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Don't Let Redistricting Litigation Disenfranchise Military Voters

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

I am concerned that litigation about the redrawing of district lines for the United States House of Representatives and for the state legislatures³ can have the effect of disenfranchising the brave young men and women who are away from home and prepared to lay down their lives in defense of our country, in our nation's five armed forces. I expressed that concern in Law Review 1203 (January 2012), Law Review 1205 (January 2012), and Law Review 1241 (April 2012). My concern continues.

For as long as military personnel have been eligible to vote at all (since World War II), a substantial minority and in some cases a majority of them have been disenfranchised through no fault of their own. Because of late primaries, lawsuits about ballot access or redistricting, and other problems, local election officials (LEOs) have all too often not had absentee ballots

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.

³Forty-nine (49) states have bicameral state legislatures, while Nebraska has a unicameral legislature.

printed and ready to mail until a few days before Election Day. Although the service member may have applied for his or her absentee ballot months in advance, the LEO in some cases does not have ballots printed and ready to mail until shortly before Election Day. For the service member at sea or at an isolated overseas duty station, where mail service is slow and intermittent, there just is not enough time for the ballot to go from the LEO to the voter and back in time for the ballot to be counted. I became aware of this problem in 1976 and have been working it ever since.

Finally, in 2009, Congress amended the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).⁴ Now, federal law explicitly requires each state to transmit ballots to UOCAVA voters by the 45th day before any primary, general, special, or runoff election for federal office.⁵

The fact that federal law explicitly requires that the ballots go out by the 45th day before Election Day does not necessarily mean that this always happens. More than 7600 LEOs administer absentee voting for federal elections. Absentee voting is administered centrally at the state level only in Alaska, Maine, and the District of Columbia. If nobody is watching, the LEO will send out ballots when he or she gets around to it, without regard to the requirements of federal law.

Readers: Please contact your LEO—the County Clerk, Town Clerk, Supervisor of Elections, Registrar of Voters, etc. The titles vary, but you can figure it out for your county or town.⁶ Is the LEO aware of the federal requirement to get the ballots out by the 45th day before Election Day?⁷ Did the LEO meet the 45-day standard in 2014? Does the LEO expect to meet this requirement in the primary and general election this year? Please ask, in person or by telephone, and let me know what you learn. Please send me an e-mail at SWright@roa.org.

Litigation about redistricting of congressional and state legislative district lines is a big problem that can delay the printing and transmission of absentee ballots and thereby disenfranchise

⁴UOCAVA is the 1986 federal statute that accords the right to vote by absentee ballot to members of the uniformed services and their voting-age spouses and dependents, within or outside the United States, and to U.S. citizens who are outside our country temporarily or permanently. UOCAVA voters are eligible to register and vote by absentee process in primary, general, special, and runoff elections for federal office (President, U.S. Senator, and U.S. Representative). UOCAVA is codified in title 52 of the United States Code, at sections 20301 through 20311 (52 U.S.C. 20301-20311).

⁵See 52 U.S.C. 20302(a)(8). Of course, this requirement assumes that you have your absentee ballot application in by that 45th day before Election Day. If you are a UOCAVA voter, military or civilian, it is not too early to apply for your absentee ballot for the 2016 presidential election. Under UOCAVA, you have the right to submit your absentee ballot request at any time during the calendar year of the election, even in January for the November general election. UOCAVA specifically overrides state “not earlier than” rules concerning the required date for submission of an absentee ballot request. See 52 U.S.C. 20306.

⁶In most states, absentee voting is administered by an official at the county level, or parish level in Louisiana. In the New England states, Michigan, and Wisconsin, officials at the city, town, or township level administer absentee voting.

⁷The 2016 general election will be held on November 8. The 45th day before that day is September 24.

military personnel. Until the district lines have been definitively established, candidates cannot qualify for the ballot, and primary absentee ballots cannot be transmitted. Until the primary has been completed and its results certified, the LEO cannot print general election ballots, much less send them out.

Perhaps the readers would be interested in how we got into this situation regarding reapportionment and redistricting for the United States House of Representatives. The United States Constitution provides:

Representatives [in Congress] ... shall be apportioned among the several States which may be included within this Union, according to their respective Numbers [of people] [but each slave only counted for 3/5 of a person] ... The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they [the Congress] shall by Law direct.⁸

After the Civil War, the 13th Amendment abolished slavery, and the 14th Amendment provided for due process and equal protection of the law. The 14th Amendment also provides for congressional reapportionment, as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.⁹

In accordance with this constitutional requirement, the Census is conducted every ten years, most recently in 2010 and next in 2020. The Census counts *human beings*, not eligible voters. Children, legal and illegal aliens, incarcerated felons, and other persons who are not eligible to vote are counted in the Census, and they count toward the reapportionment of the United States House of Representatives after the decennial Census.

Moreover, eligible voters are counted based on their actual physical presence in the spring of the decennial year, not based on where they are domiciled or eligible to vote. For example, in the spring of 2000 I was on active duty (only for a few months) and serving at MacDill Air Force Base in Tampa, Florida, and I normally slept at a hotel in Tampa. My domicile was in Arlington, Virginia. While on active duty at MacDill, I voted by absentee ballot in Arlington in November 1999 (Virginia state legislative and local elections) and February 2000 (Virginia presidential primary). I did not vote or consider myself eligible to vote in Florida. A few days after the 2000 Census, I left active duty and returned home to Arlington. Nonetheless, I was counted for Florida, not Virginia, in the reapportionment following the 2000 Census.

⁸United States Constitution, Article I, Section 2, Clause 3. Yes, the provision is capitalized just that way, in the style of the late 18th Century.

⁹U.S. CONST., amend. XIV, § 2.

Do not conflate *reapportionment* with *redistricting*. The two words are not synonymous. Reapportionment is a mathematical process, conducted under rules established by Congress early in the 20th Century. The number of Representatives was permanently set at 435, not including non-voting delegates from the District of Columbia, Puerto Rico, Guam, etc. Each state is entitled to at least one Representative. A state cannot be awarded a fraction of a Representative, and a congressional district cannot cross from one state into the next.

After the Census results are officially released, the mathematical formula is applied. Fast-growing states gain seats in the United States House of Representatives.¹⁰ States that have grown slowly or lost population lose seats. Most states remain the same.

During the 20th Century, there was massive growth in the population of large cities and suburbs, while the population of rural areas grew very slowly or even declined. Rural legislators had large majorities in state legislatures, based on district lines drawn decades earlier, before the massive shift in population from rural to urban areas. Rural legislators were most reluctant to give up political power by redrawing congressional district lines and state legislative lines to reflect current population distribution.

In 1962, the United States Supreme Court established that a claim about unequal population of congressional districts within a state was a justiciable issue.¹¹ Two years later, the Supreme Court established the “one person, one vote” rule and struck down Georgia’s drawing of congressional districts.¹² That same year, the Supreme Court extended this principle to apply to state legislative districts as well.¹³

Under these binding Supreme Court precedents, the population of congressional districts and state legislative districts within a specific state must be very close to equal, as of the decennial Census. During the decade between the 2010 Census and the 2020 Census, it is possible that some parts of a state may grow very rapidly while other parts of the same state grow slowly or even lose population, but districts must be redrawn only every ten years.

In most states, *total population* figures are used in applying the “one person, one vote” principle to the drawing of congressional and state legislative lines. It is likely that in an urban area a smaller percentage of the total population are eligible voters, because a greater percentage are children, legal or illegal aliens, and other persons who are not eligible to vote or not eligible to vote there.

Does the Constitution require that the states use figures on *eligible voters*, rather than total population, when applying the “one person, one vote” principle to the drawing of congressional

¹⁰Texas gained four new seats as a result of the 2010 Census.

¹¹*Baker v. Carr*, 369 U.S. 186 (1962).

¹²*Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹³*Reynolds v. Sims*, 377 U.S. 533 (1964).

and state legislative districts? Just this month, the Supreme Court answered that question in the negative.¹⁴

Even when the congressional districts within a specific state are very close to equal in population, it is often possible to draw the districts in such a way as to give one party an arguably unfair advantage over the other party, in a controversial process called “gerrymandering.” Currently, there are ongoing or only very recently resolved lawsuits about congressional district lines in Florida, North Carolina, and Virginia.

Disputes about congressional and state legislative redistricting constitute a partisan thicket. The Reserve Officers Association (ROA) is not a partisan organization, and we must avoid entangling ourselves in that partisan thicket. We take no position on how the district lines are to be drawn. Our concern is to ensure that *pendency of the lawsuit* must not be allowed to result in the disenfranchisement of service personnel.

When the transmission of absentee ballots is delayed, the result is the disenfranchisement of overseas military personnel. The result is the same, regardless of whether the late transmission is caused by a lack of diligence by the election official or by a pending lawsuit about redistricting or ballot access.

Time, distance, and military regulations preclude active duty military personnel from speaking for themselves on this topic, to protest their disenfranchisement. It is incumbent on those of us who have completed our military careers and retired, and those of us who are Reserve Component members not currently on active duty, to speak for them. Absentee ballots need to go out at least 45 days before Election Day, so that military personnel will have the opportunity to cast real ballots that really do get counted, no matter where their service to our country has taken them. Please contact your election official today, and let me know what you learn, at SWright@roa.org.

Please join or support ROA

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

¹⁴See *Evenwel v. Abbott*, 2016 U.S. LEXIS 2278 (April 4, 2016). The Supreme Court’s decision seems to permit a state to use a count of eligible voters, rather than a raw population count, for legislative districting.

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 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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