



MEMORANDUM

To: Interested Parties

From: John C. Keeney, Jr.

Date: February 10, 2009

Re: Report of ABA Advisor to Drafting Committee for the Military Services and Overseas Civilian Absentee Voters Act

The first meeting of the Drafting Committee was held on Friday, February 6 and Saturday, February 7, 2009 in Portland, Oregon. The initial draft, which was marked for discussion only, was substantially revised. The revised draft will be circulated prior to the next meeting of the drafting committee in Chicago next month on March 6 and 7, 2009. All conclusions at this Drafting Committee meeting in Portland, Oregon are tentative and preliminary. Each of the seven articles is discussed in order below.

Article 1. The starting point for the proposed Uniform Act is existing federal law in the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. § 1973ff. The proposed Uniform Act would standardize varying UOCAVA implementation procedures by state and local jurisdictions and extend protections to other state and local elections that the UOCAVA currently extends to federal and other elections held at the same time as federal elections. Definitions from the UOCAVA would be repeated verbatim in the Uniform Act, where possible, to promote uniformity in judicial constructions of the UOCAVA and the Uniform Act. A new definition of "covered election" includes any general, special, primary or run-off election for federal, state or local government offices or ballot measures.

The new proposed Act adds a new class of eligible voter: “stateless citizen”. There are approximately 50,000 persons in that category and they are not covered by the UOCAVA. The stateless citizen is a United States citizen of voting age, born overseas who has never resided in the United States, but is subject to United States taxes, Selective Service registration and other obligations of citizens. Because the overseas voter has never resided in the United States, he or she is “stateless”, having never resided in any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands or American Samoa. Therefore, the state elections, in which the “stateless” citizen would participate, cannot depend on prior residence in a particular state.

The Act would also authorize emergency changes to implementation procedures in the event of natural disaster, armed conflict or sudden mobilization of state National Guard and reserve units. The Federal Voting Assistance Program recommends that states provide such emergency authority to modify UOCAVA voting procedures. Eighteen states provide some form of emergency authority. The details of this emergency authority are to be considered at the Chicago meeting in March.

Article 2. This categorizes three types of protected voters. First, an absent uniformed services voter who is absent from a place of residence by reason of active duty would be permitted to register and apply for an absentee ballot in the state of residence for all covered elections. Second, an overseas voter who was domiciled in a particular place before leaving the United States would be permitted to register to vote and to apply for an absentee ballot in that state for all covered elections. Third, a new provision addresses “stateless” citizens of voting age. For a United States citizen who has never resided in the United States, the proposed Act would permit that voter to register to vote and to apply for an absentee ballot in a state which is the last

place in which a parent of the overseas voter was domiciled before leaving the United States, but only to vote for candidates for federal office. Those states that have chosen to address this problem usually restrict these “stateless” overseas voters to participation in votes for candidates for federal office only. UOCAVA is silent at this category of potential voters.

It is the tentative intent of the Drafting Committee that for any covered election, the Federal Post Card Application as prescribed under the UOCAVA, 42 U.S.C. 1973ff(b)(2) shall be the exclusive means of simultaneously registering and applying for an absentee ballot in order to qualify for the protections of this Act.

It is the tentative conclusion of the Drafting Committee that the official Federal Post Card Application shall be a standing request for future absentee ballots for approximately four (4) years. This mirrors the federal requirement applicable to federal elections. In order to deal with the frequent changes of address, the Uniform Act would mandate that state forms and the Federal Post Card application ask for email addresses for ease of updating changes of address.

Article 3. This Article would set deadlines for receipt of an application for an absentee ballot and an executed ballot from uniformed and overseas voters. It would encourage electronic transmission of absentee balloting materials to the voter electronically, as currently provided by 32 states.

A new provision would set a uniform time for an absentee ballot to be submitted by a uniformed or overseas voter as no later than 11:59 p.m. local time on the day before the day of the election. A postmark would not be required.

19 states currently accept an absentee ballot from a uniformed or overseas voter after Election Day. One state, Illinois, permits receipt of such a ballot by 14 days after the day of the election. The proposed Act would establish a uniform receipt date of 10 days after the day of the election or such later date as permitted under other state law.

Article 4. This Article contains further details for electronic submission of registration and absentee ballot applications. Due to the difficulty of receiving facsimile transmissions in war zones, alternative methods of electronic transmission other than facsimile will be encouraged. Downloadable ballots from the internet will be encouraged. Provision for telephone or internet confirmation of receipt of absentee ballots will be encouraged.

The Drafting Committee is concerned that machines for internet voting are not secure and therefore submission of executed ballots over the internet would not be permitted. Kiosks in secure solitary installations for military voters are being studied.

Article 5. The proposed Act would permit use of the Federal Write In Absentee Ballot, already approved for federal elections under the UOCAVA, 42 U.S.C. 1973ff(b), in any state or local covered election. Additional provisions will mandate increased availability of information on state and local elections for uniformed and overseas voters.

Article 6. Notarization requirements will be eliminated for the category of voters covered by this Act. There would be an oath affirming that a material misstatement is grounds for conviction for perjury, such as the UOCAVA oath under 42 U.S.C. 1973ff(b)(7). The jurisdictional basis for state prosecution of violators is under review. Non-essential matters of form would be disregarded in determining the validity of a ballot cast by an absent uniformed services or overseas voter, if the intention of the voter could be ascertained.

Article 7. This miscellaneous article emphasizes that the proposed Act should be read in harmony with the federal mandates in UOCAVA. This Act applies only for purposes of voting and does not by itself affect any other state or local law including tax law or tuition assistance eligibility.

Conclusion. The foregoing highlights the important issues that will be set forth in more detail in the proposed draft to be considered in Chicago, Illinois on March 6 and 7. Copies of that draft are anticipated to be available in two weeks. That next draft will be submitted to interested ABA entities.

If anyone has questions, comments, concerns for the next Drafting Committee meeting in March, please feel free to contact me at jkeeney@hhlaw.com or by mail at John C. Keeney, Jr., Hogan & Hartson LLP, 555 13th Street, NW, Washington, DC 20004, (202) 637-5750, fax (202) 637-5910, or contact the Standing Committee on Election Law of which I am the current chair, for which Elizabeth Yang at eyang@staff.abanet.org is the responsible ABA official.