

**LAW REVIEW<sup>1</sup> 12111**  
**November 2012 (Updated April 2022)**

## **Don't be Fooled by "Duffel Blog" Spoof**

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.

Three ROA members have sent me the blog entry copied below, from “Duffel Blog.” Those who sent me this piece apparently did not realize that “Duffel Blog” is a spoof communication, much like the newspaper called *The Onion*. Yes, some military personnel were disenfranchised this year, as is always the case, but the disenfranchisement of military voters did not affect the outcome of the presidential election.

The total number of military personnel on active duty is only 1.5 million, and President Obama defeated Governor Romney by about 3 million votes. Even if every service member voted, and voted for Romney, and was disenfranchised, enfranchising them now would only serve to cut the Obama margin in half.

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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).

**Military Absentee Ballots Delivered One Day Late,<sup>3</sup>**

**Posted by Fred Fleming on November 10, 2012 at 8:24am in General Discussion**

**Before you read this, be sure and take your blood pressure medicine..Maybe take a double dose.**

**Military Absentee Ballots Delivered One Day Late, Would Have Swung Election For Romney**

*by drew on November 7, 2012 · 370 comments*

**WASHINGTON, DC – Sources confirmed today that hundreds of thousands of military absentee ballots were delivered hours after the deadline for them to be counted, with preliminary counts showing that they would have overturned the vote in several states and brought a victory for Governor Mitt Romney.**

**Officials say the ballots were delivered late due to problems within the military mail system. Tracking invoices show the ballots sat in a warehouse for a month, then they were accidentally labeled as ammunition and shipped to Afghanistan. At Camp Dwyer, Marine Sergeant John Davis signed for them and was surprised at the contents.**

**“I told Gunny we got a bunch of ballots instead of ammo,” Davis told investigators earlier today. “He told me to file a report of improper delivery and that the chain of command would take care of it. We didn’t hear anything for three weeks. While we were waiting we came under fire so we dumped a bunch of them in the Hescoes. We didn’t dig those ones back out.”**

**After military officials realized the initial error, the ballots were then sent back to the U.S. but suffered a series of setbacks.**

**Twelve boxes of ballots were dropped overboard during delivery to the USS Kearsarge (LHD-3) in the Persian Gulf, then while the ship sailed to Bahrain, postal clerks allegedly pocketed whatever ballots they wanted.**

**The remaining absentee ballots were loaded onto a C-130, but the flight was delayed until November 1st so the crew could get tax free pay for the month. Once the ballots arrived stateside they were promptly mailed to each state’s counting facility, reaching their final destination on November 7th.**

**“It’s a shame,” Rear Admiral John Dawes said when asked for comment. “I expected a delay so I ordered that everyone cast their votes eight months ago. It’s really unfortunate that our mail system failed us and directly affected the course of history.”**

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<sup>3</sup>*Military absentee ballots delivered one day late, would have swung election for Clinton, Duffel Blog (Nov. 7, 2012), <https://www.duffelblog.com/p/military-absentee-ballots?s=r>.*

***Upon hearing the news, angry Republicans have begun a demand for a recount, but most military absentee voters have shrugged off the news, with many wondering whether the care packages their families sent six months ago were ever going to show up.***

***Read more: <https://www.duffelblog.com/p/military-absentee-ballots?s=r...>***

In 2000, in Florida, military absentee ballots played a decisive role. Under a 1982 federal court order that was still in effect in 2000, and is still in effect today, Florida is required to count, for federal offices, absentee ballots from outside the United States (including but not limited to APO and FPO addresses) that are postmarked or signed and dated not later than Election Day and received by the 10th day after Election Day.<sup>4</sup> In 2000, 2500 overseas ballots came in 1-10 days after Election Day and were counted under the 1982 court order. Among those 2500 ballots,

Bush picked up a net gain of 739. In the final count, Bush carried Florida by 537. But for those 2500 late-arriving ballots and the 1982 court order, Gore carried Florida by 202 votes and was elected President.

Of course, Election 2000 was a cliffhanger of historic proportions, while Election 2012 was only reasonably close. It is unlikely that we will see another cliffhanger of Election 2000 proportions during our lifetime.

But those who serve our country in uniform deserve to be able to cast ballots *that really do get counted*, regardless of where the service of our country has taken them, and without regard to the effect on the outcome of the election. In my 41 years of voting, I have voted for some candidates who received more than 90% and did not need my vote, and for some candidates who received less than 9% and did not much benefit from my vote. I want every one of my votes to count, every year, win or lose, cliffhanger or landslide.

I believe that most of today's active duty service members feel the same way. *Military personnel should not have to wait another 60 years to exercise a basic civil right that the rest of us take for granted.*

Sixty years ago, in June and July of 1952, the Subcommittee on Elections of the House Administration Committee, United States House of Representatives, conducted hearings on voting in the armed forces. The Honorable C.G. Hall, Secretary of State of Arkansas and President of the National Association of Secretaries of State, testified that most military personnel fighting the Korean War would likely be disenfranchised in the 1952 presidential election. Because of late primaries, ballot access lawsuits, and other problems, local election officials (LEOs) would not have ballots printed and ready to mail until a few days before Election

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<sup>4</sup>This court order was entered as a remedy for Florida's failure to get the absentee ballots mailed in time before the election, because of a September primary and an October runoff primary. In the years since 2000, the Florida Legislature has eliminated the runoff primary and has moved back the September primary to earlier in the year. Nonetheless, the 1982 court order remains in effect.

Day, in many cases. There simply would not be enough time for the absentee ballot to go from the LEO to the voter in Korea, and back, by Election Day.

The 1952 congressional report includes a copy of a letter to Congress, from President Harry S. Truman, dated March 28, 1952. In his letter, President Truman called upon the *states* to fix this problem, and he called upon Congress to enact *temporary* federal legislation for the 1952 presidential election. He wrote, “Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.”

Well, it did not work out that way. President Truman left office in January 1953 and the Korean War ground to an inconclusive halt in July 1953. The military voting issue fell off our national radar screen until November 2000, when late-arriving military absentee ballots played a crucial role in determining the outcome of the Florida nail-biter.

There have been enormous improvements in communications technology in the last six decades, but absentee voting is still being conducted essentially as it was in 1952, by shipping pieces of paper across oceans and continents by snail mail. As you can imagine, there are three time-consuming steps in absentee voting. First, the absentee ballot *request* must travel from the voter to the LEO. Second, the *unmarked* ballot must travel from the LEO to the voter. Finally, the *marked* ballot must travel from the voter to the LEO, perhaps thousands of miles away. Each of these steps can take weeks if snail mail must be used, but only seconds if secure electronic means have been authorized.

In 1952, President Truman promised that the states would have this problem solved by 1954. Finally, in 2009, Congress got tired of waiting on the states. Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), amending the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). As amended, UOCAVA now *requires* every state to mail out ballots to UOCAVA voters by the 45th day preceding the primary or general election. (For example, the 45th day preceding the 2012 general election was September 22, 2012.) Title 42, United States Code, section 1973ff-1(a)(8)(A) [42 U.S.C. 1973ff-1(a)(8)(A)]. But the fact that federal law requires that absentee ballots go out by the 45th day before Election Day does not necessarily mean that the ballots in fact go out that early.

There are more than 7,500 LEOs that administer absentee voting for federal elections. In most states, officials at the county level (or the parish level in Louisiana) administer absentee voting. In the New England states, Michigan, and Wisconsin, officials at the city, town, or township level administer absentee voting. State officials administer absentee voting centrally in Alaska, Maine, and the District of Columbia.

I invite the reader’s attention to the most eloquent opening paragraph of President Truman’s 1952 letter to Congress:

About 2,500,000 men and women in the Armed Forces are of voting age at the present time. Many of those in uniform are serving overseas, or in parts of the country distant from their homes. They are unable to return to their States either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in this election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve.

I respectfully submit that President Truman's words about the brave young men and women fighting the Korean War in 1952 apply equally to their grandsons and granddaughters, and great-grandsons and great-granddaughters, fighting the Global War on Terrorism today. Please bring these eloquent words to the attention of your LEO.

The 2012 election is over, and we are not going to change the outcome, at least not at the presidential level. But it is not too early to start planning for 2014 and 2016. We must ensure that the 2012 presidential election is that last election from which service members are effectively shut out.

Please contact your LEO *now*.<sup>5</sup> Now, is the best time, with the 2012 election in the rear view mirror, but before the LEO has put away the records of Election 2012 and turned his or her attention to other matters. Please ask your LEO to provide the following information:

1. When did your local election official (LEO) first send out absentee ballots for the 2012 general election?

By federal law, this should have been not later than the 45th day preceding Election Day (September 22, 2012). *See 42 U.S.C. 1973ff-1(a)(8)(A)*. That means section 1973ff-1(a)(8)(A) of title 42 of the United States Code.

1. How many ballots went out on that first day to active duty military personnel (INCONUS or OCONUS)? To military family members (INCONUS or OCONUS)? To U.S. citizens outside the U.S. (not including military personnel and family members)?
2. How many ballots went out AFTER that first day to military personnel? To military family members? To overseas voters?

We are trying to discern—is the problem that absentee ballots are not ready to go out sufficiently early? Or is the problem that service members and others wait too long to submit their absentee ballot requests?

1. Among these groups (military, military family, and overseas), how many marked ballots came back on time and were counted? How many came back late and were not

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<sup>5</sup>Your LEO may be the County Clerk, the County Registrar of Voters, the County Recorder, the County Board of Elections, the Town Clerk, etc. The titles vary from state to state, but you can figure it out.

counted? How many came back on time but were rejected for other reasons? (The voter's failure to sign the affidavit on the back of the ballot return envelope would be an example of a ballot that was rejected for a reason other than timeliness.) How many ballots never came back at all? How many unmarked ballots were returned by the Postal Service as undeliverable?

1. How many marked Federal Write-in Absentee Ballots (FWABs) did the LEO receive? How many of those marked FWABs did the LEO count? For those FWABs that were received but not counted, what were the reasons for rejection of the marked FWAB?

Please get the answers in writing and send them to me at ROA. My e-mail address is [SWright@roa.org](mailto:SWright@roa.org). Our postal address is 1 Constitution Ave. NE Washington, DC 20002.

Contacting the LEO serves two purposes. First, we need the data, in order to determine where this problem has been solved and where there is still room for improvement. Second, and more important, we need your LEO to understand that *someone is watching* to ensure that military personnel have a reasonable opportunity to vote. In most states, the election official is also an elected official, so that official will be interested in hearing from you and will be motivated to respond to your concerns.

#### **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.

#### **Please join or support ROA**

This article is one of 1800-plus “Law Review” articles available at [www.roa.org/page/lawcenter](http://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](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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