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New FPCA Form Eliminates the Obnoxious Race Question

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Update on Sam Wright

7.0—Military voting rights

The Federal Voting Assistance Program (FVAP) in the Department of Defense (DOD) is working on a new version of the Federal Post Card Application (FPCA) and the Federal Write-in Absentee Ballot (FWAB).³ I am most pleased that the new FWAB form eliminates the obnoxious “race” question and the “sex” (gender) question.⁴ I urge the FVAP to eliminate these obnoxious questions from the FPCA form also.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)⁵ gives members of the uniformed services and their voting-age spouses and family members (within or outside our

¹ I invite the reader’s attention to <http://www.roa.org/page/lawcenter>. You will find more than 1600 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with 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. I am the author of more than 1400 of the articles.

² 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. I have 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 more than 34 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. For more than 40 years, I have recruited volunteers in every state to seek reforms of absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform.

³ As Susan Dzeduszycka-Suinat and I explained in Law Review 16118 (November 2016), the FWAB is a back-up ballot for the UOCAVA voter who has made a timely application for a regular absentee ballot but has not received it in time to cast it, for whatever reason. In this limited circumstance, the UOCAVA voter is permitted to vote for federal offices (President, United States Senator, and United States Representative) in the general election by writing in the names of favored candidates or by expressing a party preference, like “Democratic nominee” or “Republican nominee.”

⁴ In Law Review 13154 (November 2013), I urged the FVAP to eliminate the “race” question when it was developing the current FPCA form.

⁵ UOCAVA is codified in title 52 of the United States Code, at sections 20301 through 20311 (52 U.S.C. 20301-20311).

country) and U.S. citizens outside the United States the right to register and vote by absentee process in primary, general, special, and runoff elections for federal office.⁶ Federal responsibilities under UOCAVA have been delegated to the Director of the FVAP.

One of the most important responsibilities of the FVAP is to promulgate and make available (electronically and by old-fashioned paper forms) those forms that UOCAVA voters are to use when registering to vote and applying for absentee ballots. The most basic form is the Federal Post Card Application (FPCA).⁷ A UOCAVA voter is permitted to use the FPCA as a simultaneous voter registration application and absentee ballot request. State and local election officials all over the country are required by federal law to accept the FPCA form.⁸

In 2013, the FVAP published a new version of the FPCA, for use during the 2014 election cycle and thereafter. The new form will replace that form and will be used during 2018 and thereafter.

Like earlier versions of the FPCA, the 2013 version of the FPCA, in item 4, asks the voter to provide his or her “race.” Immediately below the blank for the answer to this question, the words “see instructions” appear. Item 4 of the instructions contains the following sentence: “Also, many states ask that you provide your race or ethnic group in order to demonstrate that they are complying with the Voting Rights Act and the National Voter Registration Act.”⁹

For almost 40 years, I have urged DOD to eliminate the obnoxious race question from this form. It appears that finally somebody is listening to me.

I recall that in the mid-1980s I had a lengthy conversation with Henry Valentino, then the FVAP Director, and I objected to the inclusion of the “race” question on the 1980s FPCA. Mr. Valentino told me that several states (mostly in the South) were required to report to the United States Department of Justice on the racial make-up of the electorate, including absentee voters, and that the race question was included on the FPCA simply to enable states to meet this federal reporting requirement.

⁶ 52 U.S.C. 20310(a)(1)(A) and (a)(5).

⁷ The Presidential designee is required to design and promulgate a form that can be used by UOCAVA voters as a *simultaneous* voter registration application and absentee ballot request. 52 U.S.C. 20301(b)(2). The form is misnamed, as it has not been a postcard since the 2003 version was adopted. The form folds over and is sealed. The voter is not required to put private information on a postcard.

⁸ 52 U.S.C. 20302(a)(4).

⁹ I have reviewed both the Voting Rights Act of 1965 and the National Voter Registration Act of 1993 (“Motor Voter”), and I do not find any provision requiring the states to report to the Federal Government on the race of voters.

Mr. Valentino also assured me, “Don’t worry, Sam. The answer to the ‘race’ question will *never* be used to determine the eligibility of a specific person to vote by absentee ballot. The race question is for statistical purposes only.”

In 1996, in South Texas, we saw happen exactly what Mr. Valentino had assured me would *never* happen. I invite the reader’s attention to *Casarez v. Val Verde County*, 957 F. Supp. 847 (W.D. Tex. 1997).

This federal lawsuit arose out of the very close election for Sheriff and County Commissioner (Precinct 1) in November 1996 in Val Verde County (county seat Del Rio). When only votes cast on Election Day were counted, Democrats won narrowly for those two offices. There were exactly 800 military absentee ballots. When those 800 absentee ballots were added to the vote totals, Republicans won for Sheriff and County Commissioner.

Texas Rural Legal Aid (TRLA), a Legal Services Corporation grantee with a history of political litigation in the guise of “legal aid” for the poor, filed suit against the county in federal court, alleging that the 800 military absentee ballots were illegal because those 800 military personnel were not “real residents” of the county (according to TRLA) and because they “diluted Hispanic votes.” TRLA established that exactly 95% of the military absentee ballots (760 of the 800) were cast by non-Hispanic whites, in a county with a heavily Hispanic population.

How, you may ask, was TRLA able to establish the race and ethnicity of these military absentee voters? Easy—they examined the completed FPCA forms on file in the office of the County Clerk of Val Verde County. Judge Fred Biery agreed with the obnoxious TRLA argument that these active military personnel, who were protecting the rights that we all enjoy, were not entitled to vote because they were absent from the county, in the service of our country, and because their races and ethnicities were different from that of most county residents.¹⁰

In the aftermath of this lawsuit, I personally drafted and pushed for the enactment of an amendment to the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), an important law that was originally enacted in 1917, to protect the civil rights of the “doughboys” and “doughgirls” who were called to the colors (by voluntary enlistment, by draft, or by mobilization from the nascent National Guard, Army Reserve, Naval Reserve, and Marine Corps Reserve) to fight World War I.

The amendment that I drafted was finally enacted in 2001. In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), a long-overdue rewrite of the SSCRA. The language that I drafted was carried over into the SCRA without change. That language provides: “For the purposes of voting for any Federal office ... or a State or local office, a person who is absent

¹⁰ Judge Biery also agreed with the obnoxious argument that a service member is ineligible to vote by absentee ballot in a county (like Val Verde County) if he or she does not *presently intend*, at the time of the election, to return to that specific county upon leaving active duty by retirement or otherwise. If that is the rule, very few career service personnel are eligible to vote anywhere. When the career service member retires, he or she will likely move to a place where he or she finds a civilian job for the second career after military retirement. It is most unlikely that this will be in the same country where he or she has maintained his or her domicile throughout a long military career.

from a State in compliance with military or naval orders shall not, solely by reason of that absence—be deemed to have lost a residence or domicile in that State, *without regard to whether or not the person intends to return to that State.*¹¹ The italicized language is the language that I drafted and that Congress added in 2001.

This language was added specifically to overrule Judge Fred Biery’s obnoxious decision. The purpose and effect of the amendment is to make clear that a service member does not lose the right to vote by absentee ballot at the place that constitutes his or her domicile simply because he or she has decided that, after leaving active duty, he or she will move to another place.

Today, there are millions of Americans who are of mixed race and who may be puzzled as to how to respond to the “race” question on a voting form, especially when the form only has room for a few characters in this box. Race is not a relevant consideration when an election official is deciding on an individual’s eligibility to register to vote or to obtain an absentee ballot. I earnestly hope that the new version of the FPCA will not include this obnoxious question.

The new FWAB form will also eliminate the “sex” question—the applicant will no longer be asked to specify his or her gender. I am pleased that this question is also being eliminated from the FWAB and will likely be eliminated from the FPCA as well. While I am not aware of a specific instance of abuse based on this question, like the Val Verde County case for the race question, the principle is the same. Sex and race are not relevant considerations in determining the eligibility of an applicant for an absentee ballot, so these questions should not be asked.

The new FWAB form has also been improved with respect to understandability and usability. In its announcement of the new form, the FVAP stated:

To develop the current draft of the FWAB, FVAP leveraged an iterative process of expert design input, information gathering and testing with election officials, stakeholders and voters. The form should reflect plain language standards (wherever possible), have simplified instructions, and be structured coherently. The general design utilizes intuitive “who I am,” “where I am from,” and “where I am now” information sections to be completed before signing.

Military personnel of all races and both genders protect the rights that we all enjoy, including the right to vote in free elections. No service member should be disenfranchised by the circumstances of his or her service or by the fact that he or she happens to be of a different race or ethnic background than that of most of the voters in the county of his or her domicile. I urge DOD, the Congress, the state legislatures, and state and local election officials to continue their efforts to ensure that military personnel can cast ballots that really do get counted, without regard to their race or sex and regardless of where the service of our country has taken them.

¹¹ 50 U.S.C. 4025(a)(1).