

## Military Voting Rights in Alabama and elsewhere

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[About Sam Wright](#)

### 7.0—Military voting rights

For as long as military personnel have had the right to vote at all, a substantial minority, and in some cases a majority, have been disenfranchised through no fault of their own. Because of late primaries, ballot access lawsuits, and other problems, local election officials (LEOs) sometimes do not have absentee ballots printed and ready to transmit until a few days before Election Day. For military personnel serving at sea or at isolated overseas duty stations, there often is not enough time for the ballot to go from the LEO to the voter and back. Although the military voter may have applied for the ballots months in advance, he or she will not receive the ballot in time to be able to mark it and send it back to the LEO in time for the ballot to count.<sup>3</sup>

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1900 "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. I am the author of more than 1700 of the articles.

<sup>2</sup> BA 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](mailto:SWright@roa.org).

<sup>3</sup> I have been working this issue since November 1976. In my first case as a lawyer, I represented a congressional candidate who narrowly lost the 1976 general election. Hundreds of absentee ballots, mostly from Army Post

In a 1952 letter to Congress, President Harry S. Truman<sup>4</sup> wrote:

About 2,500,000 men and women in the Armed Forces are of voting age<sup>5</sup> at the present time. Many of those in uniform are serving overseas, or in parts of the country distant from their homes. They are unable to return to their States either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in this election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve.

In his 1952 letter, President Truman called upon the states to fix this problem, and he called upon Congress to enact temporary federal legislation for the 1952 presidential election. He wrote: "Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State law before the congressional elections of 1954."

Well, it did not work out that way. The Korean War ground to an inconclusive halt in 1953, and the military voting rights issue fell off the national radar screen until 2000, when late-arriving military absentee ballots that were counted under a 1952 federal court order determined the outcome of the 2000 presidential election in Florida.<sup>6</sup>

The greatest problem was in states like Florida, with late primaries and even later runoff primaries. Until 2002, when Florida abolished the runoff primary, Florida held its runoff primary just 35 days before the general election. As the reader can understand, the LEO cannot print general election ballots, much less mail them out, until the results of the runoff primary have been certified.

It was necessary to get the states to move back primaries and runoff primaries to earlier in the year. For decades, the problem was that late primaries generally benefit incumbents seeking reelection, and the legislators who write the rules are incumbents.

Finally, in 2009, Congress got tired of waiting on the states to fix this problem, and Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), which amended the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986. As amended, federal

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Office (APO) and Fleet Post Office (FPO) addresses, arrived in the days following Election Day and were not counted.

<sup>4</sup> In 1922, Captain Harry S. Truman, a veteran of the "Great War" in Europe, was one of the founders of our association, the Reserve Officers Association (ROA), now doing business as the Reserve Organization of America.

<sup>5</sup> At the time, the voting age was 21. It was not reduced to 18 until 1971.

<sup>6</sup> Please see Law Review 23 (March 2001).

law now explicitly requires each state to transmit absentee ballots to military personnel and dependents (within or outside the United States) and to civilian citizens outside our country temporarily or permanently *at least 45 days before Election Day*.<sup>7</sup> UOCAVA, including the 45-day rule, applies to primary, general, special, and runoff elections for federal office (President, United States Senator, and United States Representative).<sup>8</sup>

In nine states, mostly in the South, winning a party nomination requires a *majority* vote in the primary, not just a plurality. Whenever there are three or more candidates in the primary, it is possible that no candidate will receive a majority. In that situation, a runoff primary is conducted, involving the top two vote-getters in the first primary. UOCAVA further provides that “if the State declares or otherwise holds a runoff election for Federal office, [the State must] establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in a manner that gives them sufficient time to vote in the runoff election.”<sup>9</sup>

In 2014, Alabama planned to conduct the runoff primary 42 days after the first primary, thus making it impossible to meet the 45-day standard for the runoff primary. The Attorney General of the United States sued Alabama<sup>10</sup> in the United States District Court for the Middle District of Alabama, asserting that Alabama’s election schedule violated UOCAVA. Alabama adopted a “written plan” that asserted that overseas voters (military and civilian) would have time to get their ballots in for the runoff primary. Alabama contended that the “written plan” mandate under section 20302(a)(9) overrode the 45-day mandate under section 20302(a)(8).

In the District Court, the case was decided on cross motions for summary judgment because the facts were not in dispute and the dispute was about the meaning of the law (UOCAVA) as applied to the undisputed facts. The district court judge agreed with the Attorney General’s argument and disagreed with Alabama’s argument and granted the Attorney General’s motion for summary judgment.<sup>11</sup> Alabama appealed to the United States Court of Appeals for the 11<sup>th</sup> Circuit,<sup>12</sup> which affirmed the district court.<sup>13</sup>

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<sup>7</sup> 52 U.S.C. 20302(a)(8). Just because federal law requires all election officials to get the ballots out by the 45<sup>th</sup> day before Election Day does not mean that all election officials meet this deadline. More than 7,600 LEOs administer absentee voting for federal elections. Readers, please contact your own local election official (County Clerk, Supervisor of Elections, etc.) to ensure that he or she is aware of the 45-day federal deadline and that he or she in fact meets the deadline.

<sup>8</sup> 52 U.S.C. 20310(3).

<sup>9</sup> 52 U.S.C. 20302(a)(9).

<sup>10</sup> UOCAVA provides: “The Attorney General may bring a civil action in an appropriate district court for such declaratory and injunctive relief as may be necessary to carry out this title.” 52 U.S.C. 20307(a).

<sup>11</sup> *United States v. Alabama*, 998 F. Supp. 2d 1283 (M.D. Ala. 2014).

<sup>12</sup> The 11<sup>th</sup> Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.

<sup>13</sup> *United States v. Alabama*, 778 F.3d 926 (11<sup>th</sup> Cir. 2015).

In 2020, Alabama will conduct its primary on 3/3/2020 and its runoff primary on 3/31/2020, just 28 days later. This year, there are seven Republican candidates for United States Senator in Alabama, so it is very likely that a runoff will be necessary. Alabama has adopted a revised “written plan” under section 20302(a)(9).

For the 2020 primary election, and any future primary involving three or more candidates for a federal office, Alabama will send to each military voter (within or outside the United States) and to each overseas civilian voter a “special” primary ballot. For each federal office for which there are three or more candidates, the local election official will send the military or overseas voter a ballot with instructions telling him or her to *rank* the candidates from first to last. If there is a runoff primary, the first primary ballot will count for the runoff primary for the highest-ranked among the candidates that have survived to the runoff.

For example, if the individual votes in the Republican primary he or she will be asked to rank the seven U.S. Senate candidates #1 through #7. Let us say that the runoff is between the individual’s third choice and his or her seventh choice. In that situation, the ballot will be counted for the runoff as a vote for the third choice.

As I explained in Law Review 20010 (January 2020), I believe that the “ranked choice ballot” plan that Alabama has implemented is not satisfactory to comply with UOCAVA. It is hard enough for the overseas voter to identify the one candidate for each office that he or she wants to support. Expecting the voter to rank seven candidates for the United States Senate is just too much to expect.<sup>14</sup>

Unfortunately, the Attorney General has endorsed Alabama’s written plan for the runoff primary. As I explained in Law Review 20010, there is a private lawsuit in federal court challenging the constitutionality of Alabama’s ranked-choice system as applied to military and overseas voters. We will keep the readers informed of developments on this important issue.

As President Truman explained in 1952, military personnel protect the rights that we all enjoy, including the right to vote in free elections, and it is incumbent on the rest of us to ensure that they are able to enjoy the rights that they are asked to fight to preserve. Please contact your own local election official to ensure that he or she is aware of the 45-day rule and that he or she intends and expects to comply. I recognize that getting the ballots out on time requires a special effort by the election official, and sometimes it requires adjustments in long-established

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<sup>14</sup> For example, let us assume that Seaman John Paul Jones of Selma, Alabama is serving on a U.S. Navy destroyer in the Persian Gulf. Because of his service to our country, Jones does not have other sources of information about candidates and elections that other voters take for granted. Jones cannot watch Alabama television stations, or listen to Alabama radio stations, or read Alabama newspapers. He is not visited by door-to-door political canvassers, and he does not receive telephone calls from political phone banks.

election calendars. I contend that these are small accommodations to make for those who protect us all.

### **Please join or support ROA**

This article is one of 1900-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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.

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](http://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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