COMMONWEALTH of VIRGINIA

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October 27, 2008

The Honorable W.R. "Bill" Janis
Member, House of Delegates
P.O. Box 3703
Glen Allen, Virginia 23058

Dear Delegate Janis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether Virginia law requires an overseas military voter submitting a Virginia absentee ballot to include the printed name and address of the person who signs the witness statement. You also ask whether Virginia law requires an overseas military voter submitting a Federal Write-In Absentee Ballot to include the printed name and address of the person who signs the witness statement.[1] If the response to this last inquiry is in the affirmative, you then inquire whether Virginia law is preempted by the provisions of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").[2] You next ask whether the absence of the printed name and address of the person who signs the witness statement is an immaterial omission under the provisions of § 24.2-706 and SBE Elections Policy 2008-0006. Finally, you ask whether general registrars may reject Federal Write-In Absentee Ballots or Virginia absentee ballots submitted for the November 4, 2008 federal election by overseas military voters that do not include a printed name and address for the person who signs the witness statement.

Response

It is my opinion that Virginia law does not require an overseas military voter submitting a Virginia absentee ballot pursuant to the procedure contained in § 24.2-707 to include the printed name and address of the person who signs the witness statement. It further is my opinion that Virginia law requires an overseas military voter submitting a Federal Post Card Application ("FPCA") and a Federal Write-In Absentee Ballot ("FWAB") for the November 4, 2008 federal election to include the printed name and address of the person who signs the witness statement on the FPCA return envelope.[3] It is also my opinion that the applicable provision of Virginia law, § 24.2-702.1(B), interpreted to require an overseas military voter submitting only a FWAB to include the printed name and address of the person

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[1] The applicable provision of Virginia law is § 24.2-702.1(B).

[2] 42 U.S.C.A. §§ 1973ff to 1973ff-6 (West 2003 & Supp. 2008).

[3] *See* VA. CODE ANN. § 24.2-702.1(B) (2006).

who signs the witness statement is preempted by the provisions of the UOCAVA.[4] Finally, it is my opinion that general registrars may not reject a FWAB submitted by overseas military voters for the November 4, 2008 federal election, that do not include a printed name and address for the person who signs the witness statement, unless the voter is unable to sign the application due to a physical disability or inability to read or write.

Background

You advise that some general registrars in the Commonwealth are rejecting FWABs returned by overseas military voters without the witnesses' printed names and addresses on the envelopes while accepting and counting absentee ballots without such information when submitted on the Virginia absentee ballot return envelope. You express the belief that by imposing this additional requirement on overseas military voters, general registrars effectively are disenfranchising members of the Armed Forces who are bravely serving in Iraq and elsewhere around the world.

You express the belief that an overseas military voter who is voting his or her ballot is likely to turn to a fellow service member, whose current address may be a tent in Iraq or Afghanistan, to sign as the witness. You observe that § 24.2-706(4) requires local electoral boards to provide absentee voters with "[p]rinted instructions for completing the ballot and statement on the envelope and returning the ballot." Voters and witnesses are provided no instructions, however, mandating a printed name and address for the witnesses, much less instructions regarding whether the witnesses should provide their home addresses in the United States or temporary addresses on deployment. You also observe that the federal government similarly provides directions for military voters to complete federal ballots at the web site.[5] The federal directions do not advise absentee military voters that witnesses to the FWABs must provide printed names and addresses to be counted, and there is no space provided for such information.

Applicable Law and Discussion

Section 24.2-707 contains the following procedures by which a voter casts an absentee ballot: (1) a voter who applies for an absentee ballot by mail or in person receives his ballot by mail, and returns his marked ballot by mail or delivers it personally to the electoral board or the general registrar; and (2) a voter who applies for an absentee ballot in person casts his ballot at the time of application in the office of the general registrar or the secretary of the electoral board. Section 24.2-707 contains detailed requirements for marking the ballot, sealing the envelope, refolding the ballot, and signing the statement printed on the envelope in the presence of a witness, "who shall sign the same envelope." Finally, § 24.2-706 requires the voter to complete the following statement that appears on the absentee ballot envelope:

"Statement of Voter."

"I do hereby state, subject to felony penalties for making false statements pursuant to § 24.2-1016, that my **FULL NAME** is . . . . . (last, first, middle); that I am

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[4]Because I conclude that § 24.2-702.1(B), the applicable Virginia law is preempted by UOCAVA, I need not opine regarding whether the absence of the printed name and address of the person who signs a witness statement is an immaterial omission under the provisions of § 24.2-706 and SBE Elections Policy 2008-0006.

[5]*See* www.fvap.gov.

> now or have been at some time since last November's general election a legal resident of . . . . . (**STATE YOUR LEGAL RESIDENCE IN VIRGINIA** including the house number, street name or rural route address, city, zip code); that I received the enclosed ballot(s) upon application to the registrar of such county or city; that I opened the envelope marked 'ballot within' and marked the ballot(s) in the presence of the witness, without assistance or knowledge on the part of anyone as to the manner in which I marked it (or I am returning the form required to report how I was assisted); that I then sealed the ballot(s) in this envelope; and that I have not voted and will not vote in this election at any other time or place.
>
> Signature of Voter . . . . . .
>
> Date. . . . . .
>
> Signature of witness . . . . . ."

Thus, Virginia law does not require an overseas military voter submitting a Virginia absentee ballot in a federal election to include the printed name and address of the person who signs the witness statement. All that is required is the signature of the witness.

Section 24.2-702.1 provides that

> A. Notwithstanding any other provision of this title, a qualified absentee voter who is eligible for an absentee ballot under subdivision 2 of § 24.2-700 may use a federal write-in absentee ballot in general, special, and primary elections for federal office. Such ballot shall be submitted and processed in the manner provided by the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. § 1973ff et seq.) and [Chapter 7].
>
> B. Notwithstanding any other provision of this title, a federal write-in absentee ballot submitted pursuant to subsection A shall be considered valid for purposes of simultaneously satisfying both an absentee ballot application and a completed absentee ballot for federal offices only, provided that the ballot is received not less than five days prior to the election in which the voter offers to vote, and the application on the envelope contains the following information: (i) the voter's signature; however, if the voter is unable to sign, the person assisting the voter will note this fact in the voter signature box; (ii) the voter's printed name; (iii) the county or city in which he is registered and offers to vote; (iv) the residence address at which he is registered to vote; and (v) his current military or overseas address. The envelope must be witnessed, and the witness shall provide his signature, printed name and address in the witness signature box.

Thus, in contrast, § 24.2-702.1(B) requires an overseas military voter submitting a FPCA and a FWAB to include the printed name and address of the person who signs the witness statement on the FPCA.

The United States Congress has the authority to regulate federal elections under the Constitution of the United States.[6] The conduct of federal elections is a federal function and states have no inherent or

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[6] *See* U.S. CONST. art. I, § 4 (providing that "[t]he Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Choosing Senators."); *id.* art. II (providing for states to choose electors for President and Vice President); *id.* amend. XII (providing that "Congress may determine the Time of choosing the Electors and the Day on which they shall give their Votes").

reserved powers over federal elections because federal elections only came into existence when the United States Constitution was ratified.[7] The states traditionally have been responsible for the conduct of all elections, with the United States Congress occasionally passing laws governing federal elections. The Supreme Court of the United States has confirmed "Congress' broad powers to regulate federal elections and maintain a national government."[8]

UOCAVA provides for registration and voting by absent overseas voters and by absent uniformed services voters in elections for federal office.[9] UOCAVA requires the states to comply with its provisions[10] and authorizes the Attorney General of the United States to enforce its provisions.[11] Any state requirement that conflicts with the mandatory provisions of UOCAVA is preempted and invalid.[12]

UOCAVA requires the President to designate the head of an executive department to effectuate the purposes of the Act.[13] The Presidential designee is required to compile and distribute information on state absentee voting procedures, design absentee registration and voting materials, work with state and local election officials in carrying out the act, and report to Congress and the President after each presidential election on the effectiveness of the program's activities.[14] Each state is required to "permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots (in accordance with section 1973ff-2 of this title) in general elections for Federal office."[15] UOCAVA also requires each state to accept the FPCA from uniformed services voters, their spouses and dependents, and overseas electors to allow for simultaneous voter registration application and absentee ballot application.[16] Balloting materials are defined in UOCAVA to include "official post card forms (prescribed under section 1973ff of this title), Federal write-in absentee ballots (prescribed under section 1973ff-2 of this title), and any State balloting materials that, as determined by the Presidential designee, are essential to the carrying out of this subchapter."[17]

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[7]The National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process 22 (Aug. 2001) (citing Cook v. Gralike, 531 U.S. 510 (2001)).

[8]Prigmore v. Renfro, 356 F. Supp. 427, 433 (N.D. Ala. 1972), *aff'd*, 410 U.S. 919 (1973) (citing Oregon v. Mitchell, 400 U.S. 112 (1970)).

[9]*See supra* note 2.

[10]42 U.S.C.A. § 1973ff-1(a) (West 2003 & Supp. 2008).

[11]42 U.S.C.A. § 1973ff-4 (West 2003).

[12]*See* Bush v. Hillsborough County Canvassing Bd., 123 F. Supp. 2d 1305 (N.D. Fla. 2000) (voting absentee is not merely a privilege for those members of our military who do not have the freedom to choose their location). The Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973, also provides uniform national rules for absentee voting in presidential and vice-presidential elections, which are equally valid. *See Oregon*, 400 U.S. at 112. The provisions of the Voting Rights Act are applicable to Virginia. *See* 28 C.F.R. pt. 51 app. (2008) (noting that Virginia was designated as covered jurisdiction on November 1, 1964).

[13]42 U.S.C.A. § 1973ff(a) (West 2003); *see also* Exec. Order No. 12642, 53 Fed. Reg. 21975 (June 8, 1988), 3 C.F.R., 1988 Comp., p. 575 (designating Secretary of Defense as Presidential Designee to carry out federal functions under UOCAVA).

[14]42 U.S.C.A. § 1973ff(b)(2) (West 2003 & Supp. 2008).

[15]42 U.S.C.A. § 1973ff-1(a)(3) (West Supp. 2008).

[16]42 U.S.C.A. § 1973ff-1(a)(4) (West 2003).

[17]42 U.S.C.A. § 1973ff-6(2) (West 2003).

The Federal Voting Assistance Program ("FVAP") administers UOCAVA for the Secretary of Defense. FVAP is responsible for educating U.S. citizens worldwide of their right to vote, increasing participation, and enhancing the electoral process at the federal, state, and local levels. FVAP also is responsible for administering the National Voter Registration Act of 1993 for U.S. citizens abroad. FAVP allows eligible citizens to register to vote at 6,000 Armed Forces Recruitment Offices nationwide.[18] Prior to the 2004 Presidential election, Congressional members raised concerns about the efforts of FVAP to facilitate absentee voting. The Government Accountability Office ("GAO") initiated a review to address how FVAP's assistance efforts differed between the 2000 and 2004 presidential elections, what actions DOD and DOS took in response to prior GAO recommendations on absentee voting, and what challenges remained to provide assistance to military personnel and overseas citizens.[19] A challenge identified by GAO was the need to simplify and standardize the time-consuming and multistep absentee voting process that included different requirements and time frames for each state.

An official post card form and absentee write-in ballot, and instructions for the completion of such balloting materials as required by UOCAVA to simplify the absentee voting process, have been prescribed by FVAP.[20] Instructions prepared by FVAP for completion of the balloting materials to be submitted to Virginia election officials take various forms on the FVAP web site.[21] The site instructs[22] that the absentee ballot request form must be signed and dated; however, "no notary/witness [is] required."[23] The designee web site for Virginia absentee voting also has a link for "More Information on Virginia's Absentee Voting Guidelines" under the "Resources" heading, that leads to a separate webpage containing Virginia's FPCA form containing a heading immediately above the designed form that "[c]ircled letters on the form below correspond to the instructions on the following page. **You must complete all shaded areas**." The instructions on the following web page are labeled "I. Application Instructions for FPCA," and contain the following instructions for the circled letter "J," Block 7, a shaded area on the form:

> You must sign and date the FPCA. When signing, you are swearing or affirming that the information is true and correct. No notary or witness required except when a voter is unable to sign the application due to a physical disability or inability to read or write.

FVAP's Virginia FPCA form has an area that is not shaded for the signature for a witness or notary and address "if required," indicating that it is not an area that must be completed. As indicated in the instructions, a notary or witness is required only "when a voter is unable to sign the application due to a physical disability or inability to read or write." Further, FVAP's instructions contain a heading "II. Uniformed Services," with the following introductory paragraph:

> These procedures apply to persons who are U.S. citizens, residents of Virginia and members of the Uniformed Services and their family members. Uniformed Services are

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[18] *See* http://en.wikipedia.org/wiki/Federal_Voting_Assistance_Program.

[19] GAO-06-521, Elections: Absentee Voting Assistance to Military and Overseas Citizens Increased for the 2004 General Election, but Challenges Remain (April 2006).

[20] *See* Virginia forms and instructions for use, *at* www.fvap.gov/uniformed-service-members/request-registration-absentee-ballot/states/va/index.html.

[21] *See* http://www.fvap.gov/resources/media/vagVA.pdf.

[22] The instruction is provided for the response to the question "What do I fill in?"

[23] *See at* www.fvap.gov/uniformed-service-members/request-registration-absentee-ballot/states/va/index.html (Block 7).

> defined as the U.S. Armed Forces, merchant marine, commissioned corps of the Public Health Service and the national Oceanic and Atmospheric Administration.

Paragraph C, following this introductory paragraph is labeled "Notary/Witness Requirements" and contains the following statement:

> **FPCA:** No notary or witness required except when a voter is unable to sign the application due to a physical disability or inability to read or write.
>
> **Returning a Ballot:** The oath on the envelope must be witnessed and the address of the witness included.

Thus, pursuant to the mandate from the Congress to prescribe an official post card form containing both an absentee voter registration application and an absentee ballot, FVAP requires an overseas military voter submitting both a FPCA and a FWAB to include the signature, printed name, and address of a witness on the return envelope. In contrast, however, if the FWAB is submitted by itself, the FWAB instructions provide only that the witness must sign and date the form.

The Supremacy Clause of the United States Constitution provides that federal laws and treaties "shall be the supreme law of the land."[24] By virtue of this clause, federal law supersedes any conflicting state law.[25] The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area.[26] Even if Congress does not intend the enactment of a federal statutory scheme to preempt state law in the area completely, congressional enactments in the same field override state laws with which they conflict.[27] It is necessary "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[28] This inquiry requires consideration of the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.[29]

The expressed sense of Congress in enacting UOCAVA was that each state administrator of elections be "aware of the importance of the ability of each uniformed services voter to exercise the right to vote."[30] Furthermore, Congress has encouraged elections administrators to perform their duties in

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[24] U.S. CONST. art. VI, cl. 2.

[25] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824); *see also* Savage v. Jones, 225 U.S. 501, 533 (1912).

[26] *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Op. Va. Att'y Gen.: 1984-1985 at 280, 282; 1973-1974 at 284, 285.

[27] *See Jones*, 430 U.S. at 525-26 (citing Article VI of the United States Constitution).

[28] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *accord* De Canas v. Bica, 424 U.S. 351, 363 (1976); Perez v. Campbell, 402 U.S. 637, 649 (1971).

[29] *De Canas*, 424 U.S. at 363-65; Swift & Co. v. Wickham, 230 F. Supp. 398, 408 (S.D.N.Y. 1964), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd on further consideration*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967).

[30] Pub. L. No. 107-107, Div A, Title XVI, § 1601, 115 Stat. 1274.

federal elections "with the intent to ensure that each uniformed services voter receives the utmost consideration and cooperation when voting," and that "each valid ballot cast by such a voter [be] duly counted."[31] Moreover, UOCAVA requires that the states allow overseas voters "who make timely application for, and do not receive, States, absentee ballots" to use the federal write-in ballot.[32] It requires that the overseas citizen submit an application, not that the state election official receive it. I note that the primary purpose of Congress enacting UOCAVA was to remedy the unreliability of the overseas mail system.[33] UOCAVA was meant to provide a mechanism for overseas citizens and uniformed service members to vote in federal elections if they were unable to obtain a state absentee ballot.[34]

Therefore, it is my opinion that the provision of § 24.2-702.1(B) interpreted to require an overseas military voter submitting a FWAB to include the printed name and address of the person who signs the witness statement is preempted by UOCAVA. Thus, I also conclude that general registrars may not reject a FWAB submitted by overseas military voters that do not include a witness signature, and printed name and address of a witness, unless the voter is unable to sign the application due to a physical disability or inability to read or write.

Conclusion

Accordingly, it is my opinion that Virginia law does not require an overseas military voter submitting a Virginia absentee ballot pursuant to the procedure contained in § 24.2-707 to include the printed name and address of the person who signs the witness statement. It further is my opinion that Virginia law requires an overseas military voter submitting a Federal Post Card Application ("FPCA") and a Federal Write-In Absentee Ballot ("FWAB") for the November 4, 2008 federal election to include the printed name and address of the person who signs the witness statement on the FPCA return envelope.[35] It is also my opinion that the applicable provision of Virginia law, § 24.2-702.1(B), interpreted to require an overseas military voter submitting only a FWAB to include the printed name and address of the person who signs the witness statement is preempted by the provisions of the UOCAVA.[36] Finally, it is my opinion that general registrars may not reject a FWAB submitted by overseas military voters for the November 4, 2008 federal election, that do not include a printed name and address for the person who signs the witness statement, unless the voter is unable to sign the application due to a physical disability or inability to read or write.

Thank you for letting me be of service to you.

Sincerely,

Robert F. McDonnell

1:213; 1:941/08-088

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[31] *Id.*

[32] 42 U.S.C.A. § 1973ff-2(a) (West Supp. 2008).

[33] H. R. Rep. No. 99-765 at 10, 1986 U.S.C.C.A.N. at 2014.

[34] *See id.* at 5, 1986 U.S.C.C.A.N. at 2009.

[35] *See supra* note 3.

[36] *See supra* note 4.