

Absentee Ballots *Must* be Transmitted 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.

***United States v. West Virginia*, 2014 U.S. Dist. LEXIS 175952 (S.D.W.V. December 22, 2014).**³

This case arises out of the general election conducted on 11/4/2014. As amended in 2009, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) explicitly requires each state to transmit absentee ballots for federal offices⁴ to UOCAVA voters⁵ at least 45 days before any

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 (VRRRA—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 VRRRA 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 VRRRA 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 is a decision by Judge John D. Copenhaver, Jr. of the United States District Court for the Southern District of West Virginia. The defendant (State of West Virginia) did not appeal to the United States Court of Appeals for the 4th Circuit, and this case is over.

⁴The federal offices on the ballot in West Virginia in 2014 were the United States Senate and House of Representatives because 2014 was not a presidential election year.

⁵UOCAVA voters include members of the United States uniformed services on active duty and their voting-age spouses and dependents, within or outside the United States, as well as civilian United States citizens outside our country temporarily or permanently.

primary, general, special, or runoff election.⁶ West Virginia initially complied with the 45-day rule by transmitting ballots on 9/19/2014, which was 46 days before the general election.

The Republican Party's state committee nominated a substitute candidate for the office of West Virginia House of Delegates District 35, and on 10/1/2014 the West Virginia Supreme Court of Appeals ordered the West Virginia Secretary of State to substitute the new name for the name of a candidate who had withdrawn, for that office. The state's high court ordered the Secretary of State to send out corrected absentee ballots to the affected voters in the 35th House of Delegates district. The high court's order apparently contemplated that each affected voter would be required to mark and return the corrected ballot even if he or she had already sent in the first ballot, and that if a voter sent in the first ballot but not the second ballot the first ballot would not be counted *for any office, including federal offices*.

The corrected ballots were transmitted on 10/3/2014, only 32 days before Election Day. Voters were confused because the Secretary of State failed to communicate the requirement that the individual voter who had submitted the first ballot was also permitted and expected to mark and submit the corrected ballot. The standard boilerplate form used for the first ballot and the corrected ballot included a statement which the voter was expected to affirm under oath, to the effect that he or she had not voted more than once in the election, as well as a reminder that voting more than once in an election is a crime for which an individual can be fined and imprisoned.

The Secretary of State asked the state high court to clarify its order and to direct that if an absentee voter had submitted the first ballot but not the second ballot the first ballot should be counted for offices other than the West Virginia House of Delegates District 35, or at least that those ballots should be counted for federal offices. The state high court refused to clarify its earlier order, and the Secretary of State interpreted that refusal as a direction that marked first ballots should not be counted for any office.

There were four UOCAVA voters⁷ who marked and sent in the first ballot but not the corrected ballot, and those ballots were not initially counted, not even for United States Senator and United States Representative. In accordance with UOCAVA, the Attorney General of the United States sued the State of West Virginia, seeking declaratory and injunctive relief ordering West Virginia to count the four UOCAVA ballots for the offices of United States Senator and United States Representative.⁸ The parties (United States and the State of West Virginia) stipulated to the facts and asked the judge to decide the pure question of law as to whether the four ballots should be counted.

Judge John D. Copenhaver, Jr. of the United States District Court for the Southern District of West Virginia correctly decided that UOCAVA requires that these four ballots be counted and

⁶52 U.S.C. § 20302(a)(8).

⁷Two were United States civilian citizens from West Virginia (a mother and her adult son) living temporarily in Canada, and the other two were military personnel serving within the United States.

⁸See 52 U.S.C. § 20307(a).

that UOCAVA, as a federal statute, trumps conflicting state statutes and even state constitutions. The Supremacy Clause of the United States Constitution reads:

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.⁹

State officials and state court judges sometimes need to be reminded that in the 19th Century there was a bloody argument about the supremacy of federal law over state law, and General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse. It should also be noted that the westernmost counties of the Commonwealth of Virginia seceded from the Commonwealth when it unlawfully seceded from the United States, so that the new State of West Virginia was on the right side and the prevailing side of that bloody argument.

It should be noted that Judge Copenhaver did not mention in his opinion the margin of the 2014 general election in West Virginia for United States Senator or United States Representative. In fact, neither race was exceedingly close, and there was no possibility that these four ballots could change the winner for either office. These four UOCAVA voters had the right to insist that their ballots be counted for the offices of United States Senator and United States Representative, without regard to the effect or lack of effect on the outcome. I congratulate the Attorney General for successfully vindicating the voting rights of these four voters.

The important lesson of this case is that the 45-day rule is not just a suggestion—it is a mandate enforceable in federal court. Readers: Please contact your local election official (LEO). The titles vary from state to state—County Clerk, County Election Supervisor, County Auditor, Township Clerk, etc. Check out your own voter registration card, which you should carry in your wallet. That card will list the name, title, and contact information for your LEO.

Remind the LEO that absentee ballots for UOCAVA voters should have been transmitted not later than Saturday, 9/22/2018, which was exactly 45 days before the 2018 general election.¹⁰ If your LEO missed the deadline *for whatever reason*, please bring this failure to comply with federal law to the attention of the Attorney General of the United States and please send me an e-mail at SWright@roa.org. It is not too late to initiate a legal action to vindicate the voting rights of the brave young men and women from your community who serve our country in uniform.

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⁹U.S. CONST., art. VI, cl. 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

¹⁰This assumes, of course, that the UOCAVA voter has his or her absentee ballot request in by that deadline.

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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