

LAW REVIEW¹ 20027
March 2020

**Is it Unlawful for your Local Election Official to Require you to Print your
Absentee Ballot on Paper that is Exactly 8.5 Inches by 11 Inches?**

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

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

Q: I am a long-retired Colonel in the Army Reserve and a life member of the Reserve Organization of America.³ I have read with great interest some of your “Law Review” articles

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.

³At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more

about the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and other laws that are especially pertinent to those who serve our country in uniform.

When I turned 60 and started drawing my Army Reserve retirement, I moved to an Eastern European country that used to be our nation's sworn enemy, in the Warsaw Pact, but is now a NATO ally and a member of the European Union. My retired pay and Social Security benefits support a much better standard of living here in Eastern Europe than I would be able to enjoy in the state where I lived for most of the first six decades of my life, and living here has given me the opportunity to explore my family roots.

I have applied for an absentee ballot for the primary election in my home state, to be held later this spring. My hometown local election official has already sent me my primary ballot by e-mail. My problem is with the instructions that accompanied the ballot.

The instructions say that I must print the unmarked ballot on pieces of paper that are exactly 8.5 inches by 11 inches. There is no worldwide standard on the size of a "letter size" piece of paper.⁴ I have searched several stores in this city, and I have been unable to find any store that can sell me paper that is exactly 8.5 inches by 11 inches. Help!

A: UOCAVA provides:

A State shall not refuse to accept and process any otherwise valid voter registration or absentee ballot application ... or marked absentee ballot submitted in any manner by an absent uniformed services voter or overseas voter solely on the basis of the following:

1. Notarization requirements.
2. *Restrictions on paper type, including weight and size.*
3. Restrictions on envelope type, including weight and size.⁵

Your hometown election official would be violating federal law if she refuses to count your marked absentee ballot because it is printed on paper that is larger or smaller than 8.5 inches by 11 inches.

UOCAVA also provides: "The Attorney General [of the United States] may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this title [UOCAVA]."⁶ I have brought your situation to the attention of an attorney in the Civil Rights Division, United States Department of Justice (DOJ). I am confident that DOJ will

dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴See <https://www.technicalcommunicationcenter.com/2010/03/19/u-s-and-european-standard-paper-sizes/>.

⁵52 U.S.C. § 20302(i) (emphasis supplied).

⁶*Id.* § 20307(a).

sue your local election official if she refuses to correct the misleading absentee ballot instructions that are clearly inconsistent with federal law.

Q: The local election official has insisted that the instructions are consistent with state law and that state law prohibits her from changing them. What do you say about that?

A: The pertinent section of the United States Constitution is as follows:

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.⁷

If (as appears to be the case) your state law is inconsistent with UOCAVA, the election official must obey UOCAVA even if that means violating your state's law. State and local officials in your state sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

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

⁷U.S. CONST., art. VI, cl. 2. Yes, it is capitalized just that way, in the style of the late 18th Century. This provision is called the Supremacy Clause.

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