

LAW REVIEW¹ 10091

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Safeguarding Military Voting Rights: Progress Made and What Remains to be Done

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7.1—Election officials must get the absentee ballots out in time for the service member to vote.

In 2008, ROA and the Reserve Enlisted Association (REA) jointly promulgated a “top 10 priorities list.” Number 6 on the list is “safeguarding military voting rights.” In this article, I will detail the progress that has been made and what remains to be done in accomplishing this goal.

This is an issue very near and dear to my heart and a substantial focus of my legal career. As a brand-new lawyer in 1976, I worked an election recount in Harris County (Houston), Texas. The County Clerk received 300 mailed-in absentee ballots, mostly from overseas military personnel, on the day after Election Day. Those ballots were not counted, and our candidate lost by just 225 votes.

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.

I entered active duty in the Navy Judge Advocate General's Corps in January 1977. During the 1978 campaign season, I served (as a collateral duty) as the Voting Assistance Officer for the Judge Advocate General of the Navy. After I left active duty in 1980, I undertook a nationwide campaign that continues to this day, to reform absentee voting laws and procedures for the benefit of deployed military personnel. I have recruited more than 3,000 volunteers, mostly military reservists and retirees, to work on state legislators and state and local election officials. Many of the readers have been on my mailing list for years, on this issue.

I became aware of this issue in 1976, but the issue goes back much further. For as long as military personnel have been permitted to vote at all (since World War II), a substantial minority and in some cases a majority of them have been disenfranchised due to the circumstances of their service to our country.

In June 1952 (13 months after I was born), 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 and elsewhere were likely to be disenfranchised in the 1952 presidential election. Because of late primaries, ballot access lawsuits, and other problems, local election officials (LEOs) would not have ballots printed and ready to mail until a few days before Election Day. Overseas military personnel would not have time to receive their ballots, mark them, and return them on time to be counted.

As you can imagine, there are three time-consuming steps in absentee voting. First, the absentee ballot *request* must travel from the voter to the LEO back home. Second, the *unmarked* ballot must travel from the LEO to the voter. Finally, the *marked* ballot must travel from the voter back to the LEO in the voter's home town.

Each of these steps can take weeks if snail mail must be used, but only seconds if secure electronic means were authorized. Unfortunately, secure electronic means have not been authorized. As a nation, we are still conducting absentee voting as it was conducted during the Korean War, by shipping pieces of paper across oceans and continents by snail mail.

If we are going to depend upon snail mail, LEOs need to mail out ballots 45 days before Election Day, so that military personnel will have the opportunity to cast ballots that really do get counted, no matter where the service of our country has taken them.

In October 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), as part of the National Defense Authorization Act (NDAA) for Fiscal Year 2010. The MOVE Act amended the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) in several important and helpful ways. The most important amendment was to add an explicit statutory requirement that LEOs mail out ballots to military personnel and family members (within or outside the U.S.) and to overseas civilian voters by the 45th day preceding Election Day (e.g., September 18, 2010).

The MOVE Act also provided for a state to apply to the Secretary of Defense (SECDEF) for a one-time waiver, if the state can show that a late primary or other problem precluded the state from getting ballots printed and mailed by the 45th day preceding Election Day. To obtain the waiver, the state must show both an undue hardship and a satisfactory alternative arrangement (satisfactory to SECDEF) to enable UOCAVA voters (military and civilian) to cast ballots that really do get counted, despite the state having missed the 45-day deadline. Ten states plus the District of Columbia and the Virgin Islands applied for waivers. Arrangements were made by SECDEF or the Department of Justice (DOJ), for those jurisdictions.

There were serious problems in several states, but the most serious problems were in New York, Maryland, and Illinois. New York and Maryland were predictable, because those states conducted their 2010 primaries on September 14, just 49 days before Election Day. It takes much more than four days to certify the results of the primary and to print general election ballots. New York and Maryland applied to SECDEF for waivers.

New York's approved waiver request provided for the ballots to be mailed by October 1, and for an extension after Election Day on the deadline for the receipt of absentee ballots mailed in from outside the U.S., including APO and FPO addresses. The problem is that 13 counties missed the October 1 deadline and did not have ballots mailed until October 13. The late counties included all five New York City boroughs (Bronx, Brooklyn, Manhattan, Queens, and Staten Island).

Maryland applied to SECDEF for a waiver and then withdrew the waiver request. The Maryland State Board of Elections (MSBE) mailed out ballots on Saturday, September 18, but those ballots included only federal offices (United States Senator and United States Representative). The complete absentee ballots, including non-federal offices, were not mailed until well into October.

UOCAVA gives "absent uniformed services voters" (including military family members) and "overseas voters" (U.S. citizens outside our country temporarily or permanently) the right to vote by absentee ballot in primary, general, special, and runoff elections for federal office. UOCAVA is silent about the right of these citizens to vote for non-federal offices.

As I explained in Law Review 1064 (Oct. 2010), the Military Voter Protection Project (MVPP) filed suit against Maryland in the United States District Court for the District of Maryland, and the case was assigned to Judge Roger W. Titus. I invite the reader's attention to www.roa.org/law_review. You will find more than 750 articles about UOCAVA and other laws that are particularly relevant to those who serve our nation in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

On the eve of the election, Judge Titus ordered Maryland to extend the deadline for receipt of mailed-in overseas ballots from the 10th day after Election Day to the 20th day after Election Day. Maryland did not appeal and complied with Judge Titus' order. On Nov. 23, Maryland

counted overseas ballots received from Nov. 3 through Nov. 22. I congratulate the MVPP for this great victory.

While New York and Maryland were predictable problem states, because of the September 14 primary, Illinois held its primary in February. Illinois did not apply for a waiver. Nonetheless, 35 of the 110 Illinois counties seriously breached the Sept. 18 deadline. One of the late counties was St. Clair County, home to 261,000 people and to Scott AFB, and hence to a lot of military voters.

You must keep in mind that there are two relevant deadlines on the return of absentee ballots. The first deadline is for the marking of the ballot and putting it in the return mail. (Meeting this deadline is usually shown by a postmark or a dated signature.) The second deadline is for the *receipt* of the mailed-in ballot.

DOJ sued Illinois but then settled too cheaply. Under the consent decree, the deadline for the marking of the ballot was extended by only one day, from the day before Election Day to Election Day. If the voter did not have his or her unmarked ballot by Election Day, he or she was disenfranchised.

When DOJ was criticized for settling too cheaply, it insisted that we cannot countenance permitting the voter in Afghanistan or elsewhere to mark the ballot after the polls have closed, when the voter might learn that an election back home is extraordinarily close. Why the objection? We are not talking about permitting the voter to *apply for* a ballot after Election Day. We are talking about permitting the voter to mark the ballot as soon as he or she receives it, even if that is a day or two after Election Day.

The MOVE Act brought about great progress in 2009, but its implementation in 2010 shows that more needs to be done, as follows:

PROVIDE SPECIFIC STATUTORY CONSEQUENCES FOR LEOS WHO MISS THE 45-DAY DEADLINE.

We favor a UOCAVA amendment mandating an extension after Election Day of two days for each day that the LEO misses the 45-day deadline. For example, if the LEO mails ballots on the 30th day preceding Election Day, the LEO should be required to count ballots received up to 30 days after Election Day. And if the LEO misses the 30-day deadline the mark-by-Election-Day rule should be suspended.

PROVIDE FOR AN EXPLICIT PRIVATE RIGHT OF ACTION.

UOCAVA assigns to the Attorney General (DOJ) the authority and responsibility to bring a civil action against a state for declaratory or injunctive relief for violating UOCAVA. 42 U.S.C. 1973ff-4. This section does not explicitly preclude a private right of action, but neither does it explicitly provide a private right of action. Some courts that have addressed this question have held that only the Attorney General can initiate such a lawsuit.

The Attorney General may have other priorities, and we cannot depend upon DOJ to enforce UOCAVA rights. Congress should amend UOCAVA to create an explicit private right of action, to permit the disenfranchised military voter to bring a lawsuit against a state or a LEO and to get injunctive relief.

AMEND UOCAVA TO GIVE MILITARY PERSONNEL AND FAMILY MEMBERS THE EXPLICIT RIGHT TO VOTE IN NON-FEDERAL AS WELL AS FEDERAL ELECTIONS.

When DOJ has sued states for late mailing of absentee ballots and has obtained court orders providing for an extension after Election Day for the receipt of those ballots, these court orders have often (not always) provided that the late-arriving ballots be counted *only* for federal offices (President, U.S. Senator, and U.S. Representative). Congress should amend UOCAVA to give military personnel and family members, as well as civilian U.S. Government employees overseas (DOD civilians, foreign service officers, Peace Corps volunteers, Drug Enforcement Administration agents, etc.) the explicit right to vote for all offices and questions on the ballot back home.

I believe that such an amendment would be constitutional. As part of its constitutional power to raise and support armies and to maintain a navy, Congress can by legislation address issues that might deter men and women from agreeing to serve in our armed forces. On this basis, the Supreme Court has upheld the constitutionality of the Soldiers' and Sailors' Civil Relief Act (now known as the Servicemembers Civil Relief Act). *See Dameron v. Brodhead*, 345 U.S. 322 (1953). *See also Rumsfeld v. Forum for Academic & Institutional Rights Inc.*, 547 U.S. 47 (2006) (upholding the constitutionality of the "Solomon Amendment" requiring colleges and universities to give military recruiters the same access to students that they grant to other employment recruiters).

Update – April 2022

UOCAVA

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 section cited throughout the article can be found at:

42 U.S.C. § 1973ff-4 discussing enforcement can be found at 52 U.S.C. § 2030

Absentee Voting

Since this article was written, many states have embraced technology for absentee voting. Many states allow applications by email (usually with a scanned application).³ There are at least 18 states that offer an electronic alternative to requesting absentee/mail ballot.⁴

Additionally, there are four states allow some voters to return ballots using a web-based portal.⁵ One state has mobile voting app.⁶ Nineteen states and DC allow some voters to return ballots via email or fax.⁷ For more information on the states rules, visit <https://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx>.

In 2021, the U.S. Senate joined the House of Representatives in proposing a law that would allow all active-duty service members to cast votes electronically while stationed overseas. The bill is called the Rescuing Barriers for Military Voters Act.⁸ The bill has not been passed yet.

Proposed Amendments

Provide specific statutory consequences for LEOs who miss the 45-day deadline. Up to this time, the proposed amendment has not been added to the UOCAVA,

Provide for explicit private right of action. The UOCAVA has not been amended to provide for a specific private right of action.

Give military personnel and family member the explicit right to vote in non-federal elections. The UOCAVA has not been amended to protect federal and non-federal election rights. UOCAVA only applies to federal elections, but many states have enacted statutes that are similar to UOCAVA to protect military personnel and family members in state elections.

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

³*Table 6: States With Online Absentee Ballot Application Portals*, NCSL (Jan. 3, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-6-states-with-web-based-and-online-absentee-ballot-applications.aspx>.

⁴*Id.*

⁵*Id.* The states that allow voters to return ballots using a web-based portal are Arizona, Colorado, Missouri, and North Dakota.

⁶*Id.* the state that has a mobile voting app is West Virginia.

⁷*Id.* the nineteen states that allow some voters to return ballots via email or fax are Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Utah, and Washington.

⁸Nikki Wentling, *Federal Bill Would Allow Online Voting for Overseas Military* (July 14, 2021), <https://www.govtech.com/policy/federal-bill-would-allow-online-voting-for-overseas-military>.

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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