

LAW REVIEW¹ 194

Federal Law Overrides State “Not Earlier Than” Rules

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

7.4—How a Service Member or Military Spouse Can Vote

7.5—Federal Voting Statutes Trump Conflicting State Statute or State Constitution

Q: I am a sailor in the United States Navy. I serve in the crew of a nuclear submarine. We deploy for months at a time, sometimes on short notice. We are submerged, and unable to receive mail, during most of the time that we are deployed. I want to apply for my absentee ballot now, in January 2006, because we are in port for a few weeks and this is a convenient time for me to do this.

I called the county clerk in my hometown and asked about submitting my Federal Post Card Application (FPCA) in January for the November general election. She told me that our state law provides that an absentee ballot request must be submitted *not earlier than* 90 days before the election. She told me that if she receives the application more than 90 days before the election she would destroy it and not act on it.

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.

I protested that her policy is likely to result in my being disenfranchised. She blew me off. She said, “Rules are rules.” She seems to have no appreciation for my Navy service or how the circumstances of my service make voting difficult. Is she correct about the “not earlier than” requirement of state law?

A: Your county clerk is *wrong*. Regardless of what your state law provides, federal law overrides state “not earlier than” rules, in the case of military voters. “A state may not refuse to accept or process, with respect to any election for federal office, any otherwise valid voter registration application or absentee ballot application (including the postcard form [FPCA] prescribed under section 1973ff of this title) submitted by an absent uniformed services voter during a year on the grounds that the voter submitted the application before the first date on which the state otherwise accepts or processes such applications for that year submitted by absentee voters who are not members of the uniformed services.” Title 42, United States Code, section 1973ff-3(e) [42 U.S.C. 1973ff- 3(e)].

Article VI, Clause 2 of the U.S. Constitution is called the “Supremacy Clause.” It provides that a federal statute overrides a state statute, or even a state constitution. If your county clerk refuses to process your completed FPCA on the grounds that it was submitted too early, your county clerk is violating federal law, regardless of what your state law provides.

Q: May I use a single FPCA to request an absentee ballot for both the primary and the general election?

A: Yes. Moreover, you may use a single FPCA to request absentee ballots for all federal elections, including primaries and special elections, for federal office (president, U.S. Senate, and U.S. House of Representatives) in both 2006 and 2008. “If a State accepts and processes an official post card [FPCA] form (prescribed under section 1973ff of this title) submitted by an absent uniformed services voter or overseas voter for simultaneous voter registration and absentee ballot application (in accordance with section 1973ff- 1(a)(4) of this title) and the voter requests that the application be considered an application for an absentee ballot for each subsequent election for Federal office held in the State through the next 2 regularly scheduled general elections for Federal office (including any runoff elections which may occur as a result of the outcome of such general elections), the State shall provide a ballot to the voter for each such subsequent election.” [42 U.S.C. 1973ff-3(a).]

Congress has directed the Department of Defense to revise the FPCA form to facilitate the use of a single application for multiple elections. *See* 42 U.S.C. 1973ff-3(c). That revision has been made in the new FPCA form.

**Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.*

Update – April 2022

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 section cited throughout the article can be found at:

42 U.S.C. § 1973ff-3 discussing prohibition of refusal of applications on grounds of early submission can be found at 52 U.S.C. § 20306.

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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.

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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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