

LAW REVIEW¹ 16118

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The Federal Write-in Absentee Ballot (FWAB)—First you Must Apply for a Regular Absentee Ballot before you Can Submit a Completed FWAB

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4.5—Protection from State/Local Tax Authorities

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

7.2—Service Member or Military Spouse Voting and Domicile

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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.

²Susan Dzieduszycka-Suinat heads the U.S. Vote Foundation (US Vote) and its associated initiative, Overseas Vote. As the Co-founder, President and Chief Executive Officer, Susan orchestrates the work of the foundation around the greater goal of creating an environment conducive to positive electoral reform. Her work encompasses the foundation's strategic and operational planning, innovation and technical development, and commercial and marketing programs. In addition, Susan is actively engaged with voter support, outreach, research programs and policy development programs.

³BA 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.

Q: I am a Colonel in the Marine Corps, currently serving in the DC area. My wife and I and our children live in a house we own in Fairfax County, Virginia, but my domicile (legal residence) is in Houston, Texas, at the house where I lived with my parents through my childhood and where I still lived in 1989, when I turned 18, registered to vote, graduated from high school, and reported to the United States Naval Academy (USNA) for plebe summer. Four years later, I graduated and was commissioned a Second Lieutenant. I have been on active duty continuously since June 1989, including the four years at the USNA.

I have read with great interest several of your (Wright's) "Law Review" articles about military voting rights. As you have suggested in Law Review 16076 (August 2016) and several other articles, I have maintained my domicile in Texas, at the home where I was living with my parents and siblings in June 1989 when I reported to the USNA. My parents moved away to another state in 1992, before I graduated from the USNA, but that house at that address is still my domicile. Nobody in my family lives there, and I cannot receive mail at that address. The house has been through three different owners in the meantime and will soon be torn down to make room for a new shopping center development.⁴

I have never registered to vote or voted at any other place. When I have voted, it has been by absentee ballot in Harris County, Texas, and I have used that address as my "permanent home address" on the Federal Post Card Application (FPCA).⁵ I confess that my voting record has been spotty.

I wanted to vote this year. In July or August, I used a website (don't know which one) to complete and submit my FPCA, but I never received any acknowledgement from my LEO back home. Finally, on October 21, I obtained a Federal Write-in Absentee Ballot (FWAB) and marked my choices for President and Vice President and for the United States House of Representatives. (Neither Texas Senator is on the ballot this year.) I received an e-mail notice

⁴None of these developments matter. That address is still your domicile until you establish a new domicile elsewhere or until you leave active duty, whichever comes first. Maintaining your domicile in Texas makes sense because Texas is one of only seven states that have no state income tax. The other six are Alaska, Florida, Nevada, South Dakota, Washington, and Wyoming. Also, New Hampshire and Tennessee tax only dividend and interest income.

⁵The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) provides for a "presidential designee" who has primary responsibility for the federal functions called for by UOCAVA. 52 U.S.C. 20301(a). The citation is to section 20301(a) of title 52 of the United States Code. In 1988, President Ronald Reagan made the Secretary of Defense (SECDEF) the presidential designee, and that designation remains in effect. The SECDEF has delegated these functions and responsibilities to the Director of the Federal Voting Assistance Program (FVAP) in the Department of Defense (DOD). One of the presidential designee's responsibilities is to designate an official form that serves as both a voter registration application and an absentee ballot request, for UOCAVA voters. 52 U.S.C. 20301(b)(2). This official form is the FPCA. The form is misnamed, as it is no longer a postcard. The 2003 version folds over into a sealed envelope. It is still possible to obtain the paper FPCA form and fill it out the old-fashioned way, with a pen on paper, and then mail the completed form to your local election official (LEO) back home. In the second decade of the 21st Century, a much better way is to complete the form on-line at USVOTEFOUNDATION---and then submit the completed form electronically.

telling me that my FWAB will not be counted because I did not apply for a regular absentee ballot as a condition precedent to submitting the FWAB. Help!

A: It is not clear from your question if, upon completing the FPCA through the tool on the website, you downloaded the form, printed, signed and sent it to your election office. TX will accept the FPCA in-person, by email, postal mail, or fax. It is sometimes the case that voters miss those crucial final actions. Understandably, they assume that the online information is automatically sent to the election office through the website, but it is not. The site is assisting you to complete the form without omissions and to populate the form with your information, but the form must be printed. That is because the voter must sign it. Signatures are a key part of absentee voter authentication. The election office must receive the form with the voter's signature.

If you did not submit the form, this was the point of failure. If you did, however, submit the FPCA and your election office did not receive it, taking one extra step will help to avoid not receiving your ballot. After you send in your FPCA and allow a couple of weeks for the receipt and processing of the form, take a moment to check your voter status using your state's online service. You can look up this and other state links through the U.S. Vote Foundation website, under State Voting Requirements. Also, on the same site, you can look up the contact information for your election office through the Election Official Directory. Make sure to contact them to confirm your FPCA has been received and processed.

The FWAB is for the UOCAVA voter⁶ *who has applied for a regular absentee ballot* but has not received it in time to vote. UOCAVA does not require or permit the LEO to count a FWAB submitted by a UOCAVA voter who submitted the FWAB without first having submitted the FPCA, requesting a regular absentee ballot. If you did not first submit the completed FPCA, the LEO is correct to reject your FWAB.

UOCAVA provides: "The Presidential designee [Federal Voting Assistance Program Director] shall prescribe a Federal write-in absentee ballot (including a secrecy envelope and mailing envelope for such ballot) for use in general, special, primary, and runoff elections for Federal office by uniformed services voters and overseas voters *who make timely application for, and do not receive, State absentee ballots.*"⁷

The deadline for submitting the application for the regular absentee ballot is the later of the state's deadline for applying for an absentee ballot or the date that is 30 days before Election Day.⁸ If the UOCAVA voter did not first apply for a regular ballot, or if the voter's application for the regular ballot was received after the deadline, the submitted FWAB will not be counted.

⁶UOCAVA voters include active duty service members and their accompanying spouses and dependents, within or outside the U.S., and U.S. citizens outside the U.S. temporarily or permanently. 52 U.S.C. 20310(1) and (5).

⁷52 U.S.C. 20303(a)(1) (emphasis supplied).

⁸52 U.S.C. 20303(b)(2). The application for the regular absentee ballot must be *received* by that deadline.

Here is how the FWAB is supposed to work. Lance Corporal Smith is assigned to a Forward Operating Base in Afghanistan, where mail service is slow and intermittent. She applied for her regular absentee ballot for the general election back in July, but in early October she has not yet received it. At that point, she obtains the paper FWAB or more likely the on-line equivalent. She marks the FWAB for federal offices (President, U.S. Senator, and U.S. Representative, as applicable for her state in that year) and she sends her marked FWAB (probably by mail) to the election official back home. Let us say that she submitted the marked FWAB by putting it into the mail on October 4, 2016.

The very next day, she receives her regular absentee ballot in the mail. At that point, she is permitted and indeed encouraged to mark the regular ballot and put it into the mail to her LEO back home. If the LEO receives both the regular ballot and the FWAB by the deadline for receipt⁹ the LEO will count the regular ballot and leave the FWAB uncounted.¹⁰

The regular absentee ballot is clearly preferable to the FWAB. The regular ballot includes state and local offices as well as federal offices, and it includes the names of candidates who have qualified for the ballot by having won major party primaries or by other means. When you vote on the FWAB, you must write in the name of your preferred candidate or express a party preference (like “Democratic nominee” or “Republican nominee”).

Q: I will most likely still be on active duty at the time of the 2018 primary and general election. What should I do differently next time to prevent a recurrence of this problem?

A: There are several websites that will assist you to complete the FPCA form, which functions as both a voter registration and absentee ballot request for military voters, their spouses and dependents, and overseas U.S. citizens. U.S. Vote Foundation (US Vote), www.usvotefoundation.org, and the Federal Voting Assistance Program, <https://www.fvap.gov>, both provide online support to generate the FPCA form.

Important: the FPCA form will *not* be submitted for you automatically. It must be signed before it is submitted.

Regardless of which site you use to generate your FPCA, be sure to download, print and sign the form. It must be submitted to your election office either in-person, by postal mail, by fax, or by email. The allowed options for FPCA submission are state specific and you can look them up on the US Vote website under State Voting Requirements. Deadlines for submission are also listed there.

After you submit the FPCA to your election office, allow a couple of weeks for the receipt and processing of the form, take a moment to check your voter status using your state’s online service. You can look up this and other state links through the US Vote website, under State

⁹The deadline for the receipt of the marked absentee ballot is usually the time set for the close of the polls on Election Day, but in some states, it is a few days later, either by state law or sometimes by federal court order.

¹⁰52 U.S.C. 20303(d).

Voting Requirements. Also, you can look up the contact information for your election office through the Election Official Directory. Make sure to contact them to confirm your FPCA has been received and processed. These steps will ensure that you receive your ballot.

Q: My LEO back home also informed me that my voter registration has been canceled because I have not voted in the last three biennial general elections. What do I need to do about that?

A: So long as you remain on active duty and do not establish a new domicile at some other place in the United States, the fact that you are not registered to vote is of little or no consequence. *If you use the FPCA or on-line equivalent*, the completed FPCA serves as a simultaneous voter registration application and absentee ballot request.¹¹

Q: Let us say that at the time of the 2018 primary and general election I am still on active duty and still serving in the DC area and still living in the house that I own in Fairfax County. I think that I will just register to vote in Fairfax County and vote in person on Election Day, just like any other voter. Will that work?

A: You can do that, but if you do you will then have to pay Virginia state income tax on your military salary. Under a federal statute called the Servicemembers Civil Relief Act (SCRA), Virginia is precluded from taxing your military income so long as you can say truthfully that you are not domiciled in Virginia and that you physically reside in Virginia only because your military duties require your presence in the DC metro area. If you register to vote or vote in Virginia, you lose this federal law protection from having to pay Virginia state income tax. You cannot have it both ways. You cannot simultaneously be a Texan for state income tax purposes and a Virginian for voting purposes.¹²

Q: Let us say that I retire from the Marine Corps at the end of 2017 and find a civilian job in the DC metro area and remain in the house that I own in Fairfax County. What happens to my right to vote in that case?

A: In that situation, you lose your SCRA protection from having to pay Virginia state income tax, as of the day after you leave active duty by retirement or otherwise. If you remain in the Fairfax County house, you will need to pay Virginia state income tax on your military retired pay and on your civilian salary in your new job. You will also need to start paying Virginia's personal property tax on your automobile. You will need to pay these taxes whether you vote or not. If you want to vote, you will need to register to vote in the traditional way. After you leave active duty, you will no longer be a UOCAVA voter.

¹¹52 U.S.C. 20301(b)(2). It is important that you use the FPCA, not the Texas absentee ballot request form. If you use the Texas form, the LEO in Harris County will look for your name on the voter registration list and will not send you a ballot if your name is not on that list.

¹²Please see Law Review 16076 (August 2016).

Q: Alternatively, let us say that I retire at the end of 2017 and return home to Houston.

A: In that situation, you will need to register to vote in Harris County in the traditional way, as you will no longer be a UOCAVA voter. You will not be moving back to the house where you lived as a child, because that house no longer belongs to your family. You will need to register to vote, using as your home address the house or apartment that you buy or rent. If you move to Chicago or New York or some other place, you will need to register to vote at that location.

You can find your state-specific voter services and information for domestic voting, including absentee ballot request services at U.S. Vote Foundation, www.usvotefoundation.org. If you have a Voter Account on the US Vote site from your time as a UOCAVA voter, you can simply update and edit your account profile and then generate your new state specific forms within minutes. If your state has online registration, the US Vote site will offer you the option to transfer to it in the registration process. Many states now allow instant online voter registration through their centralized voter registration systems.

Update – April 2022

There are now nine states that do not have an income tax: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.

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 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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