

## **Federal Court Orders Alabama to Extend Deadline for Receipt of Mailed-in Absentee Ballots**

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.

***United States v. Alabama, Civil Action No. 2:12cv719-MHT (M.D. Ala. Feb. 28, 2012).***

As I have explained in Law Review 1225 and other articles, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) gives military personnel and family members (within or outside the United States) and overseas Americans the right to vote by absentee ballot in primary, general, special, and runoff elections for federal office (President, U.S. Senator, and U.S. Representative). To effectuate the right to vote, UOCAVA was amended in 2009 to explicitly require each state to get ballots distributed to UOCAVA voters by the 45th day preceding the primary or election. The idea is that those who serve our nation in uniform should have

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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).

sufficient time to receive their ballots, mark them, and return them on time to be counted, no matter where the service of our country has taken them.

On Tuesday, March 13, 2012, Alabama will conduct its biennial primary election. On the Republican side, the primary includes four active candidates for the presidential nomination (Newt Gingrich, Ron Paul, Mitt Romney, and Rick Santorum), but President Obama is not opposed for the Democratic presidential nomination. Both parties will nominate candidates for the U.S. House of Representatives, in all seven congressional districts. The primary also includes state legislators and other state and local officials.

In Alabama, as in New York and other states, the military voting problem in the general election has resulted from the lateness of the primary—until the results of the primary have been officially certified the LEO cannot *print* general election ballots, much less mail them out. I am most pleased that Alabama has moved its primary to earlier in the year, thus solving the structural problem for military voters in the general election.

The right to vote under UOCAVA applies to primaries as well as general elections. Several of Alabama's counties were late in mailing out ballots for the March 13 primary. As a result, the Department of Justice (DOJ) sued Alabama. Federal District Judge Myron Thompson ordered Alabama to count UOCAVA ballots that are received up to March 31, 18 days after Election Day.

Under the court order, the ballot must be *marked* by the voter not later than Election Day, March 13. The date of marking must be shown by a postmark or by an endorsement by a U.S. government official showing that the ballot was marked and placed in the return mail not later than March 13. My concern is that some Alabama counties were so late in sending out the ballots that a voter in Afghanistan or elsewhere may not *receive* the unmarked ballot until after March 13. Thus, the voter is disenfranchised by the March 13 deadline and is not helped by the 18-day extension.

When LEOs are very late in sending out ballots, a state should be required to waive the requirement that the ballot be *marked* by Election Day. What's the big deal? I am not suggesting that a voter should be permitted to *apply for* a ballot after Election Day. I am suggesting that a voter who has applied for a ballot well in advance of the 45-day point before Election Day should be permitted to mark and return the ballot upon receiving it, even if he or she receives the ballot a day or two after Election Day.

I acknowledge the possibility that a military voter in Afghanistan or elsewhere outside our country may learn, by telephone or via the Internet, that there is an exceedingly close election in his or her hometown. Thus, the voter will have a little extra incentive to send in a ballot on the day after Election Day—so what! This is a risk that the state runs when it fails to get the ballots out on time.

I am also concerned that the ballots that arrive after March 13 and on or before March 31 will be counted only for President and United States Representative. I contend that these late-

arriving ballots should be counted for non-federal offices as well. Yes, UOCAVA is limited to federal offices, but the *constitutional right to vote* is not so limited.

In Alabama and several other states, it is necessary to get a *majority* (not just a plurality) of the votes in the primary in order to get the nomination of a major party. Whenever there are three or more candidates for an office, it is possible that no candidate will get a majority. Alabama's runoff primary is scheduled for April 24, 2012. April 24 is just 42 days after March 13 and just 24 days after the March 31 revised deadline for the receipt of primary ballots mailed in from outside the country. UOCAVA explicitly applies to runoff primaries. In his opinion, Judge Thompson raised the issue of UOCAVA voting in the runoff, especially if there is a runoff in one or more of the seven congressional districts, on either the Republican or the Democratic side. Some arrangement will need to be made to ensure the effective enfranchisement of UOCAVA voters in the runoff.

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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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