

Federal Write-In Absentee Ballot

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

7.4—How a Service Member or Military Spouse can Vote

Q: I am a Soldier on active duty, currently serving in Afghanistan. I took your advice and applied for my absentee ballot, for the November general election, back in June, but now we are just 34 days away from the presidential election, and I still don't have my ballot. Here in Helmand Province, our mail is slow and intermittent. What do I do now?

A: I suggest that you go to <https://www.fvap.gov/uploads/FVAP/Forms/fwab2013.pdf> and complete the Federal Write-in Absentee Ballot (FWAB). Section 1973ff-2 of title 42 of the United States Code (42 U.S.C. 1973ff-2) provides for the FWAB—all states are required to process and count the FWAB. By federal law, the FWAB is limited to federal offices (President, United States Senator, and United States Representative). You mark this ballot by writing in the names of your favored candidates or by expressing a party preference (“Democratic nominee”

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 (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.

or “Republican nominee”) for each office. At <https://www.usa.gov/election-office> you can find your state’s election office website for state-wide voting guidance.

Federal law limits the FWAB to federal offices, but federal law is a floor and not a ceiling on your rights as a military voter. Some states permit you to use the FWAB to vote for non-federal offices as well.

Q: Casting my ballot for President, United States Senator, and United States Representative is certainly better than being wholly disenfranchised, but I am really interested in voting for our State House of Representatives. My older sister is running for that office, and the election is expected to be very close. If she loses by one vote and my ballot for her is not counted, I probably won’t get invited to her house for Christmas. Help!

A: I suggest that you go ahead and submit your FWAB now—doing so does not mean that you are giving up on your regular absentee ballot, which includes non-federal as well as federal offices. When you receive your regular ballot, you are permitted and indeed encouraged to mark it and send it in. Just include a note to the effect that you have already submitted the FWAB. If your marked regular ballot arrives back home in time, it will be counted and your FWAB will be set aside.

Whenever you receive your regular absentee ballot, even next summer, you should mark the ballot and send it back to your local election official (LEO) back home. You should also send the LEO a separate letter, in a separate envelope, complaining that your ballot was late. This ballot will not be counted, if received months after the election, but at least you can make the point that you wanted to vote for non-federal as well as federal offices and that you were prevented from doing so by the circumstances of your military service and by the LEO’s failure to get you your ballot on time.

Q: My good friend in my Army unit here in Afghanistan has not applied for an absentee ballot, but now that the election is just 34 days away he wants to vote. Is it too late for my friend to submit a completed FWAB?

A: Your friend needs to complete and submit the Federal Post Card Application (FPCA) and send it in along with this completed FWAB. The federal law provides as follows concerning the submission of the completed FWAB: “The Presidential designee [the Secretary of Defense, who has delegated this responsibility to the Director of the Federal Voting Assistance Program] shall prescribe a Federal write-in absentee ballot (including a secrecy envelope and mailing envelope for such ballot) for use in general, special, primary, and runoff elections for Federal office by absent uniformed services voters and overseas voters *who make timely application for* and do not receive State absentee ballots.” 42 U.S.C. 1973ff-2(a)(1) (emphasis supplied).

If your friend’s home state is applying this federal law literally and has not enacted a federal law that goes above the federal floor, your friend’s marked FWAB will not be counted if his request for a regular absentee ballot is received after the voter registration deadline, and that deadline

varies from 10 to 30 days before Election Day. However, many states have provided, by state law, for the military or overseas voter to submit the FWAB without first having submitted the FPCA. At this point your friend has nothing to lose by marking and completing the FPCA and the FWAB. If he does so, it is possible that his ballot will not count, but if he does not do so it is certain that his vote will not be recorded in 2012.

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-2 discussing Federal write-in absentee ballot in general elections for Federal office for absent uniformed service voters and overseas voters is located at 52 U.S.C. § 20303.

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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.

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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