

LAW REVIEW¹ 11021

Proposed Private Right of Action under UOCAVA

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.

7.7—Proposed Reforms for Military Voters

On February 14, 2011, Senator John Barrasso (Wyoming) and Senator John Cornyn (Texas) introduced S. 331, the proposed “Military and Overseas Voters’ Relief Act.” The bill would amend section 105 of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) by creating an explicit private right of action, authorizing aggrieved persons to sue, in their own names and with their own lawyers, when their UOCAVA rights have been violated.

S. 331 was referred to the Senate Committee on Rules and Administration. Reader: Please contact your United States Senators and ask them to support this bill, and please contact your United States Representative and ask him or her to introduce a similar bill in the House of Representatives.

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.

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 hometown election official. Second, the *unmarked* absentee ballot must travel from the election official to the voter. Finally, the *marked* ballot must travel from the voter back to the election official. For a service member at sea or in a place like Afghanistan, each of these steps can take weeks if snail mail must be used, but only seconds if secure electronic means were authorized.

Because of concerns about the security of electronic communications,³ electronic means have not been authorized. As a nation, we are still conducting military absentee voting the same way that it was conducted during the Korean War, by shipping pieces of paper across oceans and continents by snail mail.

Because of late primaries,⁴ ballot access lawsuits, and other problems, LEOs sometimes do not have absentee ballots printed and ready to mail until just a few days before Election Day. The service member overseas is likely to be disenfranchised, despite having applied early for his or her ballot. Through no fault of the voter, there is not enough time for the voter to receive the ballot, mark it, and return it on time to be counted.

As amended in 2009 by the Military and Overseas Voter Empowerment Act, UOCAVA now explicitly requires the states to mail out absentee ballots to UOCAVA voters (military and civilian) at least 45 days before the biennial general election for federal offices (e.g., by Sept. 18, 2010). If a state cannot make this deadline, because of an undue hardship caused by something like a late primary, the state can apply to the Secretary of Defense (SECDEF) for a waiver. To obtain the waiver, the state must show both the undue hardship and a satisfactory alternative arrangement (satisfactory to SECDEF) to ensure that UOCAVA voters have a reasonable opportunity to cast ballots that really do get counted, despite the state having missed the 45-day deadline.

While UOCAVA imposes obligations on states, it should be noted that absentee voting is not conducted by states but by LEOs at the county, parish, city, town, or township level.⁵ In New York, in 2010, the State Board of Elections applied for and received a waiver of the 45-day rule, because New York's primary was held just 49 days before Election Day. Under the approved

³I am informed by experts in the field that no system relying on the Internet can possibly be secure. A clever criminal can intercept the attachment to an e-mail (like the marked absentee ballot) and change it in a way that even experts cannot detect. If we cannot get legislation authorizing full electronic voting, we at least need electronic transmission of the absentee ballot request and the unmarked absentee ballot.

⁴Until the results of the primary have been officially certified, the local election official (LEO) cannot *print* general election ballots, much less mail them out.

⁵Only Maine, Alaska, and the District of Columbia administer absentee voting at the state level. There are more than 7,500 LEOs that administer absentee voting for federal elections.

waiver, the LEOs were to mail ballots by Oct. 1 and to extend the deadline for receiving overseas ballots, in order to provide 45 days of round trip ballot transit time. But 13 major counties, including all five boroughs of New York City, missed the Oct. 1 deadline.

Illinois conducted its 2010 primary in February. There was no apparent reason for any LEO in that state to miss the 45-day deadline, and Illinois did not apply for a waiver, but 35 of the 110 counties missed the deadline. One of the seriously late counties was St. Clair County, home to 261,000 people and to Scott Air Force Base.

It should be noted that there are two relevant deadlines in absentee voting. First, there is a deadline (usually the time set for the polls to close) for the voter to *mark* the ballot and put it in the return mail.⁶ Second, there is a deadline for the LEO to *receive* the marked ballot. If the ballots go out so late that the voter does not receive his or her unmarked ballot until after Election Day, the voter is effectively disenfranchised, no matter how many days are added to the post-election counting period for late-arriving ballots.

UOCAVA currently provides as follows concerning enforcement: “The Attorney General may bring a civil action in an appropriate district court for such declaratory and injunctive relief as may be necessary to carry out this subchapter.” 42 U.S.C. 1973ff-4. This language does not expressly preclude a private right of action, but neither does it expressly create a private right of action. Some courts addressing this question have permitted aggrieved persons (UOCAVA voters likely to be disenfranchised without court intervention) to initiate their own lawsuits, while other courts have held that only the Attorney General can initiate a lawsuit under UOCAVA.

If enacted, S. 331 would add a new subsection (b) to 42 U.S.C. 1973ff-4, as follows: “Private Right of Action—A person who is aggrieved by a violation of this Act may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this Act.” I strongly endorse this proposal. UOCAVA voters should not have to depend upon the Attorney General to enforce their rights.⁷

S. 331 would also add a new subsection (c) to section 1973ff-4, as follows: “Attorney’s Fees—In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney’s fees, including litigation expenses, and costs.” Enactment of this

⁶Compliance with this deadline is usually shown by the postmark or by a signed and dated affidavit on the ballot return envelope.

⁷As I explained in Law Review 1083, Congress recently amended the Servicemembers Civil Relief Act (SCRA) to create an explicit private right of action under that Act. I invite the reader’s attention to www.roa.org/law_review where you will find more than 800 articles about UOCAVA, the SCRA, the Uniformed Services Employment and Reemployment Rights Act (USERRA), and other laws that are particularly pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

provision would make it easier for the aggrieved UOCAVA voter to find an attorney willing to undertake such a lawsuit.

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 § 20307. S. 331 has not been enacted. Thus, it remains unclear under the statute if a private right of action can be initiated.

Electronic Means of Voting

In the over ten years since this article was written, states have begun embracing technology for absentee voting. Many states allow applications by email (usually with a scanned application).⁸ There are at least 18 states that offer an electronic alternative to requesting absentee/mail ballot.⁹ Additionally, there are four states allow some voters to return ballots using a web-based portal.¹⁰ One state has mobile voting app.¹¹ Nineteen states and DC allow some voters to return ballots via email or fax.¹² 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.¹³ The bill has not been passed yet.

⁸Table 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>.

⁹*Id.*

¹⁰*Id.* The states that allow voters to return ballots using a web-based portal are Arizona, Colorado, Missouri, and North Dakota.

¹¹*Id.* the state that has a mobile voting app is West Virginia.

¹²*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.

¹³Nikki 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>.

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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.

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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