

## LAW REVIEW<sup>1</sup> 15024

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### Military Voting under UOCAVA

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7.1—Election officials must get the absentee ballots out in time for the service member to vote.

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#### Who is eligible to vote under UOCAVA?

In the Department of Defense (DOD) there is an office called the Federal Voting Assistance Program (FVAP). This office is responsible for assisting persons who are eligible to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>3</sup> UOCAVA requires each

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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).

<sup>3</sup>UOCAVA is a federal statute that was enacted in 1986, consolidating the Federal Voting Assistance Act of 1955 and the Overseas Citizens Voting Rights Act of 1975. Until recently, UOCAVA was codified in title 42 of the United States Code. The Code was recently reorganized, and UOCAVA is now codified in title 52, at sections 20301 through 20311 (52 U.S.C. 20301-20311).

state to permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in primary, general, special, and runoff elections for federal office.<sup>4</sup> An absent uniformed services voter is a member of one of the seven uniformed services<sup>5</sup> on active duty who, because of such duty, is away from the place of residence where he or she is otherwise eligible to vote.<sup>6</sup> A member of the Merchant Marine also qualifies as an “absent uniformed services voter” if he or she is away from the place of his or her place of residence because of such service.<sup>7</sup> The term “absent uniformed services voter” also includes the spouse or dependent of a uniformed services member or Merchant Marine member who is absent from his or her place of residence because of the service of the uniformed services or Merchant Marine member and because the spouse or dependent is accompanying the service member.<sup>8</sup>

UOCAVA also gives the “overseas voter” the right to register by absentee process and vote by absentee ballot in primary, general, special, and runoff elections for federal office.<sup>9</sup> An overseas voter is a U.S. citizen of voting age who is outside the United States<sup>10</sup> either temporarily or permanently.<sup>11</sup>

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<sup>4</sup>52 U.S.C. 20302(a)(1).

<sup>5</sup>The seven uniformed services are the 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 & Atmospheric Administration. 10 U.S.C. 101(a)(5).

<sup>6</sup>52 U.S.C. 20310(1)(A). The service member need not be outside the United States or even outside the state of his or her domicile (legal residence). For example, Josephine Smith graduated from high school in Arlington, Virginia in 2009 and soon thereafter joined the Navy. She remains on active duty and is currently serving in Norfolk, 200 miles away from her Arlington home. She is an “absent uniformed services voter” under UOCAVA and is eligible to vote by absentee ballot, under UOCAVA, in primary, general, special, and runoff elections for federal office (President, U.S. Senator, and U.S. Representative).

<sup>7</sup>52 U.S.C. 20310(1)(B).

<sup>8</sup>52 U.S.C. 20310(1)(C).

<sup>9</sup>52 U.S.C. 20302(a)(1).

<sup>10</sup>For UOCAVA purposes, the term “United States” when used in a geographic sense refers to the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and American Samoa. 52 U.S.C. 20310(8).

<sup>11</sup>52 U.S.C. 20310(5). The person who is outside the United States temporarily (like a person on a three-year job assignment in Saudi Arabia) and who intends to return to the state at the end of the temporary absence is likely eligible, under state law, to vote by absentee ballot for all offices, including state and local offices that are not covered by UOCAVA. A person who is outside the United States indefinitely (even for many decades) and who has no present intent to return to the state is nonetheless eligible, under UOCAVA, to vote for federal offices. Voting *for federal offices only* under UOCAVA does not affect the determination of the person’s residence or domicile for purposes of federal, state, and local taxes. 52 U.S.C. 20309. Voting a full ballot, including state and local offices not covered by UOCAVA, can probably be utilized by the state to establish that the individual was domiciled in the state during the relevant year and is thereby required to pay state income tax. *See Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (Maryland Court of Appeals 1973). *See generally* Law Review 11112 (December 2011).

## Applying for, receiving, marking, and returning the ballot

If you are a UOCAVA voter (military or civilian, within or outside the United States), you should utilize the Federal Post Card Application (FPCA) to register to vote and request an absentee ballot. By federal law, your state *must* accept the completed FPCA as a simultaneous voter registration application and absentee ballot request.<sup>12</sup>

If you are a UOCAVA voter, it is most important that you use the FPCA form, as opposed to a state absentee ballot request form, especially if you are not already registered to vote in the traditional way. For example, Joe Adams is a Lance Corporal (E-3) in the Marine Corps and is currently serving at a forward operating base in Afghanistan. He is only 19, and he has never voted or registered to vote. If Joe uses the standard state absentee ballot request, the local election official (LEO) will not send him a ballot, because she will not find Joe's name on the registered voters list. If Joe uses the FPCA, the LEO must treat the completed form as a simultaneous voter registration application and absentee ballot request and must send Joe an absentee ballot, although he has not previously voted or registered to vote.

It is still possible to obtain the paper FPCA form from the Voting Assistance Officer (VAO) of a military unit or at a U.S. embassy or consulate outside the United States. But in the second decade of the 21st Century a much better way is to utilize the FVAP website, [www.fvap.gov](http://www.fvap.gov). You will find a "wizard" that will help you to complete the FPCA in a way that is complete, correct, and legible. The FVAP website will also provide you with the signing instructions and the address where you are to mail your completed FPCA. In many states, it is possible to submit the completed FPCA electronically, through the FVAP website.

It is also possible to complete and submit the FPCA on the website established and maintained by the Overseas Vote Foundation (OVF). You can find that site at [www.overseasvotefoundation.org](http://www.overseasvotefoundation.org). You may find the OVF website easier to use.

After you receive your unmarked absentee ballot, either electronically or through the mail, you mark the ballot, place it in the unmarked inner envelope, place the sealed inner envelope within the outer envelope, seal the outer envelope, complete the affidavit on the back of the outer envelope, and mail the sealed outer envelope back to the LEO back home.<sup>13</sup> The purpose of the double envelope system is to maintain the secrecy of the ballot during the vote-counting process. The election officials first review the outer envelopes, including the completed affidavit on the back of each envelope. The "do we count" decision is made before the outer envelopes are opened. When it is decided that a ballot will be counted, the outer envelope is opened. The still-sealed inner envelope is placed in a pile, to be counted, and the opened outer envelopes are removed from the room. When the election officials open the inner envelopes

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<sup>12</sup>52 U.S.C. 20302(a)(4).

<sup>13</sup>Only a handful of jurisdictions permit the submission of the marked absentee ballot by e-mail or other electronic means. Unfortunately, no system that relies on the Internet can possibly be secure.

and count the ballots, they have no way of identifying a ballot with a specific voter, and ballot secrecy is maintained.

In most states, the marked ballot must be *actually received* (not just postmarked) by the close of the polls on Election Day, if the ballot is to be counted. There are always absentee ballots that arrive by mail in the days following Election Day, and those ballots normally are not counted.

### **The problem of adequate ballot transmission time**

For overseas voters, military and civilian, *ballot transmission time* has always been a problem. As you can appreciate, there are three time-consuming steps in absentee voting. First, the absentee ballot *request* must travel from the voter to the LEO<sup>14</sup> perhaps thousands of miles away back home.<sup>15</sup> Second, the *unmarked* absentee ballot must travel from the LEO to the voter. Finally, the *marked* absentee ballot must travel from the voter to the LEO. Each of these steps can take weeks if “snail mail” must be utilized but only seconds if secure electronic means were authorized.

Even in the second decade of the 21st Century, it is not possible to transmit mail (including absentee ballots) to and from forward operating bases in combat zones or Navy, Coast Guard, and Merchant Marine ships at sea on a daily basis. LEOs need to have absentee ballots printed and ready to mail at least 45 days before Election Day, so that the UOCAVA voter will have sufficient time to receive the ballot, mark it, and return it on time to be counted, no matter where the voter’s service to our country has taken him or her.

Late primaries,<sup>16</sup> ballot access lawsuits, and other problems all too often delay the printing and mailing of absentee ballots and result in the disenfranchisement of the brave young men and women who are away from home and prepared to lay down their lives in defense of our country. In 2009, Congress amended UOCAVA, and now each state is *required* by federal law to transmit absentee ballots to UOCAVA voters at least 45 days before any primary, general, special, or runoff election for federal office.<sup>17</sup>

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<sup>14</sup>There are more than 7,600 LEOs who administer absentee voting for federal elections. Only Alaska, Maine, and the District of Columbia administer absentee voting centrally at the state level. In most states, absentee voting is administered by officials at the county level (County Clerk, County Board of Elections, etc.), or parishes in Louisiana. In the New England states and Michigan and Wisconsin, absentee voting is administered by cities, towns, and townships, which are smaller and more numerous than counties. There are more than 1,800 LEOs in Wisconsin and more than 1,500 in Michigan.

<sup>15</sup>The request for an absentee ballot, by a UOCAVA voter, can be made at any time during the calendar year of the election. UOCAVA specifically supersedes and overrides state “not earlier than” rules for the submission of the absentee ballot request. See 52 U.S.C. 20306.

<sup>16</sup>Until the results of the primary have been officially certified, the LEO cannot *print* general election ballots, much less mail them out.

<sup>17</sup>52 U.S.C. 20302(a)(8). Of course, this assumes that the voter has his or her absentee ballot application in by such 45th day before Election Day.

After Congress amended UOCAVA in 2009, several states amended their election laws and moved the primary date back to earlier in the year, in order to make it possible for LEOs to meet the 45-day rule. In other states, federal court orders required states to move their primaries back to earlier in the year.

In New York, the United States District Court for the Northern District of New York ordered the state (over its strenuous objections) to move the primary back from September to June. See *United States v. State of New York*, 2012 U.S. Dist. LEXIS 10101 (N.D.N.Y. Jan. 27, 2012); 2012 U.S. Dist. LEXIS 16126 (N.D.N.Y. Feb. 9, 2012). The problem is that the legislature then voted to bifurcate the primary and to hold the primary for non-federal offices at the traditional September date. As a result, ballots for federal offices (U.S. Senator and U.S. Representative) went out in plenty of time in the 2014 general election, but ballots for all non-federal offices (which were sent out separately) were very late.<sup>18</sup>

### **The Federal Write-in Absentee Ballot**

UOCAVA also provides for the Federal Write-in Absentee Ballot (FWAB).<sup>19</sup> A UOCAVA voter (military or civilian) who has made a proper and timely application for the regular absentee ballot, and who has not received it in time to mark it and return it in time to be counted can obtain the FWAB from a military or State Department VAO or from [www.fvap.gov](http://www.fvap.gov) or [www.overseasvotefoundation.org](http://www.overseasvotefoundation.org) and use this ballot to vote for federal candidates in the general election. The voter marks the ballot by writing in the names of his or her favored candidates for federal offices (President, U.S. Senator, and U.S. Representative) or by expressing a party preference, like “Democratic nominee” or “Republican nominee.” It is often possible to obtain the names of candidates, and their party affiliations, on the FVAP website, [www.fvap.gov](http://www.fvap.gov).

The FWAB is better than nothing but far from ideal. The FWAB should be regarded only as a fall-back ballot. The availability of the FWAB should not be seen as relieving the state and the LEO of their obligation to transmit regular absentee ballots in a timely manner, as required by UOCAVA.

Let us assume that Lance Corporal Jessica Jones (at a forward operating base in Afghanistan) has applied for her 2016 general election ballot months in advance of November 2016, but by early October she still has not received her regular absentee ballot in the mail, so she marks and submits the FWAB. Two days after mailing the marked FWAB to her home town LEO, she receives the regular absentee ballot in the mail. In this situation, Lance Corporal Jones is permitted and indeed encouraged to mark and return the regular absentee ballot, although she has already mailed in her FWAB. If both her regular ballot and her FWAB arrive on time to be

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<sup>18</sup>For example, in Suffolk County the ballots for federal offices went out on September 15, 2014, which was 50 days before Election Day. The non-federal ballots went out on October 3, which was just 32 days before Election Day. Please see Law Review 14086 (October 2014).

<sup>19</sup>52 U.S.C. 20303.

counted, it is the responsibility of the LEO to set aside the FWAB and count the regular absentee ballot.

### **Relationship between UOCAVA and state law**

UOCAVA is a floor and not a ceiling on the voting rights of military and overseas citizens. State law can give these people *greater or additional rights*, like the right to vote in non-federal elections, but state law cannot take away the rights that Congress conferred when it enacted UOCAVA. Under the Supremacy Clause of the United States Constitution, a federal statute like UOCAVA supersedes and overrides conflicting state statutes and even state constitutions. The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>20</sup>

### **Does UOCAVA require states to elect national convention delegates by primary rather than convention or caucus?**

In 2016, both major parties will conduct an open presidential nominating process, with no incumbent seeking reelection in either party. Most states will conduct presidential primaries, and in such a primary the UOCAVA requirement that absentee ballots go out at least 45 days before Election Day will be in force. But several states (including important early states like Iowa) will elect 2016 Convention delegates by means of a caucus or convention, rather than a primary. Time, distance, and military regulations preclude the active duty service member from appearing in person at such a caucus or convention.

Does UOCAVA forbid a state from electing its national convention delegates by caucus or convention? An argument to that effect can be made, but I think that such an argument would not prevail. When Congress enacted UOCAVA in 1986 and amended it in 2009, it was well aware that some states elect convention delegates by caucus or convention, rather than primary. If Congress had intended to require all states to conduct a primary to elect national convention delegates, it could have and should have made such intent explicit in the text of UOCAVA, or at least in the legislative history.

The two major political parties adopt rules at their quadrennial national conventions, governing the presidential nomination process four years later. At its 2012 Convention in Tampa, the Republican Party adopted a new rule requiring the state party organizations to give active duty

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<sup>20</sup>U.S. CONST, art. VI, cl. 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

military personnel and wounded warriors a reasonable opportunity to vote in the 2016 presidential nomination process.

New Rule 15(c)(7) provides: “Any process authorized or implemented by a state Republican Party for selecting delegates and alternate delegates or for binding the presidential preference of such delegates *shall* use every means practicable to guarantee the right of active duty military personnel and individuals unable to attend meetings due to injuries suffered in military service the opportunity to exercise the right to vote in that process.” (Emphasis supplied.)

Rule 15(c)(7), as adopted in 2008 for the 2012 process, provided as follows: “Any process authorized or implemented by a state Republican Party for selecting delegates and alternate delegates or for binding the presidential preference of such delegates *may* use every means practicable, *in the sole discretion of the state Republican Party*, to encourage active military personnel the opportunity to exercise their right to vote.” (Emphasis supplied.)

As you can see, this new rule is a big improvement. In 2016, the Republican state party organizations are *required*, not just encouraged, to adopt procedures that enable military personnel and wounded warriors (severely disabled veterans) to participate. If a state party’s procedures do not comply with this mandate, the state’s delegates will not be permitted to participate in the 2016 Republican National Convention.

Time, distance, and military regulations<sup>21</sup> preclude active duty military personnel from participating in caucuses and conventions. Similarly, the severely disabled veteran will likely find it most difficult if not impossible to participate in person in a caucus or convention. Each state, and each major party, must adopt rules and procedures that give active duty service members and severely disabled veterans the opportunity to participate in the nominating process without appearing in person.

In 2012, most states conducted presidential primaries, but Iowa,<sup>22</sup> Nevada,<sup>23</sup> and several other states conducted caucuses and conventions to select delegates and alternates to the National Convention. The Iowa “caucus night” system got a lot of publicity, in 2012 and in prior presidential years, because it is the first tangible step in the presidential nomination process, even before the New Hampshire primary a few days later.

The “caucus night” is very important to Iowa. Because it is first, it brings a lot of attention to one of the nation’s smaller states, and it fills up a lot of motels and restaurants—all those reporters and political operatives need places to sleep and eat.

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<sup>21</sup>Please see Law Review 1258 (June 2012). A lawful general order applicable to all active duty service members forbids them (on penalty of fine, imprisonment, and punitive discharge) to participate in a political convention, even for the purpose of voting.

<sup>22</sup>Please see Law Review 1156.

<sup>23</sup>Please see Law Review 1213.

Does new Rule 15(c)(7) outlaw the Iowa caucus? No, but Iowa and the other caucus states will need to adopt procedures that enable active duty military personnel and wounded warriors to participate meaningfully in the process without showing up in person. I look forward to working with state party organizations in Iowa, Nevada, and elsewhere as they write and enact rules and procedures to make this possible. I envision a rule enabling the active duty service member or wounded warrior to cast a written ballot that will be considered and acted upon at the caucus or convention, just as if the individual were there in person.

I do not want to hear any “slippery slope” arguments. Yes, I realize that the Iowa college student at UCLA and the voter who is suffering from severe influenza on caucus night do not have the opportunity to participate without showing up in person. My answer is that *military service is different. Were it not for the sacrifices of military personnel, now and throughout our nation’s history, none of us would have the opportunity to vote in free elections.* It is not unreasonable or unconstitutional to make accommodations for those who are away from home and prepared to lay down their lives in defense of our country that are not made for others.<sup>24</sup>

The Democratic Party has no similar rule, but I hope that it will adopt such a rule at its 2016 Convention, applicable to the presidential nominating process in 2020 and beyond.

### **Upcoming special election in New York-11**

On March 5, 2015, FVAP sent out an announcement about the opportunity to vote by absentee ballot in the upcoming special election in the 11th Congressional District of New York. Here is the entire text of that announcement:

### **Deadlines for the New York Special General Election**

ALEXANDRIA, Va. – The State of New York will conduct a special general election on Tuesday, May 5, 2015, for the 11th Congressional District in order to fill the vacancy created by the resignation of Michael Grimm. This district consists of parts of Richmond County and Kings County.

If you are a New York resident from the 11th Congressional District and need to vote absentee, you may register and request an absentee ballot using the Federal Post Card Application (FPCA) found at FVAP.gov. Complete, sign and send the FPCA to your local election official who will send you a ballot once your request is received. If you are not currently registered, your request needs to be received by April 10; if you are currently registered, your request must be received by April 28.

Detailed instructions and contact information is available at [www.fvap.gov/new-york](http://www.fvap.gov/new-york)

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<sup>24</sup>Please see Law Review 1277.

If you do not receive your requested State ballot 30 days before the election, you may use the Federal Write-In Absentee Ballot to vote. The form and candidate names are available at [fvap.gov/newyork](http://fvap.gov/newyork) under "Get My Ballot."

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If you experience any issues or have questions, FVAP's call center is available at 1-800-438-VOTE (8683), DSN 425-1584, or at [vote@fvap.gov](mailto:vote@fvap.gov). Toll-free phone numbers from 67 countries are listed at FVAP.gov. Find us on Facebook at /DoDFVAP and follow @FVAP on Twitter.

