

Absentee Voting Should be Handled Centrally at the State Level

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7.7—Proposed Reforms for Military Voters

Under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), or under state law, there are three steps in absentee voting. First, the voter must complete his or her absentee ballot *request* and transmit that request to the election official back home.³ Second, the election official must transmit the *unmarked ballot* to the voter. Third, the voter must mark the ballot and transmit it back to the election official.

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.

³A UOCAVA voter (service member on active duty within or outside the United States, voting-age spouse or dependent of service member, or U.S. citizen outside the U.S. temporarily or permanently) can skip the additional step of registering to vote if he or she uses the Federal Post Card Application (FPCA) because the election official must accept that federal form as a simultaneous voter registration application and absentee ballot request. See 52 U.S.C. § 20302(a)(4).

More than 7,600 local election officials (LEOs) administer absentee voting for federal elections. In most states, absentee voting is administered at the county level, or parishes in Louisiana. In the New England states, Michigan, and Wisconsin absentee voting is administered by cities, towns, and townships, which are considerably smaller and more numerous than counties. There are more than 1,800 LEOs just in Wisconsin and another 1,500 plus just in Michigan. Absentee voting is administered centrally at the state level only in Alaska, Maine, and the District of Columbia.

UOCAVA *requires* each state to designate a single office to provide information to UOCAVA voters about voter registration and absentee voting and it *recommends* that each state process and count UOCAVA absentee ballots centrally:

- (b)** Designation of single State office to provide information on registration and absentee ballot procedures for all voters in State.
 - (1)** In general. Each State shall designate a single office which shall be responsible for providing information regarding voter registration procedures and absentee ballot procedures to be used by absent uniformed services voters and overseas voters with respect to elections for Federal office (including procedures relating to the use of the Federal write-in absentee ballot) to all absent uniformed services voters and overseas voters who wish to register to vote or vote in any jurisdiction in the State.
 - (2)** Recommendation regarding use of office to accept and process materials. Congress recommends that the State office designated under paragraph (1) be responsible for carrying out the State's duties under this Act, including accepting valid voter registration applications, absentee ballot applications, and absentee ballots (including Federal write-in absentee ballots) from all absent uniformed services voters and overseas voters who wish to register to vote or vote in any jurisdiction in the State.⁴

Only Maine has adopted the recommendation to centralize the absentee voting process for UOCAVA voters. Alaska has processed and counted absentee ballots centrally since before it was a state, and the District of Columbia does not have counties or other political subdivisions.

It has been held that each *state* is responsible for complying with UOCAVA, and specifically with the requirement that absentee ballots be transmitted at least 45 days before Election Day:

On February 24, 2012, plaintiff United States of America ("the United States") filed this lawsuit against defendants State of Alabama and Alabama Secretary of State Beth Chapman (collectively "Alabama" or "the State"). Relying on the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 42 U.S.C. § 1973ff et seq., as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) ("MOVE Act"), the United

⁴52 U.S.C. § 20302(b).

States seeks to enforce the right of absent uniformed services and overseas voters ("UOCAVA voters") to vote by absentee ballot in the State of Alabama's federal primary election scheduled for March 13, 2012. The jurisdiction of this court is invoked pursuant to [42 U.S.C. § 1973ff-4\(a\)](#) and [28 U.S.C. § 1345](#). On March 7, 2012, the court issued a preliminary injunction requiring the State to take a number of steps to comply with UOCAVA; this is why.

I.

On February 28, 2012, following a hearing, the court granted the United States' motion for a temporary restraining order and preliminary injunction. The court required the State to compile and submit evidence related to UOCAVA ballot transmission at the county level and that the parties meet and confer and then submit a report on how to proceed. [United States v. State of Alabama, 2012 U.S. Dist. LEXIS 25526, 2012 WL 642312 \(M.D. Ala. 2012\)](#). As stated, on March 7, 2012, the court issued another preliminary injunction, this time requiring the State to take a number of steps to comply with UOCAVA. The court promised that an opinion explaining the basis for the March 7 injunction would follow on March 9, but the court extended that deadline to March 12. This is the promised [\[**3\]](#) opinion.

II.

The court considers four factors in determining whether to issue a preliminary injunction: (1) whether there is a substantial likelihood of success on the merits; (2) whether irreparable injury will result unless the injunction is issued; (3) whether the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) whether granting the injunction is in the public interest. [Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 238 F.3d 1300, 1308 \(11th Cir. 2001\)](#); [Siegel v. Lepore, 234 F.3d 1163, 1176 \(11th Cir. 2000\)](#) (en banc) (per curiam).

There is a substantial likelihood that the United States will prevail on the merits. UOCAVA guarantees military and overseas voters the right "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." [42 U.S.C. § 1973ff-1](#). In 2009, the MOVE Act amended UOCAVA to require that States transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office to provide voters sufficient time [\[**4\]](#) to receive, mark, and return absentee ballots. [42 U.S.C. § 1973ff-1\(a\)\(8\)\(A\)](#).

Alabama's contention that it is not its responsibility to ensure compliance with UOCAVA, especially where local county officials transmit ballots and administer an election, is meritless. Subject to an exception not applicable here, the statutory language is explicit: "Each State shall— ... transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter ... not later than 45 days before the

election." [42 U.S.C. § 1973ff-1\(a\)\(8\)](#). Indeed, the heading to this section is "State responsibilities." Id. at [§ 1973ff-1](#).

[*1239] *Moreover, this explicit statutory directive that Alabama bears full responsibility is reinforced by the rest of the statute.* For instance, the statute further provides that, "Each State shall— ... in addition to any other method of transmitting blank absentee ballots in the State, establish procedures for transmitting by mail and electronically blank absentee ballots" to UOCAVA voters, id. at [§ 1973ff-1\(a\)\(7\)](#); "Each State shall— ... if the State declares or otherwise holds a runoff election for Federal office, establish a written plan that provides absentee ballots [\[**5\]](#) are made available to" UOCAVA voters, id. at [§ 1973ff-1\(a\)\(9\)](#); "Each State shall designate a single office which shall be responsible for providing information regarding voter registration procedures," id. at [§ 1973ff-1\(b\)](#); and, if a voter requests a ballot but does not "designate a preference" for the type of ballot, "the State shall transmit the voter registration application or absentee ballot application by any delivery method allowable in accordance with applicable State law." Id. at [§ 1973ff-1\(e\)\(5\)](#). [2](#) ~~4~~ The statute also provides for a hardship exemption, but at the state, not local, level: "If the chief State election official determines that the State is unable to meet the requirement [to transmit ballots not later than 45 days before the election] with respect to an election for Federal office due to an undue hardship ..., the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection." Id. at [§ 1973ff-1\(g\)\(1\)](#) (emphasis added). Finally, as evidenced by how compliance with UOCAVA is to be reported, the statute imposes obligations on the States, as States, even when they delegate some duties (as [\[**6\]](#) they are free to do) to local government officials: "Not later than 90 days after the date of each regularly scheduled general election for Federal office, each State and unit of local government which administered the election shall (through the State, in the case of a unit of local government) submit a report to the Election Assistance Commission ... on the combined number of absentee ballots transmitted to absent uniformed services voters and overseas voters for the election and the combined number of such ballots which were returned by such voters and cast in the election, and shall make such report available to the general public." Id. at [1973ff-1\(c\)](#).

That Alabama bears full responsibility for compliance with UOCAVA is further confirmed by the statute's legislative history and in the caselaw. In a section meant to clarify the "delegation of State responsibilities to local jurisdictions," the legislative history explains: "[W]hile the MOVE Act contains a number of mandates on the States ..., States remain free to delegate those responsibilities to local officials. Compliance with MOVE's mandates, however, ultimately remains a State responsibility, and States will continue to be the main entity against which the provisions of MOVE and UOCAVA will be enforced should enforcement by the Department of Justice become necessary." Military and Overseas Empowerment (MOVE) Act of 2009, 156 Cong. Rec. S4513, S4517 (daily ed. May 27, 2010). Similarly, every case addressing obligations under UOCAVA has focused on the obligations of States, as States, not local government units. See, e.g., [United](#)

States v. New York, 2012 U.S. Dist. LEXIS 10101, 2012 WL [*1240] 254263, at *1 (N.D.N.Y. Jan. 27, 2012) (Sharpe, C.J.) ("New York is responsible for complying with UOCAVA and ensuring that validly-requested absentee ballots are sent to UOCAVA voters in accordance with its terms."); *United States v. Cunningham*, 2009 U.S. Dist. LEXIS 98010, 2009 WL 3350028, at *7 (E.D. Va. Oct. 15, 2009) [**8] (Williams, J.) (rejecting the argument that local election officials are necessary parties to the litigation because the "Commonwealth of Virginia ... is directed by UOCAVA [to] ensure its compliance by the local election boards"); see also, e.g., *Doe v. Miller*, 2010 U.S. Dist. LEXIS 120051, 2010 WL 4340804 (D. Nev. Oct. 27, 2010) (Navarro, J.) (considering the State of Nevada's obligations where a single county missed the deadline required by UOCAVA).

For the 2012 federal primary, Alabama's election is March 13, which means that validly requested ballots were required to be sent by January 28, 2012. It is undisputed that the State has not complied with UOCAVA's mandate; numerous Alabama counties failed to transmit UOCAVA absentee ballots at least 45 days prior to the federal primary election. Specifically, the undisputed evidence indicates that 47 Alabama counties received valid UOCAVA ballot requests, and that all 47 of these counties failed to transmit the ballots by the January 28 deadline.⁵

Because the state will be held responsible for compliance with UOCAVA, each state should centralize administration of absentee voting (at least for UOCAVA voters) at the state level. I favor that change because it will lead to better compliance with the 45-day rule and other UOCAVA requirements.

I favor this change for another reason as well. In a small rural county or township, there will only be a handful of absentee ballots. Members of the absentee ballot canvassing board (citizen volunteers) will unavoidably realize how individual military voters have cast their ballots. Those citizen volunteers may include the service member's parents or other close relatives, the employer of the service member's parents, or an employer where the service member will need to apply for work in the future, after he or she completes his or her military service and returns home. When absentee voting is processed at the state level, the number of ballots to be counted will ensure that the ballot secrecy of the individual voter is not compromised, even in a small state like Wyoming or Vermont.

The Smithsonian Institution has reported that the establishment of the secret ballot system late in the 19th Century was an important reform that helped prevent voter intimidation, vote-buying, and vote fraud.⁶ Military personnel, no less than other voters, need the protection that the secret ballot affords.

⁵*United States v. Alabama*, 857 F. Supp. 2d 1236, 1237-40 (M.D. Ala. 2012) (emphasis supplied). See also *United States v. Alabama*, 998 F. Supp. 2d 1283 (M.D. Ala. 2014), affirmed, 778 F.3d 926 (11th Cir. 2015).

⁶S.J. Ackerman, *The Vote That Failed*, SMITHSONIAN MAGAZINE (Nov. 1998), <https://www.smithsonianmag.com/history/the-vote-that-failed-159427766/>.

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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 sections cited throughout the article can be found at:

42 U.S.C. § 1973ff-1 discussing state responsibilities can be found at 52 U.S.C. § 20302.

42 U.S.C. § 1973ff-4 discussing enforcement can be found at 52 U.S.C. § 20307.

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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.

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