

LAW REVIEW¹ 17060

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Military Absentee Ballots Must Go Out at Least 45 Days Before Election Day

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

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

Q: I am the Town Clerk of a small town in New Hampshire. Absentee voting administration is one of my many responsibilities as Town Clerk. Our town has three absent military personnel who vote here by absentee ballot in most major elections.³

Mary Smith is a Chief Petty Officer (E-7) in the Coast Guard. She graduated from high school here 15 years ago and enlisted in the Coast Guard three months later.

Jerry Jones is a Captain (O-3) in the Army. He graduated from high school here ten years ago and then reported to the United States Military Academy (USMA) in West Point, New York. Six years ago, he graduated from the USMA and was commissioned a Second Lieutenant.

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.

³This factual set-up is hypothetical but realistic.

David Williams is a Lance Corporal (E-3) in the Marine Corps. He graduated from high school here two years ago, and last year he enlisted in the Marine Corps.

Captain Jones told me, when he was home visiting his parents last Christmas, that there is a federal law that requires that I get absentee ballots out to military voters by the 45th day before Election Day. Is that true?

A: Yes. In 2009, Congress amended the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to add an explicit requirement that ballots go out at least 45 days before the election to UOCAVA voters—members of the uniformed services⁴ on active duty and their voting-age spouses and dependents accompanying them, as well as United States citizens who are outside the United States temporarily or permanently.⁵ The idea is that the ballots need to go out on time so that those who serve our country in uniform, those who protect the rights that we all enjoy, will be able to cast ballots that really do get counted, no matter where the service of our country has taken them.

The 45-day rule is not just a suggestion. It is a mandate of federal law. I recognize that getting the ballots out on time requires a special effort by election officials like you. I respectfully suggest that this is a small accommodation to make for the brave young men and women who are away from home and prepared to lay down their lives in defense of our country. Were it not for the sacrifices of military personnel, from the American Revolution to the Global War on Terrorism, none of us would have the opportunity to vote in free elections.

The burden on you, as an election official, is tiny as compared to the much greater burden (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve in uniform. Please see Law Review 17055 (June 2017).

Q: The problem that we (Town Clerks) have in New Hampshire is that the primary is held in September. Until the results of the primary have been officially certified, we cannot print the general election ballots, much less send them out. In 2016, our primary was held on September 13, just 56 days before the November 8 general election. It can take more than 11 days to certify the primary results, especially if there is a very tight race that requires a recount.

A: After Congress amended UOCAVA in 2009, to add the explicit 45-day rule, most of the states that had September primaries moved those primaries back to earlier in the year, to make it possible for local election officials to comply with the federal requirement. In New York, the legislature refused to move the primary back, and the United States Department of Justice (DOJ) sued New York and won. The United States District Court for the Northern District of New

⁴The 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).

⁵52 U.S.C. § 20302(a)(8).

York ordered the State of New York to move the primary back to June.⁶ If the September primary date prevents New Hampshire Town Clerks from complying with the 45-day rule, DOJ can and should sue your state to make the state move the primary back.

Q: Where do Congress and the federal courts get the authority to order a sovereign state to change its primary date?

A: The Supreme Court has upheld the constitutionality of federal legislation that protects the rights and interests of military personnel and that overrides state and local laws and practices that violate those rights and interests and thereby make it more difficult for the Federal Government to recruit and retain service members.⁷ Congress has authority in this area under the United States Constitution, Article I, Section 8, Clauses 11-16 (the so-called war powers clauses) and also under Article I, section 4.

For military voters, the worst problem has always been in the late-primary states. It is difficult to convince state legislators to move a primary date back to earlier in the year. A late primary helps incumbents, and the legislators who write the rules are incumbents. The problem of untimely transmission of absentee ballots for overseas military personnel was identified in congressional hearings in 1952, and those hearings also identified the relationship between the primary date and the effective enfranchisement of service personnel. Congress waited patiently, for 57 years, for the states to solve this problem. Finally, in 2009, Congress lost patience with the states and mandated the 45-day rule by federal statute.

In June 1952, 13 months after I was born, the United States House of Representatives (Subcommittee on Elections, House Administration Committee) conducted hearings on absentee voting for military personnel fighting the Korean War. The Honorable C.G. Hall, Secretary of State of Arkansas and President of the National Association of Secretaries of State, testified that most military personnel fighting the Korean War would likely be disappointed if they tried to vote in the 1952 presidential election. Because of late primaries, ballot access lawsuits, and other problems, most local election officials would not have absentee ballots ready to mail until a few days before Election Day. For military personnel fighting in Korea or serving on ships at sea, where mail service is slow and intermittent, there would not be enough time for the ballot to go from the local election official to the voter and back by Election Day, and the voter would be disenfranchised.

The 1952 congressional report also includes a copy of a letter to Congress from President Harry S. Truman.⁸ In his letter, he called upon the states to fix the state laws and procedures, to

⁶See *United States v. New York*, 2012 U.S. Dist. LEXIS 10101 (N.D.N.Y. Jan. 27, 2012). See also *United States v New York*, 2012 U.S. Dist. LEXIS 16126 (N.D.N.Y. Feb. 9, 2012).

⁷See *Dameron v. Brodhead*, 345 U.S. 322 (1953).

⁸In 1922, Captain Harry S. Truman, a veteran of the “Great War,” was one of the founders of the Reserve Officers Association (ROA). In 1950, as President, he signed our congressional charter. He also signed several other laws that were and are of great interest to ROA and to military personnel. This includes the 1948 law that created the

enable military personnel to vote and have their ballots count. He also called upon Congress to enact *temporary* legislation for the 1952 presidential election. He wrote: "Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954."

Well, it did not work out that way. The Korean War ground to an inconclusive halt in 1953, and this issue (disenfranchisement of military personnel) fell off the national radar screen until November 2000, when late-arriving military absentee ballots, counted by federal court order, played a crucial role in the determination of the presidential winner in Florida.⁹ Finally, in 2009, Congress lost patience with the states and mandated effective changes as a matter of federal law.

I invite the reader's attention to the most eloquent opening paragraph of President Truman's 1952 letter to Congress:

About 2,500,000 men and women in the Armed Forces are of voting age at the present time. Many of those in uniform are serving overseas, or in parts of the country distant from their homes. They are unable to return to their States either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in this election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve.

I respectfully suggest that President Truman's words are as true today as they were in 1952. Don't make America's military personnel wait another 65 years to enjoy a basic civil right that the rest of us take for granted.

I respectfully suggest that President Truman's words need to be readdressed to those who serve as election officials today. You need to make a maximum effort to get the ballots out on time. If a late primary or some other state law impediment prevents you from complying with the 45-day rule, you need to march on the state legislature to demand the removal of that impediment.

Reader: Please share a copy of this article with your local election official, by e-mail or postal mail. Better yet, please make an appointment to see the local election official, and take a copy of this article to give to that official.

Reserve Component retirement system. At ROA headquarters, we have several pens that President Truman used to sign these laws.

⁹Please see Law Review 23 (March 2001).

Who is your local election official? The titles vary from state to state: Town Clerk, County Clerk, County Auditor, County Supervisor of Elections, etc. Look at your voter registration card. It probably contains the name, title, and contact information for your local election official.

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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.

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