

LAW REVIEW¹ 143

Standby Federal Ballot if You Do Not Receive Your Regular Absentee Ballot

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

7.4—How a Service Member or Military Spouse Can Vote

Q: On Independence Day, I completed my federal post card application (FPCA) and mailed it to my local election official. Now the election is fast approaching, time is running out for returning a ballot, but I still do not have my ballot. I am on a ship in the middle of the Pacific Ocean, and I am concerned that if the ballot does not arrive very soon I will not be able to get my marked ballot back to my hometown by Election Day. Help!

A: This is exactly the situation for which the Federal Write-in Absentee Ballot (FWAB) was designed. That ballot is provided for in Title 42, United States Code, section 1973ff-2 (42 U.S.C. 1973ff-2). This has been the law since 1986, but this special federal fallback ballot has not been well known within the military, until this year.

You should obtain an FWAB from your ship's voting assistance officer (VAO). Mr. Charles Abell, the deputy assistant secretary of defense for Personnel & Readiness, has stated on several

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.

occasions that FWABs and FPCAs will be prepositioned in more than adequate numbers on all ships and at all overseas commands this year. If your ship does not have FWABs on board, send an e-mail today to Ms. Polli Brunelli, the director of DoD's Federal Voting Assistance Program (FVAP). Her e-mail is brunellip@fvap.ncr.gov.

The FWAB is not limited to your state, and it is not limited to this year. The ballot is limited to federal offices—president, senators, and representatives. (It is possible that there is no Senate race in your home state this year.) You mark the ballot by writing in the names of your favored candidates for those three offices. If you do not know the name of the candidate for whom you wish to vote for the Senate or House of Representatives, you can vote for “Republican nominee” or “Democratic nominee.”

After you mark the ballot, mail it to the same local election official to whom you already mailed your FPCA. See your ship’s VAO to obtain the FWAB—he or she will also show you the 2004 edition of the *Voting Assistance Guide*, biennially published by DoD as the basic reference for military voters and VAOs. The *Guide* is also available on the FVAP Web site, www.fvap.gov.

Q: I noticed that the FPCA is available on the FVAP Web site. What about the FWAB?

A: Because the FWAB is an *actual ballot*, not just an application for a ballot, it is not available on any Web site. It is necessary to use the *actual federal form* printed by the Government Printing Office (GPO). And photocopying the official federal form will not work, either. I certainly hope that an adequate supply of FWABs has been prepositioned on your ship well in advance of the election.

Q: If I mark my FWAB and put it in the mail to my local election official today, and if I receive my regular absentee ballot tomorrow, am I permitted to complete and send in the regular absentee ballot?

A: Yes, and you are encouraged to do so. The regular absentee ballot contains all offices, not just federal offices, and it contains names of candidates, not just titles of offices. “An overseas voter who submits a Federal write-in absentee ballot and later receives a State absentee ballot may submit the State absentee ballot. The Presidential designee [FVAP director] shall assure that the instructions for each Federal write-in absentee ballot clearly state that an overseas voter who submits a Federal write-in absentee ballot and later receives and submits a State absentee ballot should make every reasonable effort to inform the appropriate State election official that the voter has submitted more than one ballot.” [42 U.S.C. 1973ff-2(d).] If your regular ballot arrives in time to be counted, your FWAB will be set aside and not counted. [42 U.S.C. 1973ff-2(b)(3).]

Q: My brother is a junior officer in the Army. He is currently in Iraq, but he and his unit are scheduled to redeploy to their home base (Fort Bragg, N.C.) sometime in mid-October. If he does not receive his regular absentee ballot before departing Iraq, is he permitted to submit an FWAB from Fort Bragg?

A: Under current law, no. “A Federal write-in absentee ballot of an overseas voter shall not be counted ... if the ballot is submitted from any location in the United States.” [42 U.S.C. 1973ff-2(b)(1).]

You have put your finger on a deficiency in this federal law, and I strongly suggest that Congress be asked to address this deficiency next year. When this law (the Uniformed and Overseas Citizens Absentee Voting Act) was enacted in 1986, Congress had in mind the Cold War paradigm of some military personnel permanently stationed outside the country and a much larger group serving within the country.

During the global war on terrorism, most military units have home bases within the United States, and they deploy to global hot spots for a year or more, then redeploy to the home base. As a result, there is no longer a clear distinction between CONUS and OCONUS military personnel assigned, if there ever were such a distinction. Congress should amend 42 U.S.C. 1973ff-2 to permit a member of the armed forces to submit the FWAB from within the United States.

I can think of another scenario where permitting a service member to submit the FWAB from within our country would be most useful. Think of a sailor on a nuclear submarine. He needs to cast and mail his absentee ballot before deploying, because nuclear submarines routinely remain submerged for 60–90 days at a time. But these submarines are based within the United States, in places like Connecticut, Georgia, and Washington state. The FWAB would be much more useful if the law were amended to permit its use within our country.

**Military title used for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government.*

Update – April 2022

UOCAVA Location

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 absent uniformed services voters and overseas voters can be found at 52 U.S.C. § 20303.

FWAB

The FWAB is now available online. You may print a blank FWAB from the Federal Assistance Voting Program or you may use another online source to do so.³

Additionally, with the passage of the national Defense Authorization Act of FY2005 in 200, the FWAB may now be used by *all* absent Uniformed Service voters both inside and outside the United States.

Director of FVAP

Mr. David Beirne currently serves as Director of the Federal Voting Assistance Program.⁴

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This article is one of 1800-plus “Law Review” articles available at 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.

³FVAP.Gov, <https://www.fvap.gov> (last visited Apr. 28, 2022). The link for the fillable FWAB is <https://www.fvap.gov/uploads/FVAP/Forms/fwab.pdf?searchHint=true>.

⁴FVAP Leadership, FVAP.Gov, <https://www.fvap.gov/info/about/leadership> (last visited Apr. 28, 2022).

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:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002