

LAW REVIEW¹ 13154

Remove the “Race” Question from the PPCA Form

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The Federal Voting Assistance Program (FVAP) in the Department of Defense (DOD) has recently released the new version of the Federal Post Card Application (FPCA). I am most disappointed that the new form continues the obnoxious “race” question.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)³ gives members of the uniformed services and their voting-age spouses and family members (within or outside our country) and U.S. citizens outside the United States the right to register and vote by absentee

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.

³UOCAVA is codified in title 42 United States Code, section 1973ff through 1973ff-7 (42 U.S.C. §§ 1973ff—1973ff-7).

process in primary, general, special, and runoff elections for federal office. Federal responsibilities under UOCAVA have been delegated to the Director of FVAP.

One of the most important responsibilities of FVAP is to promulgate and make available (electronically and by old-fashioned paper forms) those forms that UOCAVA voters are to use when registering to vote and applying for absentee ballots. The most basic form is the Federal Post Card Application (FPCA).⁴ A UOCAVA voter is permitted to use the FPCA as a simultaneous voter registration application and absentee ballot request.⁵ State and local election officials all over the country are required by federal law to accept the FPCA form.⁶

FVAP has recently published a new version of the FPCA, and the Office of Management and Budget has approved this new form, which will be distributed and utilized during the 2014 election cycle and thereafter. I am most disappointed that the new version of the FPCA, in item 4, still asks the voter to provide his or her “race.” Immediately below the blank for the answer to this question, the words “see instructions” appear. Item 4 of the instructions contains the following sentence: “Also, many states ask that you provide your race or ethnic group in order to demonstrate that they are complying with the Voting Rights Act and the National Voter Registration Act.”⁷

I recall that 30 years ago I had a lengthy conversation with Henry Valentino, then the FVAP Director, and I objected to the inclusion of the “race” question on the 1980s version of the FPCA. Mr. Valentino told me that several states (mostly in the South) were required to report to the United States Department of Justice on the racial make-up of the electorate, including absentee voters, and that the race question was included on the FPCA simply to enable states to meet this federal reporting requirement.

Mr. Valentino also assured me, “Don’t worry, Sam. The answer to the ‘race’ question will *never* be used to determine the eligibility of a specific person to vote by absentee ballot. The race question is for statistical purposes only.”

In 1996, in South Texas, we saw happen exactly what Mr. Valentino had assured me would *never* happen. I invite the reader’s attention to *Casarez v. Val Verde County*, 957 F. Supp. 847 (W.D. Tex. 1997). This federal lawsuit arose out of the very close election for Sheriff and County Commissioner (Precinct 1) in November 1996 in Val Verde County (county seat Del Rio). When only votes cast on Election Day were counted, Democrats won narrowly for those two offices.

⁴This form should be renamed. Since 2003, it is no longer. Postcard, thankfully, but a form that is folded and placed in a sealed envelope. At least for the last decade, FVAP has not been asking UOCAVA voters to put personal information (date of birth, Social Security number, home address, etc.) on a postcard.

⁵42 U.S.C. § 1973ff(a)(2).

⁶*Id.* §1973ff-1(a)(4).

⁷I have reviewed both the Voting Rights Act of 1965 and the National voter Registration Act of 1993 (“Motor Voter”), and I did not find any provision requiring the states to report to the Federal Government on the race of voters.

There were exactly 800 military absentee ballots. When those 800 absentee ballots were added to the vote totals, Republicans won for Sheriff and County Commissioner.

Texas Rural Legal Aid (TRLA), a Legal Services Corporation grantee with a history of political litigation in the guise of “legal aid” for the poor, filed suit against the county in federal court, alleging that the 800 military absentee ballots were illegal because those 800 military personnel were not “real residents” of the county (according to TRLA) and because they “diluted Hispanic votes.” TRLA established that exactly 95% of the military absentee ballots (760 of the 800) were cast by non-Hispanic whites, in a county with a heavily Hispanic population.

How, you may ask, was TRLA able to establish the race and ethnicity of these military absentee voters? Easy—they examined the completed FPCA forms on file in the office of the County Clerk of Val Verde County.

Judge Fred Biery agreed with the obnoxious TRLA argument that these active military personnel, who were protecting the rights that we all enjoy, were not entitled to vote because they were absent from the county, in the service of our country, and because their races and ethnicities were different from that of most county residents. In the aftermath of this lawsuit, I personally drafted and pushed for the enactment of an amendment to the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), an important law that was originally enacted in 1917, to protect the civil rights of the “doughboys” and “doughgirls” who were called to the colors (by voluntary enlistment, by draft, or by mobilization from the nascent National Guard, Army Reserve, Naval Reserve, and Marine Corps Reserve) to fight the “war to end all wars.”

The amendment that I drafted was finally enacted in 2001. In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), a long-overdue rewrite of the SSCRA. The language that I drafted was carried over into the SCRA without change. I am referring to section 595(a)(1) of the Appendix to title 50 of the United States Code [50 U.S.C. App. 595(a)(1)]. That language provides: “For the purposes of voting for any Federal office … or a State or local office, a person who is absent from a State in compliance with military or naval orders shall not, solely by reason of that absence—be deemed to have lost a residence or domicile in that State, *without regard to whether or not the person intends to return to that State.*” The italicized language is the language that I drafted and that Congress added in 2001. This language was added specifically for the purpose of overruling Judge Fred Biery’s obnoxious decision.

Today, there are millions of Americans (including our President) who are of mixed race and who may be puzzled as to how to respond to the “race” question on a voting form, especially when the form only has room for a few characters in this box. Race is not a relevant consideration when an election official is deciding on an individual’s eligibility to register to vote or to obtain an absentee ballot. I call upon Secretary of Defense Charles T. Hagel to direct the FVAP to remove the “race” question from the new FPCA form.

Update – March 2022⁸

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 sections cited throughout the article can be found at:

42 U.S.C. § 1973ff discussing Federal responsibilities can be found at 52 U.S.C. § 20301.

42 U.S.C. § 1973ff-1 discussing state responsibilities can be found at 52 U.S.C. § 20302.

FPCA

In 2017, the Federal Voting Assistance program (FVAP) in the Department of Defense (DOD) worked on a new version of the FPCA form. In the new version, which is now in place today, the FVAP eliminated the race question.⁹

SCRA

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.¹⁰ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 595 discussing enforcement of storage liens can be found at 50 U.S.C. § 4025.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.¹¹

⁸Update by Second Lieutenant Lauren Walker, USMC.

⁹See Samuel F. Wright, *New FPCA Form Eliminates the Obnoxious Race Question*, ROA LAW REVIEW 17021 (Mar. 2017) (provides a detailed discussion on the change to the FPCA form).

¹⁰*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited Mar. 10, 2022).

¹¹Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

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ROA is almost a century old—it was established on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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.

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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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¹²Congress recently established the United States Space Force as the 8th uniformed service.