

## LAW REVIEW<sup>1</sup> 10093

### Great Victory for Military Voting Rights

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

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

7.2—Service member or military spouse voting and domicile

7.3—Voting in Non-Federal Elections

***Doe v. Walker, 646 F.Supp. 2d 687 (D. Md. 2010).***

“It is axiomatic that a state may not erect obstacles which deprive a group of citizens of the fundamental right to vote absent sufficient justification. *Louisiana v. United States*, 380 U.S. 145 (1965). This case requires the Court to determine whether preliminary injunctive relief should be granted to the Plaintiffs on their claim that the manner in which Maryland is conducting absentee voting for state offices in the November 2, 2010 election deprives absent uniformed services voters and overseas voters of their fundamental right to vote. As explained below, the Court concludes that it does, and, by separate order, a preliminary injunction will be entered.”

This is the first paragraph of the scholarly and eloquent decision of Judge Roger W. Titus of the United States District Court for the District of Maryland. This is the case that I discussed in Law

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<sup>1</sup>I invite the reader’s attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup>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](mailto:SWright@roa.org).

Review 1064 (October 2010). I invite the reader's attention to [www.roa.org/law\\_review](http://www.roa.org/law_review). You will find more than 750 articles about the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and other laws that are particularly pertinent 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.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), a federal statute enacted in 1986 and codified in title 42 of the United States Code, 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 (President, U.S. Senator, and U.S. Representative).

"Absent uniformed services voters" are members of the U.S. uniformed services (Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service commissioned corps, and National Oceanic and Atmospheric Administration commissioned corps) in active service who are absent, because of their service, from their places of domicile, either within or outside the United States. Voting age family members of uniformed services members also qualify as "absent uniformed services voters" when they are absent from their places of domicile because they are accompanying service members serving within or outside the United States. "Overseas voters" are U.S. citizens of voting age who are outside the United States temporarily or permanently.

UOCAVA is silent as to the eligibility of military and overseas citizens to vote for non-federal offices, like the Maryland Senate or House of Delegates, but virtually all military personnel and family members and some overseas civilians are eligible under state law to vote for all offices. A person who is away from his or her place of domicile for temporary purposes (even for many years) does not lose the domicile.

"For purposes of voting for any Federal office ... *or a State or local office*, a person who is absent from a State in compliance with military or naval orders shall not solely by reason of that absence—(1) be deemed to have lost a residence or domicile in that State, *without regard to whether or not the person intends to return to that State*; (2) be deemed to have acquired a residence or domicile in any other State; or (3) be deemed to have become a resident in or a resident of any other State." 50 U.S.C. App. 595 (emphasis supplied). This provision is part of the SCRA.

In October 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 made several important and helpful amendments to UOCAVA. As amended by the MOVE Act, UOCAVA now explicitly requires each state to mail absentee ballots at least 45 days before Election Day to UOCAVA voters, military and civilian. If a state is unable to meet the 45-day requirement because of an undue hardship caused by something like a late primary, the state can apply to the Secretary of Defense (SECDEF) for a one-time waiver of the 45-day rule. To obtain the waiver, the state must show both an undue hardship and a satisfactory alternative arrangement (satisfactory to SECDEF) that gives UOCAVA voters sufficient time to receive, mark, and return their absentee ballots, despite the state having missed the 45-day deadline.

The Maryland State Board of Elections (MSBE) applied to SECDEF for a waiver on July 28, 2010, contending that the primary scheduled for September 14, 2010 (just 49 days before the general election) made it impossible for the state to meet the 45-day rule, because it takes more than four days to certify the primary winners and print and mail general election ballots. On August 25, the MSBE wrote to SECDEF again and withdrew the July 28 waiver request. The MSBE promised to mail absentee ballots *for federal offices only* by Saturday, September 18, and the MSBE met that deadline. The ballots for all offices were not mailed until well into October.

The Military Voter Protection Project (MVPP)<sup>3</sup> filed this lawsuit in the United States District Court for the District of Maryland, on behalf of John Doe, the pseudonym for a Maryland Army National Guard officer serving on active duty in Iraq. The MVPP contended that the constitutional right to vote of John Doe and others similarly situated was violated by Maryland's untimely mailing of absentee ballots. Judge Titus agreed and granted the requested relief.

Judge Titus ordered Maryland to extend by ten days (beyond the ten days already provided by state law) the deadline for the receipt of absentee ballots mailed in from outside the United States, including APO and FPO addresses. On Tuesday, November 23 (three weeks after Election Day), the county boards of elections counted overseas ballots received between November 3 (the day after Election Day) and November 22 (20 days after Election Day). These ballots were counted for all offices.

Maryland did not appeal. We will keep the readers informed of developments on this important issue.

#### **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.

#### *SCRA*

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.<sup>4</sup> The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The

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<sup>3</sup>Eric Eversole, a Commander in the Navy Reserve Judge Advocate General's Corps and a member of ROA, is the Executive Director of the MVPP.

<sup>4</sup>*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited Mar. 10, 2022).

changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 595 discussing the guarantee of residency for military personnel and spouse of military personnel can be found at 50 U.S.C. § 4025.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.<sup>5</sup>

#### **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.

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<sup>5</sup>Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

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