

Voting by Military Personnel and Overseas Citizens: the Uniformed and Overseas Citizens Absentee Voting Act

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Voting by Military Personnel and Overseas Citizens: the Uniformed and Overseas Citizens Absentee Voting Act

Hans A. von Spakovsky*

All United States military personnel and their dependents, as well as American citizens located abroad, have a statutory right to vote by absentee ballot in all federal elections. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §1973ff *et seq.* (“UOCAVA”), to “update and consolidate provisions of current law relating to absentee registration and voting in elections for Federal office by members of the uniformed services and by citizens of the United States who reside abroad.” H.R. Rep. No. 765, 99th Cong., 2d Sess. 5 (1986). The predecessor statutes were the Overseas Citizens Voting Rights Act, 42 U.S.C. §1973dd *et seq.*, and the Federal Voting Assistance Act, 42 U.S.C. §1973cc *et seq.*

Summary of Statutory Provisions

Administration:

Under 42 U.S.C. §1973ff, the President was required to designate the head of an executive department to have primary responsibility for federal functions under UOCAVA. In 1988, President Ronald Reagan designated the Department of Defense and DOD in turn set up an office to administer its responsibilities, the Federal Voting Assistance Program (“FVAP”). Exec. Order No. 12,642, 53 Fed. Reg. 21,975 (June 8, 1988). FVAP provides assistance to military and civilian personnel who are eligible to vote under UOCAVA and its website contains detailed information on voting, including state-by-state instructions on registering and obtaining absentee ballots. See www.fvap.gov.

Enforcement:

Enforcement of UOCAVA is the responsibility of the Department of Justice. 42 U.S.C. §1973ff-4. The Attorney General may bring a civil action for declaratory or injunctive relief. As described *infra*, the Department of Justice has instituted numerous enforcement actions against states violating the requirements of UOCAVA.

State Requirements:

In essence, UOCAVA requires all states to “permit absent uniformed services voters and

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overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” 42 U.S.C. §1973ff-1(1). “Absent uniformed services voters” are defined as (i) a member of a uniformed service who is absent by reason of active duty from the place of residence where the member is otherwise qualified to vote; (ii) a member of the merchant marine who is absent due to his service; and (iii) a spouse or dependant who is also absent from the place of residence of the spouse or dependent because of that active duty or service. 42 U.S.C. §1973ff-6. In addition to the usual services one would expect to have included in the term “uniformed services” (the Army, Navy, Air Force, Marines, and Coast Guard), the term also includes the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration. 42 U.S.C. §1973ff-6(7).

The “states” covered by UOCAVA include the 50 states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and American Samoa. 42 U.S.C. §1973ff-6(6). This leads to the somewhat confusing result that a civilian who is temporarily working overseas in a United States territory such as Guam, but whose state of residence for voting purposes is, for example, Georgia, is not considered an “overseas” voter who would be covered by UOCAVA’s protections. See 42 U.S.C. §1973ff-6(8). That voter would be limited to his state’s statutory provisions for absentee voting. All of the states and territories have their own laws on absentee and early voting.

UOCAVA voters who take advantage of the statute’s provisions do not affect their “residence or domicile” for Federal, State or local tax purposes. 42 U.S.C. §1973ff-5.

UOCAVA requires States to:

- accept any valid voter registration application and absentee ballot application that is received not less than 30 days before the election;
- permit the use of a special Federal Write-in Absentee Ballot (“FWAB”) as a back-up ballot under certain circumstances; and
- use the official post card prescribed in the statute for simultaneous voter registration application and absentee ballot requests.

42 U.S.C. §1973ff-1.

Voter Registration and Absentee Ballot Requests:

As required by UOCAVA, FVAP has developed a Federal Post Card Application (“FPCA”) form that doubles as both a registration form and an absentee ballot request form. 42 U.S.C. §1973ff(b)(2). It is a postage-free postcard, printed and distributed by FVAP to embassies and military bases. The FPCA is also available online at www.fvap.gov/pubs/onlinefzca.pdf as Standard Form 76A. This form can be used by UOCAVA voters in place of a state’s registration form to become registered to vote and in place of a state’s absentee ballot request form to request that an absentee ballot be sent to the voter.

If a voter using the FPCA “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,” the State has to send the voter an absentee ballot for each such subsequent federal election. 42 U.S.C. §1973ff-3(a). This requirement is abrogated if (i) the voter notifies the State that he no longer wants to be registered or (ii) the State determines that the voter has registered in another State. *Id.* at (b). If a State rejects a voter’s registration or ballot request, the voter must be provided the reason for the rejection. 42 U.S.C. §1973ff-1(d).

Some States bar absentee ballot request forms from being submitted before a certain date prior to an election. Section 1973ff-3(e) prohibits a State from refusing to accept or process a ballot request form “submitted by an 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.”

Federal Write-In Absentee Ballot:

fvap has also developed the FWAB form, which is widely available at embassies and military bases. It is available online at www.fvap.gov/pubs/ofwab.pdf as Standard Form 186A. The FWAB can be used by UOCAVA voters to cast a ballot in a general election if they have not received the state absentee ballot they requested. UOCAVA does not require a State to accept the FWAB for a primary or special election.

One very significant change to the FWAB went into effect just days before the November 2, 2004 election. On October 28, 2004, President Bush signed into law the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (“2005 Authorization Act”), which among other things, amended UOCAVA. Pub. L. No. 108-375 (H.R. 4200). Section 566 of the 2005 Authorization Act amended the definition of “overseas voter” in §1973ff-1 and §1973ff-2 to specify that the FWAB can be used by “absent uniformed services voters and overseas voters.” In other words, military personnel, whether located in the United States or abroad, and overseas civilians, can now use the FWAB as a back-up ballot. Prior to this amendment, the FWAB could only be used by *overseas* voters, both civilian and military. The 2005 Authorization Act also amended the deadline for the FWAB to be received by a State.

UOCAVA specifies that the FWAB will not be counted by a State:

- (1) in the case of a ballot submitted by an overseas voter who is not an absent uniformed services voter, if the ballot is submitted from any location in the United States;
- (2) if the application of the absent uniformed services voter or overseas voter for a State absentee ballot is received by the appropriate State election official after the later of
 - (A) the deadline of the State for receipt of such application; or
 - (B) the date that is 30 days before the general election; or
- (3) if a State absentee ballot of the absent uniformed services voter or overseas voter is

received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot under State law.

See 42 U.S.C. §1973ff-2 as amended by Pub. L. No. 108-375, Section 588.

The amendment by the 2005 Authorization Act added part (2)(A), the deadline of the State for receipt of an absentee ballot application. Prior to this amendment, a voter had to get his application to the State at least 30 days before the election to use the FWAB.

Basically, the FWAB is supposed to be used if a voter has requested an absentee ballot, but for some reason, whether it is delayed by mail problems or otherwise, the voter fails to receive the state absentee ballot. Under such circumstances, the voter can complete the FWAB and send it back to state election officials. If he then receives the state absentee ballot in the mail, completes it, and mails it back to state election officials, the State will not count the FWAB if the state ballot gets back before the deadline. If the state ballot is not received by election officials or arrives after the state-imposed deadline for receipt, the State must count the FWAB if it was received before the deadline.

Special rules apply to the completion of the FWAB that were designed to prevent state election officials from not counting ballots because of minor problems in the way the voter completed the write-in ballot. The voter can designate a candidate by writing in the name of the candidate or his political party; for the offices of President and Vice President, a vote for a named candidate or his political party will be considered a vote for the electors supporting the candidate; and any abbreviation, misspelling, or other minor variation in the name of the candidate or political party must be disregarded if the “intention of the voter can be ascertained.” 42 U.S.C. §1973ff-2(c).

States can use their own absentee ballot in place of the FWAB if the state ballot is approved by FVAP and is made available at least 60 days before the deadline for receipt of a state ballot. 42 U.S.C. §1973ff-2(e). A State also does not have to permit use of the FWAB (i) if the State has in effect a law that requires absentee ballots to be available to *uniformed services voters* at least 90 days before the general election and (ii) that requires absentee ballots to be available to *other overseas voters* as soon as the official list of candidates in the general election is complete. 42 U.S.C. §1973ff-2(f).

Information on UOCAVA:

UOCAVA requires each State to designate a single office responsible for providing information to UOCAVA voters on voter registration and absentee ballot procedures. 42 U.S.C. §1973ff-1(b)(2). The Help America Vote Act of 2002 amended this section to require States to send the new Election Assistance Commission information on the number of absentee ballots transmitted and returned within 90 days of each general election for federal office. *Id.* at (c). Although FVAP has sporadically collected some of this information in the past, this amendment will for the first time legally require information on the actual number of absentee ballots cast by UOCAVA voters in each State to be provided to the federal government. The initial reports will

be filed after the November 2, 2004 election.

Enforcement of UOCAVA

Violations of UOCAVA:

The Department of Justice has filed more than 20 enforcement actions against state election officials pursuant to UOCAVA starting in 1988 and continuing through 2004, and filed numerous suits prior to 1988 under the predecessor statutes to UOCAVA. Information about those suits is available at www.usdoj.gov/crt/voting/misc/activ_uoc.htm. Generally, these suits were filed when absentee ballots were mailed out so late by state and local officials that there was a substantial risk that many overseas voters would not receive the ballots in time to be able to complete and return them to the State by the deadline for receipt established by State law.

UOCAVA does not specify the exact number of days prior to the election that requested absentee ballots must be mailed out by State election officials. However, UOCAVA does require that States permit absent uniformed service voters and overseas voters to use absentee ballots to vote in elections. As a result, the Department has successfully argued that this requirement imposes a duty on States to mail absentee ballots to voters early enough before an election so that the ballots have sufficient time to travel overseas, provide a reasonable amount of time for the voters to review and complete the ballots, and then mail them back to the United States, taking into account average overseas mail transit time as established by military and U.S. Postal Service experts.

The mail transit delays experienced by overseas voters has not changed in the almost 20 years since UOCAVA was passed. At that time, Congress reported:

Mail delivery is a problem for overseas voters. Members of the military may be in locations where mail service is sporadic, or they may be away for days or weeks at a time on temporary duty or on maneuvers. Among civilians overseas, missionaries and Peace Corps Volunteers in particular often work in remote areas where mail delivery is slow. Citizens working on oil rigs or on remote construction sites regularly encounter mail delays.

H.R. Rep. No. 765, 99th Cong., 2d Sess. 10-11 (1986).

Congress also found that “[b]ased on surveys of the U.S. Postal Service and of military postal authorities, ballots should be mailed to overseas addresses *at least* 45 days prior to an election in order to ensure adequate time for a ballot to reach a voter and be returned.” *Id.* The 45-day transit time was emphasized again recently by the United States Election Assistance Commission (“EAC”) in a report it released in September, 2004 on the best practices for facilitating voting by overseas citizens covered by UOCAVA. The EAC’s first recommendation in the Executive Summary is that States should “[m]ail absentee ballots at least 45 days prior to

the deadline for receipt of voted absentee ballots.” Report of the U.S. Election Assistance Commission, *Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act* (2004). See <http://www.eac.gov/fvap.asp?format=none>.

Special rules for overseas voters are particularly important given that many overseas voters are members of the armed forces, based in the war zones of Iraq and Afghanistan where mail delays are all too common. A report released by the General Accounting Office cited the wartime standard of 12 to 18 days for one-way mail delivery to Iraq and found that the average transit times for letters and parcels into the theater was between 11 and 14 days, although “the method used to calculate these averages consistently masks the actual times by using weighted averages that result in a significant understating of transit times.” *Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved*, GAO-04-484 (April 2004), at page 2.

Constitutionality of UOCAVA

Courts have rejected constitutional challenges to UOCAVA. States are not precluded from treating voters covered by UOCAVA differently than other voters. See *Igartua De La Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995). In *Igartua*, residents of Puerto Rico brought an action alleging that UOCAVA violated their equal protection rights because it permitted United States citizens residing outside the United States to vote by absentee ballot in presidential elections, but did not permit United States citizens residing in Puerto Rico to do so. The First Circuit dismissed this challenge, holding that UOCAVA merely drew a distinction between citizens living abroad and citizens who move anywhere within the United States. *Id.* at 10. The court further reasoned that this distinction neither affected a suspect class nor infringed a fundamental right, noting that although the distinction between the classes “affects the right to vote, [UOCAVA] does not *infringe* that right but rather limits a state’s ability to restrict it.” *Id.* at 10 n.2 (emphasis added). As such, the court reasoned that the distinction need only be supported by a rational basis. *Id.* at 10.

Similarly, the Second Circuit has also held that UOCAVA’s distinctions between citizens residing abroad and citizens residing within the United States and its territories is not subject to strict scrutiny. See *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001) (holding that Congress acted in accordance with the Equal Protection Clause in requiring States and territories to extend voting rights in federal elections to former resident citizens residing outside the United States, but not to former resident citizens residing in either a State or territory of the United States).

The Supreme Court has also upheld absentee voting statutes that were “designed to make voting more available to some groups who cannot easily get to the polls,” without making voting more available to all such groups, on grounds that legislatures most often approach identified problems gradually. *McDonald v. Board of Election Comm’rs*, 394 U.S. 802, 807 (1969). Thus, a “statute is not invalid under the Constitution because it might have gone farther than it did.”

Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (internal quotation marks omitted). Indeed, the Supreme Court has expressly recognized that “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

2000 and 2004 General Elections:

UOCAVA and its provisions were in the national spotlight after the 2000 presidential election. In *Harris v. Florida Elections Canvassing Comm’n*, 122 F. Supp. 2d 1317, 1323 (N.D. Fla. 2000), *aff’d* 235 F.3d 578 (11th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001), the plaintiffs attempted to overturn a Florida administrative rule that provided overseas voters with a ten-day extension after the election to return their absentee ballots. *See also Bush v Hillsborough County Canvassing Board*, 123 F.Supp.2d. 1305 (N.D. Fla. 2000). Florida’s administrative rule had been promulgated to settle an enforcement action filed by the United States in 1980 against Florida under the predecessor statutes to UOCAVA. Florida was not sending out absentee ballots until at most 20 days before the election and in some cases only several days before the election. *Harris* at 1321.

In the enforcement action, the district court issued a TRO, “recognizing the late mailing out of the ballots and directing that overseas absentee ballots for the federal elections of November 6, 1980 should be received and counted if they were received within 10 days of election day.” *Id.* at 1321-1322. In 1982, due to continuing problems, Florida entered into a consent decree with the United States that included requiring Florida to submit a plan of compliance. After the Florida legislature failed to comply with the plan by passing necessary legislation, the district court issued a series of orders that finally resulted in Florida issuing an administrative rule that required absentee ballots for UOCAVA voters to be mailed out 35 days prior to the election and provided a 10-day extension of time after the election for their receipt. *Id.* at 1322-23. Florida’s administrative rule was upheld in *Harris* and a Florida statute requiring receipt of absentee ballots by election day was held to conflict with the federal statutes guaranteeing armed services members’ right to vote.

After the 2004 Presidential election, Florida’s absentee ballot extension for UOCAVA voters was again attacked, this time by the ACLU, claiming that not giving the same 10-day extension to all other absentee voters violated the Civil Rights Act of 1957, 42 U.S.C. §1971(a)(2)(B), as well as the Equal Protection Clause of the 14th Amendment. The ACLU’s motion for a preliminary injunction was denied after the court found no violation of the law and the case was subsequently dismissed. *Friedman v Snipes*, Case No. 04-22787 (S.D. Fla. November 9, 2004).

UOCAVA and New Technology – Electronic Transmission:

In 2004, the Department of Justice filed two enforcement actions in Pennsylvania and Georgia prior to each State’s federal primary due to late mailing of absentee ballots by local election officials. In both cases, district courts ordered extensions of time as well as other

remedies such as the States paying for voters' use of expedited mail delivery services to send back absentee ballots. See *United States v. Georgia*, Case No. 1:04-CV-2040 (N.D. Ga. July 15, 2004) (obtaining a 3-day extension of time in Georgia for the primary and primary runoff election for all federal ballots cast by UOCAVA voters); *United States v. Pennsylvania*, C.A. No. 1:CV-04-830 (M.D. Penn. April 16, 2004) (obtaining a 21-day extension of time in Pennsylvania for the primary election for all federal ballots cast by UOCAVA voters).¹ In the Georgia case, the Department also obtained a remedy it had never obtained before – the district court gave the State the authority to send requested ballots to UOCAVA voters by facsimile and email and to accept the returned and completed ballots by facsimile machine. *Slip Op.* at 6. FVAP has had an electronic transmission service for a number of years that allows both voters and state and local election officials to send election materials by facsimile, such as a request for registration or a ballot, a blank ballot sent to the voter by the election official, or a voted ballot returned to the local election official. Information on this service is available at www.fvap.gov/services/faxing.html.

State laws on facsimile and email transmission of election materials vary widely. All states allow voters to fax absentee ballot request forms to election officials; over half the states allow election officials to fax ballots to voters; and about half the states allow voters to fax completed ballots to election officials, although many of these statutes have certain conditions and requirements that apply. However, only a small handful of states allow election officials to email ballots to voters and only three allow a voter to email a completed ballot to election officials (Missouri, Montana, and North Carolina). See Mo. Rev. Stat. 115.279(1); 115.291(2),(3); Mont. Code Ann. 13-21-207, Mont. Admin. R. 44.3.1403; and N.C. Gen. Stat. 163-257, as amended by N.C. Legis. 2004-127, 8 N.C. Admin. Code 12.0101-12.0111. Facsimiles and emails present a marked improvement in delivery of ballot materials over regular mail because of their instantaneous transmission, but also present different security and possible integrity problems.

In 2001, FVAP was authorized by another defense authorization bill to implement an electronic voting system for UOCAVA voters and originally planned to have the system (SERVE - the Secure Electronic Registration & Voting Experiment) in place for the 2004 election. See Pub. L. No. 107-107, Div. A, Title XVI, §1601 (Dec. 28, 2001), 115 Stat. 1274. However, after undergoing extensive development, the project was cancelled after a number of computer scientists raised questions regarding its security. SERVE would have allowed voters

¹It is important to remember that UOCAVA only applies to federal elections. It does not apply to local or state elections. In some instances, however, when faced with a federal enforcement action because of a failure to properly send out absentee ballots to voters, States will move to extend the same remedies ordered or agreed to for UOCAVA voters on the federal portion of a ballot to the state portion of the ballot. In both of the enforcement actions filed in Pennsylvania and Georgia, the States moved to obtain orders protecting voters casting their ballots for state offices after they were ordered to provide such remedies for ballots cast for federal offices. See *Larios v Cox*, Civil No. 1:03-CV-693-CAP (N.D. Ga. July 15, 2004) and *Pennsylvania v. Board of Elections of Allegheny County*, Action No. 300-MD-2004 (Pa. Commw. Ct. April 21, 2004).

to register to vote and cast a ballot electronically over the Internet. See *“Pentagon Decides Against Internet Voting This Year,”* American Forces Press Service, February 6, 2004, at www.defense.gov/news/Feb2004/n02062004_200402063.html. This electronic voting project has been postponed until “the first regularly scheduled general election for Federal office which occurs after the Election Assistance Commission notifies the Secretary that the Commission has established electronic absentee voting guidelines and certifies that it will assist the Secretary in carrying out the project.” 2005 Authorization Act, Section 567.

Conclusion

There is no question that American military personnel and other overseas citizens can face significant problems in trying to exercise their right to vote. The inherent problems in overseas mail delivery and associated delays are often difficult to overcome. UOCAVA does provide protections for such voters but it is not a panacea. There are many steps that state and local election officials can take to make this process easier and more efficient. It is up to state legislators and election administrators to ensure that the absentee voting process is made as efficient as possible for all such voters.