HERRITY REPORT

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# Special Edition: **Protecting the Rights of Voters Using Federal Write in Absentee Ballots**

I have been getting a large number of calls regarding my press conference on the setting aside of Federal Write-In Absentee Ballots for lack of a witness address. As I was preparing this update for you I received some very good news. Attorney General Bob McDonnell has issued a directive to county registrars to count the FWABs (FWABs) without the witness address as federal law preempts the state law requiring the address. I hope that this directive will resolve the issue and these votes will now be counted. I have included the update I was preparing on the issue and portions of the Attorney General's press release below.

**Protecting the Rights of Voters Using Federal Write in Absentee Ballots**

As many of you know I held a press conference on Thursday, October 23 at the West Springfield Government Center with four retired members of our armed services regarding the setting aside of Federal Write-In Absentee Ballots at the office of the Fairfax County General Registrar. Prior to my press conference over 98% of the FWABs had been set aside because they did not include an address for the witness. There is something clearly wrong when over 98% of ballots are set aside. There has been a lot of confusion on this subject over the last several days. I will try to clarify the requirements and what is being done below:

**The Federal Write-in Absentee Ballots (FWAB) defined**. FWAB is a federally mandated write-in ballot that allows military service members and others overseas and their dependents to cast an absentee ballot when they have not received their absentee ballot. It is a safety net that allows service members and others to vote even if the mail truck hasn't reached his or her remote base in Iraq or Afghanistan in time to cast a regular absentee ballot. It can also be used to both request an absentee ballot and to cast your vote.

**Why FWABs were being rejected.** The reason the Fairfax County Registrar was rejecting these ballots is because they didn't include the witness' address. As of late last week 98% of these ballots did not include a witness address. Many registrars in the state were accepting the ballots without an address.

**Why the confusion?** In 2002 a Virginia law was passed requiring the witness's address "in the witness signature box". However in 2005 the FWAB was revised and the witness box was removed and replaced with a single small line with a label in fine print that reads "Witness/Notary and Address (if required)". The current Federal form (SF-186A) for the FWAB does not have adequate space for witnesses or clear instructions to include the witness address. The Department of Defense's official Voting Assistance guide, which it provides to service members as an instruction manual for casting votes while overseas, does not clearly tell service members that they must include an address for their witness. The Department of Defense's Federal Assistance Voters Program web site (http:www.fvap.gov/uniformed-service-members/fed-write-inabsentee-ballot/states/va/index.html) does not even mention the address requirement in the instructions for Virginia ballots. See the instructions for Block 7 of the Virginia web site. It says "sign and date in the presence of one witness. The witness must sign and date the form." No instructions on including the address. The service member using the site would thus have no way of knowing the requirement for an address.

**Is an address required on other Absentee Ballots?** Virginia law does not require a witness address for any other type of absentee ballot. For example, a Virginia resident attending college out of state does not need to include his/her witness address on their absentee ballot. Unfortunately, the Commonwealth and its Registrars are holding our service members, including those currently defending their country in war zones, and others using the FWABs to much more exact standards, requiring the witnesses who sign their FWAB to include their address.

**What is the solution?** As a result of my press conference and attention to the situation, the Fairfax County Registrar indicated he would not require the witness address on FWABs where the individual had already requested an absentee ballot. This still leaves a large percentage of FWABs as set aside. There are a number of people across the county, state and country working to resolve this situation. There are also a number of approaches being taken to resolve the problem. There are a number of federal laws, judicial decisions and electoral board decisions at play – they are too numerous and complicated to list here. It is expected the Attorney General will weigh in on the matter (see below). I will keep you up to date on the status of this issue.

To me the issue is very simple. As I said at my press conference, federal law should prevail and the votes should be counted. Ninety eight percent of the voters can't be wrong and we can't disenfranchise those men and women overseas, including those that protect and defends our right to vote in this democracy. For this reason I can assure you that I will stay involved with this issue until it has clearly been taken of.

**Update: The Attorney General's Position:**

***FAIRFAX -*** *Attorney General Bob McDonnell released a formal opinion today concluding that federal absentee ballots from overseas military voters lacking the printed name and address of a witness must be counted. The opinion affirms that federal law preempts state law, thus clarifying the state and federal statutes regarding the issue. The confusion centered over whether a state law requiring a witness's printed name and address controls federal absentee ballots or the federal law governs this issue. The opinion was requested by Delegate Bill Janis (R-Henrico).*

*In the formal opinion the Attorney General finds, "It is…. my opinion that the applicable provision of Virginia law, § 24.2-702.1(B), interpreted to require an overseas military voter submitting only a Federal Write-in Absentee Ballot to include the printed name and address of the person who signs the witness statement is preempted by the provisions of the (federal) Uniformed and Overseas Citizens Absentee Voting Act. Finally, it is my opinion that general registrars may not reject a Federal Write-In Absentee Ballot submitted by overseas military voters for the November 4, 2008 federal election that does not include a printed name and address for the person who signs the witness statement….."*

*Approximately 100 Federal Write-In Absentee Ballots have been set aside in Fairfax County pending a legal conclusion regarding the discrepancy between state and federal law. Additional Federal Write-In Absentee Ballots may also have been received in other jurisdictions. The Federal Write-In Absentee Ballot is most commonly used by members of the military who are stationed overseas and have not received a state absentee ballot. It is a means by which service members can be guaranteed a vote in federal elections.*

*A copy of this formal opinion was provided to the State Board of Elections this afternoon.*

I sincerely hope the Fairfax County Registrar will now count these ballots. I will stay on top of this issue and keep you informed.

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