

Law Review 1288

September 2012

More on Ohio Lawsuit regarding Early Voting

Captain Samuel F. Wright, JAGC, USN (Ret.)

7.0—Military Voting Rights

Obama for America v. Husted, 2012 U.S. Dist. LEXIS 124567 (S.D. Ohio Aug. 31, 2012).

In Law Review 1277[1] I wrote about the lawsuit in Ohio concerning early voting[2] for the 2012 general election. In 2008, a few of Ohio's 88 counties conducted early voting on the Saturday, Sunday, and Monday before the Tuesday general election, while most counties ended early voting at 6 p.m. on the Friday before the election. The Ohio Legislature determined that there should be uniform hours for early voting across the State of Ohio and enacted legislation ending early voting in all counties at 6 p.m. on the Friday before Election Day. Obama for America,[3] the Democratic National Committee, and the Ohio Democratic Party filed suit against Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine in the United States District Court for the Southern District of Ohio, seeking a court order requiring Ohio to permit all eligible voters in all counties to vote by early voting through 6 p.m. on the Monday (November 5) that is one day before Election Day.

In a confusing series of enactments, the Ohio Legislature has permitted Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)[4] voters to vote by early voting on the Saturday, Sunday, and Monday before Election Day, although all other voters are precluded from voting after 6 p.m. on Friday.

For example, let us assume that Senior Airman Betty Jones is on active duty and assigned to Wright-Patterson Air Force Base (WPAFB) in Dayton, Ohio. Unlike most active duty personnel at WPAFB, Jones considers Ohio to be her domicile. Jones lives in an apartment just outside the WPAFB main gate. She has established that apartment as her domicile, and she has registered to vote using the apartment as her home address. She is paying Ohio state income tax on her Air Force salary.

Late in the afternoon on Friday, November 2, Jones learns that she will be required to stand a 24-hour watch at WPAFB on Tuesday, November 6 (Election Day). Because of this watch, she will not be permitted to leave the base, even for a few minutes to vote while the polls are open on Election Day. When she learns of this watch assignment, it is too late for her to make it to the early voting site by 6 p.m. on Friday, November 2. Under the rules that Ohio has established, Jones (as an active duty service member) will be permitted to cast her ballot by early voting on Saturday, Sunday, or Monday, although early voting for all other voters ended at 6 p.m. on Friday.

The plaintiffs in this case assert that according early voting rights to UOCAVA voters (especially military personnel) on Saturday, Sunday, and Monday before Election Day while denying that privilege to other voters violates the Equal Protection Clause of the 14th Amendment of the United States Constitution.[5] ROA and 14 other military associations[6] intervened in the lawsuit as defendants and filed a brief urging the judge to dismiss the lawsuit.

The intervenors are concerned about the effects of the adverse precedent if the District Court and potentially the 6th Circuit[7] accept the plaintiffs' basic premise that the Equal Protection Clause makes it unconstitutional for a state to make accommodations for active duty military personnel that are not made for all others. The Equal Protection Clause requires that like things are treated alike; it does not require that different things be treated alike. *Military*

service is different. Because of their service to our country, including the possibility of deployments or assignments on little or no notice, service members face problems in voting that civilians generally cannot even understand. Moreover, were it not for the sacrifices of military personnel, from the American Revolution to the Global War on Terrorism, none of us would have the opportunity to vote in free elections.

For example, the Servicemembers Civil Relief Act (SCRA) accords valuable rights to members of the armed forces on active duty, with regard to civil lawsuits and proceedings (in federal and state courts and administrative agencies) in which they may be defendants or plaintiffs. Let us assume that Lance Corporal (LCPL) Bob Williams (of Toledo) is on active duty in the Marine Corps in Afghanistan. Mary Jones sues LCPL Williams in Ohio state court. Because of his service to our country in a combat zone, LCPL Williams may be unaware that he has been sued, and the deadline for LCPL Williams to file an answer to Jones' complaint has passed. Jones has filed a motion for default judgment, based on LCPL Williams' failure to file an answer within the time permitted.

Under the SCRA, the state court judge is required to take several enumerated steps to ensure that LCPL Williams is aware of the lawsuit and has had a fair opportunity to present his side of the case. These SCRA rights only apply when the defendant against whom a default judgment has been sought is a member of the armed forces on active duty. A defendant who has failed to file a timely answer for some other reason has no such protection.

Is the SCRA unconstitutional because it accords special rights to active duty service members that are not accorded to civilians? We fear that the answer may be yes, *if the plaintiffs' basic premise is accepted.* That is why ROA and the other 14 military associations intervened in this lawsuit.

After giving the parties (including the intervenors) the opportunity to present evidence and make oral and written legal arguments, Judge Peter C. Economus took the case under advisement and then issued his decision on August 31, 2012. He found that the plaintiffs had showed a likelihood of success on the merits, and he granted a temporary injunction requiring the State of Ohio to conduct early voting, in all counties and for all eligible voters, through 6 p.m. on the Monday before Election Day.

Our concern is not with the remedy that Judge Economus has ordered.^[8] Our concern is with the adverse precedent that Judge Economus has created. By granting *any* relief, Judge Economus has necessarily accepted the plaintiffs' basic premise—that according privileges to military personnel that are not accorded to others violates the Equal Protection Clause. If Judge Economus had rejected this basic premise, he would have denied all relief, since federal judges are not authorized to change election procedures unless they first find that the established procedures are unlawful or unconstitutional.

The State of Ohio has appealed to the 6th Circuit. Because we are concerned about the adverse precedent that the District Court has created, ROA and the other 14 military association intervenors have joined the State of Ohio in appealing to the 6th Circuit. The appellate court has set an expedited briefing schedule. We will keep the readers informed of developments in this important case.

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 789 articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[2] Early voting is a system whereby registered voters are permitted to cast their ballots in person at the county courthouse or other designated locations in the weeks leading up to Election Day and is to be distinguished from absentee voting by mail, which is not affected by the Ohio lawsuit.

[3] Obama for America is President Obama's official reelection committee.

[4] UOCAVA is a federal statute enacted in 1986 and amended several times, most recently in 2009. UOCAVA is codified at title 42, United States Code, sections 1973ff and following (42 U.S.C. 1973ff *et seq.*). UOCAVA gives members of the uniformed services (Army, Navy, Air Force, Marine Corps, Coast Guard, commissioned corps of the Public Health Service, and commissioned corps of the National Oceanic & Atmospheric Administration) and Merchant Marine on active duty or in active service, as well as their voting-age family members, the right to register and vote by absentee process in primary, general, special, and run-off elections for federal office, whether they are within or outside the United States. UOCAVA also accords these voting rights to U.S. citizens of voting age who are outside the United States temporarily or permanently. The Ohio Legislature determined that local election officials need the weekend before Election Day to prepare for the important Election Day responsibilities, and that accommodating perhaps 100,000 early voters during that weekend would interfere with the preparation. On the other hand, accommodating perhaps 100 UOCAVA voters in early voting during that weekend would not significantly impinge on preparations. In view of this minimal impact and the special needs of UOCAVA voters, the Ohio Legislature determined that it was reasonable and warranted to make a special accommodation for a handful of UOCAVA voters that was not made for tens of thousands of civilian voters.

[5] Section 1 of the 14th Amendment (ratified in 1868) provides as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*" (Emphasis supplied.)

[6] The other 14 intervenors are the Military Officers Association of America, the National Guard Association of the United States, the Association of the United States Army, the Association of the United States Navy, the Marine Corps League, the National Association for Uniformed Services, the Non Commissioned Officers Association, the Army Reserve Association, the Fleet Reserve Association, the U.S. Army Ranger Association, AMVETS, the National Defense Committee, and the Military Order of the World Wars.

[7] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Ohio, Tennessee, Kentucky, and Michigan.

[8] If the Court of Appeals affirms the District Court's order, military personnel and family members will be permitted (along with all other voters) to vote by early voting until 6 p.m. on Monday, November 5.