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Don't Let Ballot Access Litigation Disenfranchise Military Voters

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.

***Perry v. Judd,* 2012 WL 120076, No. 12-1067 (4th Cir. Jan. 17, 2012).**

William Shakespeare wrote *Hamlet* in 1602. In Act III, Scene 1 of that play, Prince Hamlet delivers his famous "to be or not to be" soliloquy contemplating suicide. The soliloquy includes a litany of all that is wrong with human life, and "the law's delays" is one item in a very long list. Of course, that problem is much worse in the 21st Century than it was in the 17th. But sometimes the courts can move very quickly, and this is an example of such a situation.

Virginia will hold its presidential primary on March 6, 2012. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) requires local election officials to send out absentee ballots by the 45th day before Election Day, for any primary, special, or general election for federal office. *See* title 42, United States Code, section 1973ff-1(a)(8)(A) [42 U.S.C. 1973ff-

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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.

1(a)(8)(A)]. This means that absentee ballots for the March 6 primary must be mailed by Saturday, January 21. The idea is to ensure that the service member will have sufficient time to receive the absentee ballot, mark it, and return it on time to be counted, no matter where the service to our country has taken the member.

Virginia law provides somewhat onerous requirements for a candidate to qualify to be listed on the ballot. For a statewide primary, as in this case, the candidate must submit a nominating petition signed by at least 10,000 Virginia registered voters, including at least 400 in each of the 11 congressional districts. Each individual who circulates a nominating petition for a candidate must be a resident of Virginia.

The deadline to file a nominating petition was set for December 22, 2011. These rules have been in effect in Virginia for more than a decade, and multiple presidential candidates qualified for the ballot, in both major parties, in 2004 and 2008. The Virginia State Board of Elections (VSBE) reiterated all these rules and established the December 22 filing deadline in a formal document published on May 25, 2011, almost seven months before the filing deadline.

On the December 22 filing deadline, former Massachusetts Governor Mitt Romney and Representative Ron Paul of Texas filed nominating petitions with the VSBE. Their petitions were found to be sufficient, and they will be listed on the ballot. Plaintiff Rick Perry (Governor of Texas) filed a petition with fewer than 10,000 signatures. Intervening plaintiff Newt Gingrich (former Representative from Georgia and Speaker of the House) filed a petition with 11,050 signatures, but more than 1,050 of them were found to be invalid. Only Romney and Paul will be listed on the ballot.

Perry filed suit in the United States District Court for the Eastern District of Virginia against the VSBE and its members, and also the Republican Party of Virginia, seeking an injunction requiring that his name be added to the ballot and that the absentee ballots not be mailed until his name was added. Gingrich intervened in the suit, seeking the same relief for him. After an expedited trial, the District Judge ruled against Perry and Gingrich based on the ancient equitable doctrine of laches, and Perry and Gingrich immediately appealed to the United States Court of Appeals for the 4th Circuit.[3] The District Court decision was released on Friday, January 13. Perry and Gingrich appealed on Sunday, January 15. The Court of Appeals decision, affirming the District Court, was released on Tuesday, January 17. This case sets a new record for judicial expedition.

The District Judge indicated that he was inclined to uphold the constitutionality of Virginia's requirement for 10,000 signatures and at least 400 in each congressional district, but that he was deeply troubled concerning the constitutionality of the Virginia requirement that each

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[3]The 4th Circuit is the federal appellate court that sits in Richmond and hears appeals from district courts in Virginia, West Virginia, Maryland, North Carolina, and South Carolina.

person circulating petitions for a candidate be a resident of Virginia. The District Judge held that he would not reach the merits of the Perry-Gingrich challenge to Virginia's ballot qualification rules because of the equitable doctrine of laches.

In affirming the District Court, the 4th Circuit panel held:

> We cannot grant Movant's [Perry's] request for this extraordinary remedy [ordering the VSBE to add Perry's name to the ballot]. We find it unnecessary to address whether Movant would likely succeed in his constitutional challenges because the district court was correct in concluding that the defense of laches bars the requested relief on the instant motion in any event. Movant contends that the district court abused its discretion in determining that the doctrine of laches bars his motion for a preliminary injunction. We do not agree. An affirmative defense to claims for equitable relief, laches requires a defendant to prove two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello v. United States,* 365 U.S. 265, 282 (1961). We believe that the Board [VSBE] was able to satisfy both elements of this defense.

Thanks to this quick judicial action, the absentee ballots for the March 6 primary are going out on January 21 as required. The 4th Circuit has provided a template for resolving this issue in other states, as is likely to happen. Litigation about ballot access and redistricting must not be permitted to result in the disenfranchisement of the brave young men and women who are away from home and prepared to lay down their lives in defense of our country.

ROA sends a Bravo Zulu to member Donald Palmer, a Commander in the Navy Reserve Judge Advocate General's Corps, who serves as the Secretary (full-time administrator) of the VSBE. Thank you also to Virginia Attorney General Ken Cuccinelli. They eloquently brought to the attention of the District Court and Court of Appeals the unavoidable relationship between timely resolution of ballot access disputes and the effective enfranchisement of overseas voters. All too often over the last seven or eight decades, courts have failed to notice that relationship. For example, in 2004 the Arkansas Supreme Court enjoined county election officials from mailing out general election ballots, while the state's high court was deciding whether Ralph Nader should be listed on the ballot as an independent candidate for President. When the court finally decided that Nader should not be listed, and the ballots were finally mailed, Arkansans serving in places like Iraq were effectively disenfranchised.

In litigation involving government agencies and processes (like elections), it is often the case that the rights and interests of persons who are not party to the litigation are inevitably affected by the outcome or by the pendency of the litigation. Courts need to be made aware of these secondary and tertiary effects. Where appropriate, the Service Members Law Center will file *amicus curiae* briefs to bring to the court's attention the rights and interests of absent service members. Please let me know if you are aware of a situation where such an *amicus* brief would be helpful.

Update – April 2022

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-1 discussing state responsibilities can be found at 52 U.S.C § 20302.

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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.

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Reserve Officers Association
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