

## Military Voting: One Step Forward and Two Steps Back

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.

7.3—Voting in Non-Federal Elections

The United States Election Assistance Commission (EAC) has released its report on military and overseas voting in the 2010 general election, and the news is not good. We were expecting progress in 2010, based on the 2009 enactment of the Military and Overseas Voter Empowerment Act (MOVE Act), including a new explicit federal statutory requirement that every state mail out absentee ballots by the 45<sup>th</sup> day preceding the election. Instead of progress, we see regression.

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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).

According to the EAC, our nation's 7,500 local election officials (LEOs)<sup>3</sup> sent out 335,319 unmarked absentee ballots to *overseas* military personnel (APO and FPO addresses) for the 2010 general election, but only 107,774 of those unmarked ballots were filled out and submitted, and only 100,557 of those ballots were counted.<sup>4</sup> *This means that the disenfranchisement rate was in excess of 70%.*

As we approach the start of the 2012 presidential election year, I make the following suggestions for military absentee voters:

**a. Apply early for your absentee ballot.**

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) now explicitly requires your LEO to have absentee ballots printed and ready to mail by the 45<sup>th</sup> day prior to Election Day, but the LEO cannot send you a ballot until he or she has received your properly completed application for a ballot. Under UOCAVA, a federal law, you can apply as early as January for the November general election. *See 42 U.S.C. 1973ff-3.* This section of UOCAVA explicitly supersedes state "not earlier than" rules for the submission of the absentee ballot request. I invite your attention to Article VI, Clause 2 of the United States Constitution, commonly known as the Supremacy Clause. Federal law trumps conflicting state law. Regardless of what your state law may provide, you have the right to, and you should, apply for your absentee ballot early in 2012.

**b. Establish and maintain contact with your LEO.**

Who is your LEO? Find out the name, telephone number, and e-mail address. And keep in contact with that official to ensure that he or she has the correct address to send you your absentee ballot.

If you visit your hometown on leave, call upon the LEO *in uniform*. Military personnel are overwhelmingly serving in certain areas of high military concentration (Northern Virginia, Tidewater Virginia, San Diego, San Antonio, etc.). Outside these military areas, folks seldom see military personnel in uniform. Let the LEO know that you are serving in our nation's armed forces and that you still call that community home.

Do you still have a parent or other relative living in your hometown? If so, keep that relative posted as to your whereabouts, and give that relative a *limited power of attorney* to apply for

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<sup>3</sup>Except in Maine, Alaska, and the District of Columbia, absentee voting is conducted by local officials at the county, parish (Louisiana), city, town, or township level, and there are more than 7,500 such offices nationwide.

<sup>4</sup>That means that 7,217 ballots were rejected because they arrived too late or because of some other technical failure, like the voter's failure to sign the affidavit on the back of the ballot return envelope.

absentee ballots or make inquiries about your ballot, on your behalf. Ask that relative to call upon the LEO from time to time.

**c. Don't apply for an absentee ballot if you don't want to vote.**

I am shocked that 2/3 of the absentee ballots sent to overseas military personnel *never* came back. Why would a service member go to the trouble of applying for an absentee ballot and then not mark and return the requested ballot? It does not make sense.

**d. Mark and return your ballot no matter how late you receive it.**

If you receive your absentee ballot for the 2010 general election this month, a year after Election Day, *mark and return the ballot*. Of course, a ballot received a year after the election will not be opened, much less counted, but at least you can make the point that you wanted to vote and that you were disenfranchised by factors beyond your control.

In this situation, you should also send a *separate letter in a separate envelope* to the LEO. I applied for my absentee ballot in May 2010, six months before the election. I received the ballot in November 2011, 12 months after the election. You must do better in getting me a ballot in time for me to vote!

**e. Use the Federal Write-in Absentee Ballot.**

UOCAVA provides the Federal Write-in Absentee Ballot (FWAB) for the military or overseas voter who has timely applied for a regular absentee ballot but has not received it. You mark the ballot by writing in the names of your favored federal candidates, or you express a party preference ("Republican nominee" or "Democratic nominee") for each federal office.<sup>5</sup>

If you are a member of the armed forces or a military family member, you can submit the FWAB from either within or outside the United States. If you are not on active duty and not a military family member, and if you are voting under UOCAVA as an "overseas voter" you must submit the completed FWAB from an address outside the United States. *See 42 U.S.C. 1973ff-2(b)(1).*

You need not give up on the regular absentee ballot to submit the FWAB. If you submit the completed FWAB and then receive your regular absentee ballot (which includes non-federal as well as federal offices), you are permitted and indeed encouraged to complete and submit the regular absentee ballot as well. *See 42 U.S.C. 1973ff-2(d).* The LEO is responsible for ensuring that only one ballot is counted, and that will be the regular ballot if it arrives on time.

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<sup>5</sup>Under UOCAVA, the FWAB is limited to federal offices (President, United States Senator, and United States Representative) in the general election, but some states have by state law expanded the use of the FWAB to include non-federal offices and elections other than the biennial general election.

**f. Keep in touch with the Federal Voting Assistance Program.**

The Director of the Federal Voting Assistance Program (FVAP), in the Department of Defense, is responsible for the federal responsibilities under UOCAVA. The current FVAP Director is Bob Carey, a Captain in the Navy Reserve and life member of ROA. His e-mail is [Bob.Carey@fvap.gov](mailto:Bob.Carey@fvap.gov). You can reach the FVAP toll-free at 800- 438-VOTE or DSN 425-1854. I also invite your attention to their excellent website, [www.fvap.gov](http://www.fvap.gov).

**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-3 discussing the prohibition of refusal of application on grounds of early submission can be found at 52 U.S.C § 20306.

42 U.S.C. § 1973ff-2 discussing the federal write-in absentee ballot in general elections for. Federal office for absent uniformed service voters and overseas voters can be found at 52 U.S.C § 20303.

*Director of FVAP*

The current director of FVAP is David Beirne.<sup>6</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

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<sup>6</sup>*FVAP Leadership*, FVAP.Gov, <https://www.fvap.gov/info/about/leadership> (last visited Apr. 14, 2022).

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](http://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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