

Voting Victims—Antiquated Process Can Disfranchise Service Members

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.

As of early November, five states—Kentucky, Louisiana, Mississippi, New Jersey, and Virginia—and many municipalities conducted important elections. And although Election Day 2012 is still a year away, this predictably close-fought presidential campaign will reveal itself much sooner. The 2012 nomination process would begin in just three months, when Iowa would conduct its caucuses in 1,784 precincts on Feb. 6, 2012. The New Hampshire primary would follow eight days later. However, Iowa has moved up its caucuses to January 3, 2012. New Hampshire will likely move up its primary as well.

In the past, the Service Members Law Center has conducted detailed discussions of the critical role of late-arriving military absentee ballots. Law Review 23 addresses their importance in

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 (VRRRA—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 VRRRA 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 VRRRA 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.

determining the outcome of the 2000 presidential cliffhanger in Florida. But it doesn't begin with the general election.

Deployed service members also should participate in the nomination process of candidates, as well as election of candidates for federal, state, and local office. Law Review 1156 addresses this specifically with regard to military participation in the 2012 Iowa caucuses. Yet despite advances in technology and efficiency, deployed service members still must navigate an antiquated absentee voting process.

Military absentee voting is still conducted in much the same way it was during World War II. As a result, service members—and their ballots—must endure three time-consuming steps to complete the absentee voting process. The process includes having pieces of paper (ballots) and requests shipped across oceans and continents by *snail mail*.

First, an absentee ballot request must travel from the voter to the local election official (LEO) back home. Second, the unmarked absentee ballot must travel from the LEO to the voter. Finally, the marked ballot must travel from the voter to the LEO.

Each step can take weeks through snail mail, rather than seconds if secure electronic means were authorized. In most places, those means are not authorized. Instead, absentee ballots must be printed and ready to mail sufficiently early, to allow the voter to receive the ballot and return it in time to be counted. There's the rub.

The LEO cannot print absentee ballots (much less mail them out) until all uncertainties about who and what goes on the ballot are resolved. Law Review 1055 addressed this when it described the June 1952 military absentee voting hearing of the House Subcommittee on Elections, Committee on House Administration. "C.G. Hall, Secretary of State of Arkansas and President of the National Association of Secretaries of State, testified that military personnel fighting the Korean War were likely to be disenfranchised in the 1952 election," through no fault of their own. This was the result of "late primaries, ballot access lawsuits, and other problems." LEOs would not have absentee ballots printed and ready to mail until a few days before Election Day, in some cases. Although the service member may have applied for the ballot months in advance, there was just not enough time for the ballot to go from the LEO to Korea and back by Election Day.

The 1952 congressional hearing report included a copy of a March 1952 letter to Congress from President Harry S Truman. He called upon the states to fix the problem and 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 a halt in 1953, and the issue dropped from the national radar screen.

Then, in 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). This federal statute gives members of the uniformed services and their voting-age family members (within or outside our country) and overseas Americans (outside the United States temporarily or permanently) the right to register by absentee process and vote by absentee ballot in primary, general, special, and runoff elections for federal office (president, U.S. senator, and U.S. representative).

UOCAVA also gives the U.S. attorney general the authority and responsibility to sue any state that violates UOCAVA by failing to give military and overseas citizens a reasonable opportunity to cast ballots that really do get counted. Until 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 the ballots are not mailed sufficiently early to enable UOCAVA voters to return them on time to be counted, UOCAVA has been violated. The attorney general has brought several such lawsuits, based on that theory. The usual remedy sought and obtained has been a court-ordered extension on the deadline for the return of a ballot mailed in from overseas.

In 2009, Congress enacted the Military and Overseas Voter Empowerment (MOVE) Act and clarified this ambiguity. As amended, UOCAVA now explicitly requires every LEO to have absentee ballots mailed out to UOCAVA voters by the 45th day preceding the primary or general election. No more excuses. The states have had 60 years to fix this problem.

The nation has more than 7,500 LEOs who administer absentee voting for federal elections. Only Alaska, Maine, and the District of Columbia administer absentee voting on a statewide basis. In every other state, officials at the county, parish, city, town, or township level receive absentee ballot requests, mail out unmarked ballots, and receive and count marked ballots. It is difficult for someone here in Washington to monitor (much less to affect) the performance of 7,500 LEOs around the country.

This is a great project for ROA departments and chapters. Please identify your LEO, who in most states is an elected official, like the county clerk. Visit the LEO and let him or her know that you are concerned about ensuring that the brave young men and women from your community who are serving our nation in uniform will have the opportunity to participate in the 2012 primary and general election, no matter where the service of our country has taken them.

Please visit the LEO again on the 44th day preceding the primary or general election. Have the absentee ballots been transmitted to military and overseas voters? If you find that the 45-day deadline has been missed (for whatever reason), please let me know, and please bring this matter to the attention of Bob Carey, director of the Federal Voting Assistance Program in the Department of Defense. His telephone number is 703-588-8118, and his e-mail address is Robert.Carey@fvap.gov.

In his 1952 letter to Congress about military voting rights, President Truman wrote:

About 2,500,000 men and women in the Armed Forces are of voting age at the present time. Many of those in uniform are serving over seas or in parts of the country distant from their homes. They are unable to return to their states either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in the election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve.

President Truman's eloquent words about the brave young men and women fighting the Korean War in 1952 are equally true of their grandsons and granddaughters, and great-grandsons and great-granddaughters, fighting today. Time, distance, and military regulations preclude military personnel from contacting LEOs to complain about untimely receipt of absentee ballots. It is incumbent on those of us who have already served to contact LEOs on their behalf.

Update – April 2022

Absentee Voting

In the roughly 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).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>.

³Table 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.

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.

Director of FVAP

Mr. David Beirne currently serves as Director of the Federal Voting Assistance Program.⁹

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.

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.

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>.

⁹FVAP Leadership, FVAP.Gov, <https://www.fvap.gov/info/about/leadership> (last visited Apr. 19, 2022).

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:

Reserve Officers Association
1 Constitution Ave. NE
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