures. In making that determination, the County Board applied hyper-technical rules about how the individual voter must sign his or her name on the petition. Those lawsuits will likely delay further the printing and mailing of general election ballots.

¹¹These figures come from a letter dated November 9, 2009, from the FVAP to the MSBE.

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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.

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