

LAW REVIEW¹ 21072

November 2021

Vote in the 2022 Mid-Term Elections

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

4.5—SCRA protection against state and local tax authorities

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

7.2—Relationship between where the servicemember or spouse votes and where he or she must pay state and local taxes.

Just one year from now, on 11/8/2022, our nation will conduct the 2022 mid-term elections, for 34 United States Senate seats and all 435 seats in the United States House of Representatives. In addition, 36 states and 3 territories will elect Governors, and 30 states, 3 territories, and the District of Columbia will elect Attorneys General, and there will be numerous other elections for state legislative, county, and municipal positions.³ If you are a citizen of the United States and at least 18 years old, you are eligible to vote in these elections, and I urge you to do so.

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.

³See https://en.wikipedia.org/wiki/2022_United_States_elections (last checked 9/30/2021).

If you are on active duty in any one of our nation's eight uniformed services⁴ and if you are absent, because of such service, from the place that is your residence (domicile), you are eligible to vote by absentee ballot in the place that is your residence (domicile) for general, special, primary, and runoff elections for federal offices.⁵ You are also eligible, under the Servicemembers Civil Relief Act (SCRA), to vote in person or by absentee ballot for state and local offices and ballot questions.⁶

Q: How do I apply for an absentee ballot for the 2022 primary and general election?

A: You should use the Federal Post Card Application (FPCA) to make a simultaneous voter registration application and absentee ballot request.⁷ It is still possible to obtain a paper copy of the FPCA and to complete it in the old-fashioned way, with pen on paper, and then mail the application to your election official back home. In the 21st Century, a much better way to register to vote and request an absentee ballot is through the website of the U.S. Vote Foundation or its overseas vote initiative.⁸ Using either of those websites, you can complete your FPCA and submit it electronically or by mail to the appropriate local election official.

Q: When should I submit my completed FPCA to register to vote and apply for an absentee ballot?

A: You can submit your FPCA application at any time during the calendar year of the election. In other words, you can apply on January 1, 2022, or on any later date, to vote in the 2022 general election or any primary, special, or runoff election scheduled for 2022. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) specifically supersedes and overrides any "not earlier than" State laws on when an active-duty service member can apply for his or her absentee ballot. The pertinent UOCAVA section is as follows:

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 prescribed under section 101 [52 U.S.C. § 20301]) 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

⁴The eight uniformed services include the armed forces (the Army, Navy, Marine Corps, Air Force, Coast Guard, and the newly created Space Force) as well as the commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration. See 10 U.S.C. §§ 101(a)(4) and 101(a)(5).

⁵See 52 U.S.C. §§ 20302(a)(1); 20310(1)(A).

⁶See 50 U.S.C. § 4025(a).

⁷52 U.S.C. §§ 20301(b)(2), 20302(a)(4). If you are on active duty in one of the eight uniformed services, your hometown election official is required by federal law to treat your completed FPCA as a simultaneous voter registration application and absentee ballot request and to send you an absentee ballot *even if you have not registered to vote in the traditional way*.

⁸See *Register to Vote/Absentee Ballot Request, OVERSEAS VOTE*, <https://www.overseasvotefoundation.org/vote/VoterInformation.htm> (last visited Oct. 2021).

accepts or processes such applications submitted by absentee voters who are not members of the uniformed services.⁹

Under the “Supremacy Clause” of the United States Constitution,¹⁰ a Federal statute like USERRA overrides conflicting State statutes and constitutions.¹¹

You should submit your completed FPCA form *as early as possible* to provide yourself sufficient time to receive your ballot, mark it, and return it by the deadline (usually the time set for the closing of the polls on Election Day). UOCAVA requires that “Each State shall”

- (8)** transmit a validly requested absentee ballot to an absent uniformed service voter or overseas voter—
 - (A)** except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election; and
 - (B)** in the case in which the request is received less than 45 days before an election for Federal office—
 - (i)** in accordance with State law; and
 - (ii)** if practicable and as determined appropriate by the State, in a manner that expedites the transmission of such absentee ballot.¹²

In other words, if the election official has your absentee ballot request in hand at least 45 days before Election Day, the election official *must* transmit the unmarked absentee ballot to you not later than the 45th day before Election Day. Be sure to get your absentee ballot request in on time so that you will receive your unmarked ballot on time.

Q: Where do I submit my completed FPCA (registering to vote and requesting an absentee ballot)?

A: You must send your completed FPCA to the election official for the community where you have your domicile (legal residence). In two States, Alaska and Maine, State offices administer absentee voting at the State level—i.e., you send your application to an office in the State capital. In Connecticut, Massachusetts, Michigan, New Hampshire, Rhode Island, Vermont, and Wisconsin, election officials in cities, towns, and township (which are smaller than counties)

⁹52 U.S.C. § 20306.

¹⁰U.S. CONST., art. VI, cl. 2.

¹¹See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹²52 U.S.C. § 20302(a)(8).

administer absentee voting. In the other States, officials at the county level administer absentee voting.¹³

If you generate your FPCA on the U.S. Vote Foundation or Overseas Vote website, it will print with instructions including your election office address to which you should submit your completed form. The Foundation websites also have an Election Official Directory which you can use to look up complete contact details of your local election official.

Q: You said that I must send my completed absentee ballot application to the election official for the place that constitutes my domicile (legal residence). How do I determine my domicile?

A: Generally speaking, if you are on active duty your domicile is the place where you lived and had your domicile *immediately before you entered active duty*, unless and until you have established a new domicile at the place where you physically reside pursuant to your military assignment. Please see Law Review 21073, the next article in this “Law Review” series, for a detailed discussion of the domicile of active-duty service members and how that determination affects your obligation to pay State income tax and personal property tax to the State where you physically reside. If you are uncertain about your domicile, make an appointment to meet with a military legal assistance attorney, and take a copy of Law Review 21073 with you.

The determination of your domicile is a matter of applying laws and legal principles to your specific facts. This is not a matter of “pick a State, any State.” You cannot just pick a State based on its favorable tax policy, like no State income tax, nor can you pick a State based on the perception that it is “in play”—that the election in that State is remarkably close and your vote might determine the outcome.

Q: Do I have to be serving outside the United States to be eligible to vote by absentee ballot under UOCAVA?

A: No, you do not have to be away from the United States, and you do not even have to be away from your domicile State. It is only necessary that you be absent, because of your service, from the *place of your domicile*. For example, Petty Officer Joe Smith was born and raised in Arlington, Virginia and graduated from high school there in 2018. Soon after graduation day, he enlisted in the Navy and left home to report to basic training. He is still on active duty and is serving at Naval Base Norfolk, two hundred miles from his home in Arlington. His domicile is at the home that he shared with his parents and siblings before he left home to go on active duty, even if his parents have since moved away or passed away. Joe is still in Virginia, but he is away from his domicile because of his Navy service, and he is eligible to vote by absentee ballot in Arlington.

Q: My husband is a civilian—not on active duty. I am serving on active duty at a military base in California, and he lives with me in an apartment near the base. He is away from his home

¹³In Louisiana, the counties are called “parishes.”

(domicile) because he accompanied me to California while the military stationed me here. Is my husband eligible to vote by absentee ballot under UOCAVA?

A: Yes. UOCAVA's definition of "absent uniformed services voter" includes active-duty members of the uniformed services and it also includes "a spouse or dependent of a [service] member referred to in subparagraph (A) or (B) who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote."¹⁴

Your husband needs to send a completed FPCA to the election official for his place of domicile. Please note that your husband's domicile is not necessarily the same as yours. It is entirely possible for a married couple to live together in the same house or apartment but have domiciles in different States if at least one of them is on active duty in the uniformed services.¹⁵

Q: Why does the FPCA ask me to provide two different addresses?

A: The FPCA, or any absentee ballot request form, has two address lines. The "permanent home address" is the place, in the election official's jurisdiction, that constitutes your domicile. The election official needs your exact street address and apartment number (if any). The election official needs to "precinct" your application—to send you the same ballot that you would receive if you appeared in person at the polling place on Election Day.

The "mail my ballot to" address should be different from the permanent home address if you are a service member on active duty. It can be your military unit's address, or it can be the street address of the house or apartment where you sleep, within a reasonable commuting distance of the base where you serve.

Q: After I have submitted my completed FPCA, what happens next?

A: The election official will send you (by mail) an unmarked absentee ballot, a set of instructions, an inner envelope, and an outer envelope. It is essential that you read and follow the instructions carefully and that you comply with the requirements of the double-envelope system.

You should mark your ballot in secret and then place the marked ballot in the inner envelope. The inner envelope should have no identifying markings. You then seal the inner envelope and place it in the outer envelope and seal the outer envelope. On the back of the outer envelope, which is addressed to the election official, you must complete the affidavit and include your

¹⁴52 U.S.C. § 20310(1)(C).

¹⁵Please see Law Review 20011 (January 2020) for a detailed discussion of the domicile of military spouses for voting and taxation purposes.

identifying information. Then you transmit the sealed outer envelope back to the election official.¹⁶

When election officials count the absentee ballots, they will review the outer envelopes to determine identity and eligibility of the absentee voters. Then, they will open the outer envelopes and put the still-sealed inner envelopes in a stack and remove the opened outer envelopes from the room.

The election officials will open the unmarked inner envelopes and count the ballots contained therein. The double-envelope system serves two important purposes. First, it preserves the *secrecy of the ballot*. When the election officials open the unmarked inner envelopes, they have no way to identify the individual who cast a ballot.

The double-envelope system also promotes the integrity of the system. If the process is followed correctly, the election officials will not know *how you voted* when they review your affidavit on the back of the outer envelope to determine your identity and eligibility.

Do not send a “naked” absentee ballot to the election official. It is important that you seal your marked absentee ballot in the unmarked inner envelope and put that sealed inner envelope in the outer envelope. *Follow the instructions carefully to ensure that your ballot will be counted.*

I hope that this information is useful to you and will help you to vote in primary, general, special, and runoff elections in 2022 and to ensure that your vote is counted.

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at www.roa.org/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.

¹⁶For UOCAVA voters, the Federal Government bears the cost of postage in the United States Postal Service, the Army Post Office, and the Fleet Post Office. Ordinarily, you do not need to put a postage stamp on the ballot return envelope.

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