

## **Military Voting in South Carolina Primary**

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.

On February 18, 2014, Mr. Bruce Carroll of York, South Carolina filed a formal complaint with the United States Department of Justice (DOJ), alleging that South Carolina is violating the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) in the way that it is conducting this year's primary for United States Senator and United States Representative.

Congress enacted UOCAVA in 1986, consolidating the provisions of the Federal Voting Assistance Act of 1955 (applying to military personnel and their family members) and the Overseas Citizens Voting Rights Act of 1975 (applying to U.S. citizens outside our country). UOCAVA gives active duty members of the uniformed services (Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration) and the Merchant Marine and their voting age family members the right to register and vote by

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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).

absentee process in primary, general, special, and runoff elections for federal office (President, United States Senator, and United States Representative). Uniformed service members and family members have the right to vote under UOCAVA whether they are within or outside the United States. UOCAVA also gives the same right to vote to U.S. citizens outside the United States temporarily or permanently.

For as long as military personnel have been permitted to vote at all, many and in some cases most of them have been effectively disenfranchised. Because of late primaries, ballot access lawsuits, and other problems, local election officials (LEOs) often do not have absentee ballots printed and ready to mail until a few days before Election Day. For the overseas voter (military or civilian), there just is not enough time for the ballot to go from the LEO to the voter and back by Election Day, even if the overseas voter applied for his or her ballot months in advance.

Prior to 2009, UOCAVA gave military and overseas citizens the right to vote in federal elections (including primaries, runoffs, and special elections) but it did not mention a specific number of days of required ballot transmission time. Nonetheless, several courts have held that if the ballots are not mailed in sufficient time to enable the UOCAVA voter to return the ballot in time to be counted the federal law has been violated, and appropriate relief might include a federal court order extending the deadline for the receipt of the absentee ballot mailed in from outside our country.

For example, 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 received up to ten days after Election Day. Late-arriving overseas ballots played a critical role in the Florida-2000 presidential election cliffhanger.<sup>3</sup>

In 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), which amended UOCAVA in several important ways. The most important 2009 amendment was to add an explicit requirement that every state mail out ballots at least 45 days before any federal election, including primaries, runoff primaries, and special elections, as well as the biennial general election.<sup>4</sup>

South Carolina is one of a handful of states (mostly in the South) that require a majority (as opposed to a mere plurality) in the primary to win a party nomination. Whenever there are three or more candidates in the primary, it is possible that the candidate with the most votes

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<sup>3</sup>Please see Law Review 23 (March 2001). I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 1,014 articles about military voting rights, reemployment rights, and other military-legal matters. You will also find 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. We added 169 new articles in 2013.

<sup>4</sup>See 42 U.S.C. 1973ff-1(a)(8)(A). The citation means that you can find this provision at section 1973ff-1(a)(8)(A) of title 42 of the United States Code.

will come up short of 50%. When this happens in South Carolina, a runoff primary is held between the top two candidates.

Senator Lindsey Graham is South Carolina's senior senator. He was elected in 2002 and reelected in 2008 and is seeking reelection this year. There are at least five Republican candidates challenging him in the primary, so it is likely that no candidate will receive a majority. If that happens, there will be a runoff between the top two candidates. The problem is that in South Carolina the runoff primary is held just two weeks after the first primary. This compressed schedule guarantees that South Carolina will violate UOCAVA and will disenfranchise overseas South Carolinians in the runoff primary. This is the gist of Mr. Carroll's complaint to DOJ. I think that his complaint is legally and factually sound and that DOJ will act on it.

Last year, Senator James DeMint of South Carolina resigned to become the President of the Heritage Foundation. The Governor appointed Representative Tim Scott to be the interim Senator. That appointment created a vacancy in South Carolina's First Congressional District.

The Governor set the schedule for the special election to fill the vacancy, and the election schedule she set guaranteed that South Carolina would violate UOCAVA in the three 2013 federal elections. The primary was held less than 45 days after the deadline for candidates to qualify for the ballot. The runoff primary was held just 14 days after the first primary. The special election was held less than 45 days after the runoff primary.

UOCAVA requires DOJ to file an annual report to Congress about its UOCAVA enforcement actions.<sup>5</sup> On page 4 of the 2013 DOJ Report, there are three paragraphs about South Carolina's non-compliance with UOCAVA in 2013:

"On March 22, 2013, the Department [DOJ] reached an agreement with South Carolina to ensure that UOCAVA voters were able to receive and return their ballots in time for them to be counted in the State's May 7, 2013 special general election for the First Congressional District. Because a special primary runoff election for the Republican nomination was held on April 2, 2013, a final ballot with the final list of candidates for the May 7, 2013 special election could not be transmitted to UOCAVA voters by the 45-day deadline of March 23, 2013.

Under the agreement, the State agreed to transmit a special ballot to UOCAVA voters on or before March 23, 2013. The ballot devised by the State contained the two Republican Party candidates in the runoff election and the other party nominees, and an option of voting a straight Republican ticket or voting for a write-in candidate. Additionally, the State agreed to transmit, by expedited means, the final special general election ballot to all UOCAVA voters as soon as the results of the runoff were certified on April 5, 2013, and to inform voters of the option to return their ballots by express delivery at no cost

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<sup>5</sup>42 U.S.C. 1973ff-4(b).

to the voters. The State agreed to develop instructions, and notice and ballot counting procedures, to effectuate the voting options for UOCAVA voters in the special election.

In the letter confirming the agreed to procedures, the Department urged South Carolina to seek a permanent legislative solution to ensure that the special election calendar established by state law was compliant with UOCAVA in all circumstances.”

No such permanent legislative solution has been enacted in South Carolina. The Honorable Alan Wilson, Attorney General of South Carolina and a Lieutenant Colonel in the Army Reserve, is working with the South Carolina Legislature and Election Commission to find a solution that will give military and overseas South Carolinians a reasonable opportunity to participate in the nomination and election of the public officials who will decide when and where they will fight and with what compensation and equipment.

I want to hear from you if you are on active duty and domiciled in South Carolina but serving elsewhere, and if you fear that you will be effectively disenfranchised in a runoff primary held just 14 days after the first primary. My e-mail is [SWright@roa.org](mailto:SWright@roa.org).

#### **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 sections 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.

42 U.S.C. § 1973ff-4 discussing enforcement can be found at 52 U.S.C. § 20307.

#### *Electronic means of voting*

Beginning in 2020, South Carolina began allowing military and overseas citizens to vote by absentee ballot through an online portal.<sup>6</sup> Through this new online portal, South Carolina UOCAVA voters provide their name, date of birth, and PIN number given to them by the election official, to access the ballot.<sup>7</sup>

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<sup>6</sup>Karen Jowers, *Another state adds online absentee voting option for military and overseas US citizens* (Sept. 16, 2020), <https://www.militarytimes.com/pay-benefits/2020/09/16/another-state-adds-online-absentee-voting-option-for-military-and-overseas-us-citizens/>.

<sup>7</sup>*Id.*

UOCAVA voters may request an absentee ballot by using the Electronic Voting Accessibility Tool (EVAT).<sup>8</sup> If you are already a designated UOCAVA voter in EVAT, you can access your ballot through EVAT.<sup>9</sup> It will be available no later than 45 days prior to the election.<sup>10</sup> If you are not a designated UOCAVA voter, EVAT can assist you through completing and uploading your Federal Post Card Application (FPCA).<sup>11</sup> You can also get the FPCA from the Federal Voting Assistance Program website.<sup>12</sup>

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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.

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<sup>8</sup>*Military and Overseas Citizens*, SOUTH CAROLINA ELECTION COMMISSION, <https://info.scvotes.sc.gov/eng/evat/login.aspx> (last visited April 10, 2022).

<sup>9</sup>*South Carolina*, ELECTION PROTECTION, <https://866ourvote.org/state/south-carolina/> (last updated Mar. 2022).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

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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