LAW REVIEW[1] 11013 (REV)

Military Voting in 2011 Chicago Mayor Election

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 Law Review 1113, as we originally published it on our website, I asserted that overseas military personnel were likely disenfranchised in Chicago's 2011 mayoral election, because a lingering dispute about the eligibility of Rahm Emanuel (the eventual winner) was not resolved by the Illinois Supreme Court until just 28 days before Election Day. When I wrote the original version of this article, I was under the impression that the absentee ballots had not been mailed until the state's highest court finally decided the eligibility question. The Chicago Board of Election Commissioners has pointed out that I was in error. In fact, the absentee ballots went out in early January, more than 45 days before Election Day.

I apologize for any hurt that my error may have caused. We removed the original version of the article, and we are publishing this revised article as a retraction, an apology, and a correction.

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[1]I 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.

[2]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.

Rahm Emanuel was away from his Chicago home for several years, first while representing a Chicago district in the U.S. House of Representatives and more recently while serving as Chief of Staff to President Barack Obama. When long-time Mayor Richard Daley announced that he would not seek reelection in 2011, Rahm Emanuel resigned as Chief of Staff, returned to Chicago, and announced his candidacy for Mayor.

Illinois law requires that a candidate for Mayor have been a resident of the city for at least a year prior to Election Day. Several registered voters challenged the listing of Rahm Emanuel on the ballot, claiming that he did not meet the requirement of having resided in the City of Chicago for at least one year prior to Election Day. The Chicago Board of Election Commissioners considered and rejected the challenge to Emanuel's candidacy. The objecting voters filed suit, and the state trial court upheld the decision of the Elections Board that Emanuel was eligible and should be listed on the ballot. The objecting voters appealed to Illinois' intermediate appellate court, which held that Emanuel was not eligible and should not be listed. The Illinois Supreme Court agreed to hear the case on an emergency basis, and it reversed the intermediate appellate court and ordered that Emanuel's name appear on the ballot. The problem is that Election Day was only 28 days away when the state's highest court finally resolved this issue.

Rahm Emanuel contended, and the Illinois Supreme Court agreed, that he was a "resident" of Chicago for electoral purposes during the time that his service as U.S. Representative and Chief of Staff to the President required his presence here in our nation's capital. We agree with the principle that an individual does not lose his or her "residence" for electoral purposes when service for the Federal Government (in a military or civilian capacity) requires the individual's presence elsewhere.

If the Illinois Supreme Court had ruled the other way and had held Rahm Emanuel to be ineligible, it would have been necessary to send out new absentee ballots, just 27 or 26 days before Election Day. Service members overseas risked being disenfranchised, because they would not have had time to receive the substitute ballots and to mark and return those ballots in time for them to be counted. Extending the deadline for the return of overseas ballots would have interfered with timely mailing of absentee ballots for the runoff election, if a runoff had proved necessary. Extending the date of the runoff would have required an extension of the term of office of the current Mayor.

As it turned out, Rahm Emanuel was held to be eligible, and he was listed on the ballot, both on Election Day and on absentee ballots. He received more than 50% of the vote and thus avoided the need for a runoff.

I believe that the states need to enact legislation to cover this sort of scenario, which arises from time to time. Ballot access litigation should not result in the disenfranchisement of overseas military personnel. One solution is to send out two ballots, one with the name of the challenged candidate and one without that candidate's name. The instructions should explain why two ballots are being sent simultaneously. The voter should be instructed to mark both

ballots. If the challenged candidate is ruled eligible, the ballot with his or her name on it will be counted. If the challenged candidate is ruled ineligible, the ballot without his or her name will be counted.

I want to congratulate the Chicago Board of Election Commissioners for making special efforts in recent years to get absentee ballots mailed out well in advance of Election Day, and prior to the 45-day deadline now required by federal law, so that military personnel will have ample time to vote, no matter where the service of our country has taken them. Readers: Please check with your own local election official. When were absentee ballots sent out for the 2010 general election? How does your local election official handle the ballot access litigation scenario?

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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.

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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