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**Military Voting in 2016**

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7.0—Military voting rights

The 2016 presidential election is now only one year away, so now is a good time to review the laws that govern where and how active duty service members and family members are eligible to vote. Two federal statutes apply here.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) is a federal statute that was enacted in 1986 and is codified in title 52 of the United States Code, at sections 20301 through 20311 (52 U.S.C. 20301-11).<sup>3</sup> UOCAVA gives Absent Uniformed Services Voters (AUSVs) and Overseas Voters (OVs) the right to register and vote by absentee process in primary, general, special, and runoff elections for federal office.<sup>4</sup>

The Servicemembers Civil Relief Act (SCRA) is a federal statute that was enacted in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after our country entered World War I. The SCRA is codified in title 50 of the United States Code, at sections 3901 and following (50 U.S.C. 3901 *et seq.*). The SCRA has important provisions that protect the service member from double taxation of his or her

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1400 "Law Review" articles about the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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<sup>3</sup> UOCAVA was formerly codified in title 42 of the United States Code. It was moved to title 52 as part of a reorganization of the United States Code.

<sup>4</sup> Federal offices are President, United States Senator, and United States Representative. UOCAVA is discussed in detail in this article.

income and personal (moveable) property. These provisions are very relevant in determining *where* the service member should vote.

### **Who is eligible to vote under UOCAVA?**

UOCAVA gives Absent Uniformed Services Voters (AUSVs) and Overseas Voters (OVs) the right to vote in primary, general, special, and runoff elections for federal office.<sup>5</sup> UOCAVA defines the term AUSV as follows:

As used in this title, the term--

(1) "absent uniformed services voter" means--

(A) a member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote;

(B) a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote; and

(C) a spouse or dependent of a 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.<sup>6</sup>

#### ***Examples:***

##### **1. Active duty service member serving away from domicile**

Joe Smith graduated from Wakefield High School in Arlington, Virginia in 2012 and weeks later he enlisted in the United States Navy. He is still on active duty and is currently serving at the large Navy base in Norfolk, Virginia, 200 miles away from his Arlington home. Joe has maintained his domicile in Arlington, at the home owned by his parents—the home where he lived immediately before he enlisted in the Navy and reported to active duty in the fall of 2012. Joe qualifies as an AUSV—he is absent because of his uniformed service from the place of residence where he is otherwise qualified to vote.

It is not necessary that Joe be serving outside the United States or even outside the Commonwealth of Virginia to qualify as an AUSV. It is only necessary that he be absent

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<sup>5</sup> 52 U.S.C. 20301(a)(1).

<sup>6</sup> 52 U.S.C. 20310(1). Section 20310(5) [52 U.S.C. 20310(5)] defines the term "Overseas Voter" (OV) to include U.S. citizens who are outside the United States temporarily or permanently. The discussion of OVs (not active duty service members) is outside the scope of this article. Please see Law Review 1257 (June 2012) for a discussion of the voting rights of U.S. citizens outside the United States.

(because of his Navy service) from his domicile. Joe has exactly the same UOCAVA rights regardless of whether he is stationed in Virginia (but outside Arlington) or stationed in another state or stationed at sea or at an overseas duty location.

## 2. Active duty service member serving at place of domicile

Mary Jones also graduated from Wakefield High School in Arlington in 2012. Mary enlisted in the Army shortly after graduation and is currently serving on active duty at Fort Hood in Texas. Because Texas has no state income tax while Virginia has such a tax, Mary has changed her domicile from Virginia to Texas. Mary has registered to vote at the apartment where she lives, just outside the main gate of Fort Hood.<sup>7</sup>

Mary does not presently qualify as an AUSV because she is not absent (because of her Army service) from the place where she is domiciled and eligible to vote. If Mary deploys from her Fort Hood base to Afghanistan or some other place, she will qualify as an AUSV during her deployment. Similarly, if Mary remains on active duty and transfers (Permanent Change of Station—PCS) to a new duty station in another state, and maintains her domicile at the apartment near Fort Hood, Mary will then qualify as an AUSV.

## 3. Commissioned officer of the Public Health Service (PHS) or the National Oceanic & Atmospheric Administration (NOAA)<sup>8</sup>

Bob Williams, a physician, was living in Arlington when he joined the PHS Corps in 2005. Bob is still actively serving in the PHS and is assigned to a medical clinic at an Indian reservation in Arizona. Bob has maintained his domicile in Arlington while serving elsewhere in the PHS.

Both UOCAVA and the SCRA apply to all seven uniformed services, not just the five armed forces.<sup>9</sup> Bob qualifies as an AUSV and will continue to so qualify as long as he remains in the PHS in active service and as long as he maintains his domicile in Arlington.

## 4. Spouse of active duty service member—same domicile

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<sup>7</sup> The result would be exactly the same if Mary lived in assigned military quarters on the base and established that place as her domicile. The Supreme Court has held that it is unconstitutional to deny a person the right to register and vote based on his or her residence on a “federal enclave.” See *Evans v. Cornman*, 398 U.S. 419 (1970).

<sup>8</sup> The NOAA Corps and the PHS Corps have only commissioned officers, no enlisted personnel.

<sup>9</sup> There are five armed forces—the Army, Navy, Marine Corps, Air Force, and Coast Guard. 10 U.S.C. 101(a)(4). There are seven uniformed services, which includes the five armed forces plus the PHS Corps and the NOAA Corps. 10 U.S.C. 101(a)(5).

Alexander Adams graduated from Hillsborough High School in Tampa, Florida in 2005 and shortly thereafter married Christina Cox, his high school sweetheart, and they are still married. Alexander and Christina lived together as a married couple in an apartment in Tampa from 2005 to 2008, when Alexander joined the Coast Guard. Alexander is still on active duty in the Coast Guard and currently serves at a Coast Guard station in California. Christina has accompanied Alexander as he has transferred from one Coast Guard duty station to the next over the last eight years, all the while maintaining her domicile in Tampa, at the address of the apartment that she shared with Alexander from 2005 to 2008. Christina qualifies as an AUSV because she is absent (because of her husband's uniformed service) from her domicile in Tampa.<sup>10</sup>

#### 5. Spouse of active duty service member—not the same domicile

David Davis also graduated from Hillsborough High School in Tampa in 2005. David joined the Army shortly after graduation, and he has remained on active duty. David is currently serving at Fort Myer in Arlington, Virginia. David has maintained his domicile in Tampa.<sup>11</sup>

David lives in an apartment in Arlington and walks to work at Fort Myer, but he is not domiciled in Arlington. In 2014, David met Monica Meyer, who has lived in Arlington her entire life, and he married her in early 2015. After the wedding, Monica moved into David's apartment near Fort Myer. Although David and Monica are married to each other and live together in the same apartment, they are domiciled in different states. David is domiciled in Florida, and federal law gives him the right to maintain that domicile. Monica did not become a Floridian by marrying a Floridian. Monica is domiciled in Arlington, Virginia. Monica is not currently an AUSV because she is not absent (due to her spouse's uniformed service) from her place of domicile.

### **Where is the service member or military spouse eligible to vote?**

Every human being has one and only one *domicile*—legal residence. A citizen is eligible to vote (in person or by absentee ballot) *only* in the place that qualifies as the person's domicile.

For a civilian,<sup>12</sup> the person's domicile is the place where he or she usually sleeps, unless for a temporary purpose measured in days, weeks, months, or perhaps a few years.<sup>13</sup> Daddy

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<sup>10</sup> The result would be exactly the same if it were the wife on active duty in a uniformed service and the husband a civilian accompanying the active duty spouse.

<sup>11</sup> Like Texas, Florida has no state income tax.

<sup>12</sup> For this purpose, a Reserve Component (RC) member *not on active duty* is considered a civilian.

<sup>13</sup> For example, Barry Bonds is domiciled in Arlington, Virginia and works for a major corporation. The employer sends Barry to California for a three-month work assignment, and Barry has every intention of returning to Arlington at the end of the three-month assignment. In that case, Barry does not lose his Virginia domicile or establish a California domicile. But if Barry moves from Virginia to California with no specific intent to return at a

Warbucks can afford to buy and furnish 365 houses and to spend each night of the year sleeping in a different house, but Daddy still has only one vote and only one domicile.

The active duty service member is exempted from the usual rule about necessarily becoming a domiciliary of a new state to which the individual has moved. For example, Alexander Adams is on active duty in the Coast Guard and is stationed in California. Alexander has maintained his domicile in Tampa, Florida and is exempt from having to pay California state income tax on his military salary. Alexander is eligible to vote in Florida, not in California.

“A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.”<sup>14</sup>

“Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.”<sup>15</sup>

Alexander cannot have it both ways. He cannot be a Floridian for tax purposes and a Californian for voting purposes. Like any human being, he has one and only one domicile at a time, for all legal purposes. If he registers to vote or votes in California, he gives up his exemption from having to pay California state income tax.

“Evidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue.” *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973). This holding of the Maryland Court of Appeals (Maryland’s high court) has been cited with approval and upheld in eight later Maryland high court decisions: *Reeder v. Board of Supervisors of Elections of Queen Anne’s County*, 269 Md. 261, 305 A.2d 132 (1973); *Knapp v. Comptroller of the Treasury*, 269 Md. 697, 309 A. 2d 635 (1973); *Bartell v. Bartell*, 278 Md. 12, 357 A.2d 343 (1976); *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979); *Wamsley v. Wamsley*, 333 Md. 454, 635 A.2d 1322 (1994); *Roberts v. Lakin*, 340 Md. 147, 665 A.2d 1024 (1995); *Blount v. Boston*, 351 Md. 360, 718 A.2d 1111 (1998); and *Oglesby v. Williams*, 372 Md. 360, 812 A.2d 1061 (2002). The Oklahoma Supreme Court has also cited *Lenderking* with approval and has followed it. See *Suglove v. Oklahoma Tax Commission*, 1979

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specific date in the near future, Barry has thereby lost his Virginia domicile and established a California domicile, as of the date of the move. Barry would be required to pay California state income tax, not Virginia income tax, and Barry would be eligible to vote in California, not Virginia.

<sup>14</sup> 50 U.S.C. 4001(a).

<sup>15</sup> 50 U.S.C. 4001(b).

OK 168, 605 P.2d 1315 (1979). It is very likely that other state courts will follow this line of reasoning.

It is possible to change one's domicile while serving on active duty in the uniformed services. To do so, one must *simultaneously* have a physical presence in the state to which one wishes to change and the *intent* to make that new place home. Neither intent alone nor physical presence or absence alone is sufficient to establish a new domicile or to destroy a pre-existing domicile.

**Examples:**

1. The Joe Smith scenario

Joe Smith has maintained his domicile in Arlington, Virginia, at the place where he lived (with his parents and siblings) at the time that he graduated from high school and joined the Navy. The place where *he lived* controls, not the current residence of his parents. If Joe remains on active duty for a career of 20 years or more, it is likely that at some point his parents will move away or pass away. The death or move of his parents does not affect Joe's domicile, at the place where *he lived* just before he enlisted in the Navy. It is not necessary that Joe have relatives living at the address he claims as his domicile or that he be able to receive mail at that address.

2. The Mary Jones scenario

Mary has properly changed her domicile from Virginia to Texas. At the time she made the change, she simultaneously had a physical presence in the state to which she wished to change and the intent to make that place home. Mary is now eligible to vote only in Texas, not in Virginia.

Let us assume that Mary remains on active duty for a career and transfers to a new duty station, in another state, after her three-year assignment at Fort Hood. Mary can maintain her domicile at the address of the apartment where she lived, just outside the main gate of Fort Hood. Mary will probably want to maintain her Texas domicile, because Texas has no state income tax.<sup>16</sup>

**How do service members vote?**

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<sup>16</sup> The states that have no state income tax are Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. In addition, New Hampshire and Tennessee tax only interest and dividend income. See [www.govspot.com/know/incometax.htm](http://www.govspot.com/know/incometax.htm).

## 1. The Mary Jones scenario

Mary does not qualify as an AUSV because she is not absent (due to her uniformed service) from the place of her domicile—where she is eligible to vote.<sup>17</sup> Mary will need to register to vote in the traditional way, and she will need to vote in person at her polling place on Election Day, just like any other voter.<sup>18</sup>

## 2. The Joe Smith scenario

Joe is absent from his domicile (in Arlington) because of his Navy service in Norfolk, 200 miles away. Joe is eligible to vote by absentee ballot in Arlington, under UOCAVA.

It is important that Joe use the Federal Post Card Application (FPCA)<sup>19</sup> to apply for an absentee ballot. Joe completes the form and sends it to the Registrar of Voters of Arlington County.

It is still possible to obtain and fill out the old-fashioned, paper FPCA form. However, an online, guided process which assists the military voter to complete the form correctly for his or her state is accessible at the U.S. Vote Foundation [www.usvotefoundation.org](http://www.usvotefoundation.org) and the Overseas Vote Foundation (OVF) [www.overseasvote.org](http://www.overseasvote.org) websites.<sup>20</sup> These websites contain an easy to use “wizard” that Joe can use to complete the form in a way that is complete and legible. Joe can then download, print, sign and submit the form by post, or by e-mail, depending on his state’s options.

Joe will receive his unmarked absentee ballot, either electronically or by mail, depending on what he has specified as a preference. He marks the ballot and places it in the unmarked “inner envelope” and seals that envelope. He then places the sealed inner envelope in the outer envelope. He completes the affidavit on the back of the outer envelope and mails the marked ballot back to the Arlington Registrar.<sup>21</sup>

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<sup>17</sup> When Mary transfers to her next duty station and maintains her domicile at the address of the apartment near Fort Hood, Mary will then qualify as an AUSV.

<sup>18</sup> It would be prudent for Mary to cast an “early vote” in the weeks leading up to Election Day because it is possible that her military duties will preclude her from getting to the polling place on Election Day. The state laws that give employees the right to time off from work to vote do not apply to active duty service members.

<sup>19</sup> The FPCA is misnamed. For more than a decade, this federal form has folded over into a sealed envelope. Since a new FPCA form was adopted in 2004, it has not been necessary for you to put personal information (date of birth, Social Security number, etc.) on an open postcard.

<sup>20</sup> Any UOCAVA voter is eligible to use the FPCA and the OVF website, and this includes uniformed services personnel and spouses within the United States.

<sup>21</sup> The purpose of the double envelope system is to preserve the secrecy of your ballot. The election officials review the completed affidavits and make the necessary determinations about identity and eligibility before they open the outer envelopes. Then, the still-sealed inner envelopes are removed from the outer envelopes and the outer envelopes are removed from the room. When the election officials review and count the marked ballots, they have no way of knowing the identity of any one voter and the secrecy of the ballot is preserved.

## The problem of ballot transit time

For as long as military personnel have been permitted to vote at all (since World War II), a substantial minority of them (sometimes 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) have often not had absentee ballots printed and ready to mail until a few days before Election Day. For military personnel serving at sea or at isolated overseas duty stations, the ballots often go out so late that the service member voter is unable to receive the ballot, mark it, and return it on time to be counted.

Finally, in 2009, Congress amended UOCAVA. Each state is now *explicitly required by federal law* to get ballots out to UOCAVA voters not later than 45 days before Election Day.<sup>22</sup> Several states have moved their primaries back to earlier in the year, in order to make it possible for LEOs to meet the 45-day rule.<sup>23</sup>

The fact that federal law requires that ballots go out by the 45<sup>th</sup> day before Election Day does not necessarily mean that this always happens. There are more than 7600 LEOs who administer absentee voting for federal elections.<sup>24</sup> If no one is watching, the LEO may send out the ballots when he or she gets around to it, without regard to the requirements of law.

Readers: Please contact your LEO (County Clerk, Town Clerk, Registrar of Voters, etc.). Is the LEO aware of the requirement to get ballots out by the 45<sup>th</sup> day before Election Day? Did the LEO meet this standard in 2014? Does he or she expect to meet the standard for the primary and general election in 2016? Please let me know what you learn. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at (800) 809-9448, ext. 730.

Of course, the 45-day rule assumes that the voter has his or her absentee ballot request in by the 45<sup>th</sup> day before Election Day. It is important that service members submit their absentee ballot requests early in calendar year 2016, even if they have not yet had the opportunity to focus on their candidate preferences at that time.<sup>25</sup>

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<sup>22</sup> 52 U.S.C. 20302(A)(8).

<sup>23</sup> Until the results of the primary have been officially certified, the LEO cannot *print* general election ballots, much less mail them out.

<sup>24</sup> Absentee voting is administered centrally at the state level only in Alaska, Maine, and the District of Columbia.

<sup>25</sup> UOCAVA explicitly supersedes and overrides state “not earlier than” rules on when the absentee ballot request can be submitted. UOCAVA provides: “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 [FPCA]), 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.” 52 U.S.C. 20306.



## **The Federal Write-in Absentee Ballot**

Congress has also provided the Federal Write-in Absentee Ballot (FWAB) for AUSVs and OVs who make timely applications for but do not timely receive their regular absentee ballots.<sup>26</sup> The voter marks the FWAB by writing in the names of favored candidates or by expressing a party preference for federal offices (“Republican nominee” or “Democratic nominee”).

### *Examples*

Craig Cox is a Lance Corporal in the Marine Corps and is serving at a forward operating base in Afghanistan. Craig applied for his absentee ballot months ago, but we are up to October 10, 2016, and Craig still does not have his ballot from his home-town LEO. At that point, Craig obtains the FWAB (available on-line through the Overseas Vote Foundation) and marks it and sends it to his LEO back home. The LEO must count this ballot for federal offices.

Let us assume that in the next day’s mail (October 11, 2016), Craig receives his regular ballot from the home town LEO. Craig is permitted and indeed encouraged to mark and return the regular ballot, although he has already submitted the FWAB. If both ballots arrive at the LEO in time to be counted, the LEO should set aside the FWAB and count the regular ballot.<sup>27</sup>

Denise Davis is also a Lance Corporal, at the same forward operating base. Denise has not applied for an absentee ballot, but on October 10 she gets interested in the election. She obtains the FWAB, marks it, and places it in the mail to her LEO back home. This marked FWAB will not be counted because Denise did not make a timely application for her regular absentee ballot.<sup>28</sup>

## **Military voting in primaries and caucuses**

Both major political parties are conducting contested races for the presidential nomination. Most states will be conducting presidential primaries. The UOCAVA voter (military or civilian) is eligible to vote by absentee ballot in such a presidential primary, just like voting in the general election.

Iowa and several other states will select and bind convention delegates by a caucus system that requires voters to appear in person. Time, distance, and military regulations preclude service members from attending such caucuses and participating.

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<sup>26</sup> 52 U.S.C. 20303.

<sup>27</sup> 52 U.S.C. 20303(d).

<sup>28</sup> 52 U.S.C. 20303(a)(1).

The two major political parties adopt rules at their quadrennial national conventions, governing the presidential nomination process four years later. At its 2012 Convention in Tampa, the Republican Party adopted a new rule requiring the state party organizations to give active duty military personnel and wounded warriors a reasonable opportunity to vote in the 2016 presidential nomination process.

New Rule 16(d)(7) provides:

Any process authorized or implemented by a state Republican Party for selecting delegates and alternate delegates or for binding the presidential preference of such delegates *shall* use every means practicable to guarantee the right of active duty military personnel and individuals unable to attend meetings due to injuries suffered in military service the opportunity to exercise the right to vote in that process. This rule is not intended to and shall not prevent a state from using a caucus or convention process that may or may not elect presidential delegates or alternates.<sup>29</sup>

Rule 15(c)(7), as adopted in 2008 for the 2012 process, provided as follows: “Any process authorized or implemented by a state Republican Party for selecting delegates and alternate delegates or for binding the presidential preference of such delegates *may* use every means practicable, *in the sole discretion of the state Republican Party*, to encourage active military personnel the opportunity to exercise their right to vote.” (Emphasis supplied.)

As you can see, this new rule is a big improvement. In 2016, the state party organizations are *required*, not just encouraged, to adopt procedures that enable military personnel and wounded warriors (severely disabled veterans) to participate.

Time, distance, and military regulations<sup>30</sup> preclude active duty military personnel from participating in caucuses and conventions. Similarly, the severely disabled veteran will likely find it most difficult if not impossible to participate in person in a caucus or convention.

In 2012, most states conducted presidential primaries, but Iowa, Nevada, and several other states conducted caucuses and conventions to select delegates and alternates to the National Convention. The Iowa “caucus night” system gets a lot of publicity, this year and in prior

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<sup>29</sup> Emphasis supplied.

<sup>30</sup> Please see Law Review 1258 (June 2012). A lawful general order that applies to all active duty service members forbids them from attending partisan political meetings, like the “caucus night” in Iowa. Service members who violate this rule are subject to fine, imprisonment, and discharge from the service. Since this is a lawful general order, the prosecution need not prove that the defendant was actually aware of the general order. All service members are conclusively presumed to be aware of general orders.

presidential years, because it is the first tangible step in the presidential nomination process, even before the New Hampshire primary a few days later.<sup>31</sup>

I do not want to hear any “slippery slope” arguments. Yes, I realize that the Iowa college student at UCLA and the voter who is suffering from severe influenza on caucus night do not have the opportunity to participate without showing up in person. My answer is that *military service is different*. It is not unreasonable or unconstitutional to make accommodations for those who are away from home and prepared to lay down their lives in defense of our country that are not made for others.

The Democratic Party has no rule similar to Republican Rule 16(d)(7). When the Democratic Convention in 2016 adopts rules for the 2020 nomination process, I hope that such a rule will be adopted.

#### **Update—December 2015**

The Republican Party has made great progress in implementing Rule 16(d)(7) and in enabling active duty service members and severely disabled veterans to participate in the caucus and convention states without appearing in person. Please see Law Review 15114 (December 2015).

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<sup>31</sup> In 2016, the Iowa Caucus will be held on February 1.