

DOJ Proposes UOCAVA Amendments

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 20, 2011, Assistant Attorney General for Legislative Affairs Ronald Weich sent identical letters to Speaker of the House John A. Boehner and Vice President (President of the Senate) Joseph R. Biden, Jr. These letters propose amendments to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Servicemembers Civil Relief Act (SCRA). I endorse these proposals. In this article, I will discuss the proposed UOCAVA amendments.

Background

Congress enacted UOCAVA in 1986, consolidating the Federal Voting Assistance Act of 1955 (pertaining to voting rights for military personnel and family members) and the Overseas Citizens Voting Rights Act of 1975 (pertaining to voting rights for U.S. citizens outside the

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.

United States, temporarily or permanently). UOCAVA is codified in title 42, United States Code, sections 1973ff through 1973ff-7 (42 U.S.C. 1973ff-1973ff-7).

UOCAVA applies to two classes of persons: absent uniformed services voters (AUSVs) and overseas voters (OVs). An AUSV is a member of a uniformed service (Army, Navy, Marine Corps, Air Force, Coast Guard, commissioned corps of the Public Health Service, or commissioned corps of the National Oceanic and Atmospheric Administration) on active duty who, by reason of such active duty, is absent from the service member's place of residence. 42 U.S.C. 1973ff-6(1)(A). A member of the merchant marine who is away from his or her place of residence because of merchant marine service also qualifies as an AUSV. 42 U.S.C. 1973ff-6(1)(B). Finally, a spouse or dependent of a uniformed services member or merchant marine member who is absent from his or her place of residence because of the service member's (or merchant marine member's) service qualifies as an AUSV. 42 U.S.C. 1973ff-6(1)(C).

The service member or spouse or dependent need not be outside the United States and need not be outside his or her state of residence. For example, Joe Smith, a sailor on active duty in the United States Navy, is a resident of Arlington (Virginia) and is currently serving and physically residing in Norfolk (Virginia), about 200 miles away. Joe qualifies as an AUSV under UOCAVA.

An OV is a United States citizen who is outside the United States temporarily or permanently. 42 U.S.C. 1973ff-6(5). The term "United States" in a geographic sense means the 50 states, the District of Columbia, Guam, the Virgin Islands, and American Samoa. 42 U.S.C. 1973ff-6(8).

Each state is required, as a matter of federal law, to permit AUSVs and OVs to vote in primary, general, special, and runoff elections for federal offices (President, United States Senator, and United States Representative, including non-voting delegates from DC, Puerto Rico, Guam, the Virgin Islands, and American Samoa). 42 U.S.C. 1973ff-1(a)(1).

The biggest voting problem (especially for military personnel at sea or in places like Afghanistan) is *insufficient ballot transmission time*. 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 local election official (LEO) back home. Second, the *unmarked* ballot must travel from the LEO to the voter. Finally, the *marked* ballot must travel from the voter to the LEO.

Each of these steps can take weeks if "snail mail" must be used, but only seconds if secure electronic means are authorized. Because of concerns about hacking or other unlawful manipulation, electronic means have not been authorized. Accordingly, LEOs need to have ballots printed and ready to mail at least 45 days before Election Day, so that the military member will have sufficient time to receive the ballot, mark it, and return it on time to be counted, no matter where the service of our country has taken that member. All too often, late primaries, lawsuits about ballot access or redistricting, and other problems have meant that LEOs have not had ballots printed and ready to mail until just a few days before Election Day.

Until amended in 2009, UOCAVA did not mention a specific number of days of required ballot transmission time, but it is not a huge leap to argue that if for whatever reason the ballots are not available early enough to enable overseas voters (military and civilian) to vote, UOCAVA has been violated, and the Department of Justice (DOJ) has brought several lawsuits on that basis. The usual remedy sought and obtained is a federal court order extending the deadline for the *return* of the absentee ballot mailed in from outside the United States (including APO and FPO addresses).

In 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), which made several important amendments to UOCAVA. The most important amendment was to include an *explicit* requirement that each state mail absentee ballots, to UOCAVA voters, at least 45 days before Election Day.³ See 42 U.S.C. 1973ff-1(a)(8)(A). The purpose of the DOJ proposed amendments is to put teeth into the 45-day rule.

Eliminate the opportunity for waivers of the 45-day rule

As amended by the MOVE Act in 2009, UOCAVA provides the opportunity for a state to apply for and be granted a waiver of the 45-day rule, if the state can show that a hardship (like a late primary) prevents the state from printing and mailing absentee ballots by the 45th day preceding Election Day. 42 U.S.C. 1973ff-1(g). The DOJ letter proposes that Congress eliminate this waiver provision. I say: *It is about time!*

In June 1952, 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 because of late primaries, ballot access lawsuits, and other problems, most military personnel fighting in Korea were likely to be disenfranchised in the 1952 presidential election. LEOs just would not have the ballots printed and ready to mail until a few days before Election Day, in many cases.

The 1952 hearings report includes a copy of a March 1952 letter to Congress from President Harry S. Truman. In his letter, he called upon the states to fix this problem, and he called upon Congress to enact *temporary* federal legislation for the 1952 presidential election. He wrote, “Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.”

Well, it did not work out that way. The Korean War ground to an inconclusive halt in 1953, and this issue (military voting rights) fell off our national radar screen until 2000, when a court-

³This assumes, of course, that the voter’s application for an absentee ballot was received more than 45 days before Election Day. If the voter waits until the last minute to request an absentee ballot, the “own dumb fault” rule applies. The application for an absentee ballot, by a UOCAVA voter, can be made at any time during the calendar year of the election, even in January for a November election. See 42 U.S.C. 1973ff-3.

ordered ten-day extension on the deadline for the return of overseas ballots in Florida played a crucial role in the determination of the outcome of the presidential election in Florida.

The states have had almost 60 years to fix this problem. No more excuses! No more waivers!

State certification of meeting the 45-day rule

Section 201 of the DOJ draft bill would amend 42 U.S.C. 1973ff-1 by adding a new requirement that each state certify to the Attorney General, in writing, by the 55th day preceding Election Day, that the UOCAVA absentee ballots have been mailed or will be mailed by the 45th day preceding Election Day. Also, the state must again certify, by the 43rd day preceding Election Day, that the 45-day standard has been met by all LEOs in the state. Having this information prior to Election Day, rather than waiting for complaints to filter in from overseas voters, will be most useful in enforcing the 45-day rule.

New consequences for missing the 45-day rule

Section 202 of the draft bill provides a new requirement that the state transmit the ballots by express means, and a requirement that the state permit express means for the voter to return the marked ballot if the state failed to mail the ballots by the 40th day before Election Day. “A State’s compliance with this subparagraph does not bar the Attorney General from seeking additional remedies necessary to effectuate the purposes of this Act.”

Section 203 of the draft bill would put the responsibility clearly on the state, rather than the LEO.⁴ The draft bill would add the following two sentences to UOCAVA: “In any such action, the only necessary party is the State. It shall not be a defense to such action that local election officials are not also named as defendants.” I say, “Right on!”

Section 203(b) of the draft bill would provide substantial civil penalties against states that violate the 45- day rule or otherwise violate UOCAVA. There would be a civil penalty of up to \$110,000 for a first violation and up to \$220,000 for second and subsequent violations.

Create an explicit private right of action to enforce UOCAVA

As currently written, 42 U.S.C. 1973ff-4 provides: “The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this subchapter.”

⁴There are more than 7,500 LEOs that administer absentee voting for federal elections. Only Alaska, Maine, and the District of Columbia administer UOCAVA voting at the state level.

As I explained in Law Review 1121⁵, there is a division in the case law as to whether there is an implied private right of action under UOCAVA. Some courts have held that the aggrieved UOCAVA voter, who is likely to be disenfranchised without judicial intervention, can initiate a lawsuit in federal court to enforce the right to vote under UOCAVA, while other courts have held that only the Attorney General can initiate such a lawsuit.

In Law Review 1121, I proposed that Congress amend UOCAVA and create an explicit private right of action. I am most pleased that section 203(d) of the DOJ draft bill would do this, and section 203(e) would provide for the UOCAVA voter who brings such a lawsuit and prevails to get attorney fees, litigation expenses, and costs, as part of the relief that the court is to award.

Section 4323(h)(1) of USERRA provides: “No fees or court costs may be charged or taxed against any person claiming rights under this chapter.” 38 U.S.C. 4323(h)(1). This means that the service member claiming a USERRA violation is exempted from having to pay the filing fee (usually \$350) and even if the service member loses the court cannot make the member pay the employer’s attorney fees or costs.

I propose that section 203(e) of the DOJ draft bill be changed, in accordance with section 4323(h) of USERRA. The prevailing party should be able to collect attorney fees only if the prevailing party was the military or overseas voter claiming that his or her UOCAVA rights were violated. If a service member initiates a lawsuit in good faith against a state, the service member should not have to worry about having to pay the state’s attorney fees, even if the state prevails, for whatever reason.

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 sections cited throughout the article can be found at:

42 U.S.C. § 1973ff-1 discussing state responsibilities can be found at 52 U.S.C § 20302. UOCAVA still provides the opportunity for a state to apply for and be granted a waiver of the 45-day rule if the state can show that a hardship prevents the state from printing and mailing absentee ballots by the 45th day preceding Election Day. Additionally, the section has not been amended

⁵Please see www.servicemembers-lawcenter.org for more than 800 articles about UOCAVA, USERRA, the SCRA, 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.

to include a requirement that a state certify to the Attorney General that the UOCAVA absentee ballots have been mailed or will be mailed by the 45th day preceding Election Day.

42 U.S.C. § 1973ff-3 discussing the prohibition of refusal of applications on grounds of early submission can be found at 52 U.S.C § 20306.

42 U.S.C. § 1973ff-4 discussing enforcement can be found at 52 U.S.C § 20307. Section 20307 only provides that the Attorney General may bring a civil action.

42 U.S.C. § 1973ff-6 discussing the definitions can be found at 52 U.S.C § 20310.

There have been no amendments to UOCAVA to provide for additional consequences for missing the 45-day rule.

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).⁶ There are at least 18 states that offer an electronic alternative to requesting absentee/mail ballot.⁷ Additionally, there are four states allow some voters to return ballots using a web-based portal.⁸ One state has mobile voting app.⁹ Nineteen states and DC allow some voters to return ballots via email or fax.¹⁰ 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.¹¹ The bill has not been passed yet.

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

⁶Table 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>.

⁷*Id.*

⁸*Id.* The states that allow voters to return ballots using a web-based portal are Arizona, Colorado, Missouri, and North Dakota.

⁹*Id.* the state that has a mobile voting app is West Virginia.

¹⁰*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.

¹¹Nikki 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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