

## DOJ Sues New York to Enfranchise Military Voters

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

7.1—Election officials must get the absentee ballots out in time for the service member to vote.

On Oct. 12, 2010, the Department of Justice (DOJ) sued New York under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), seeking a remedy because nine major counties in the state (including all five New York City boroughs) have failed to mail absentee ballots in time for overseas voters (military and civilian) to receive their ballots, mark them, and return them on time to be counted. As amended a year ago by the Military and Overseas Voter Empowerment Act (MOVE Act), UOCAVA explicitly requires each state to mail absentee ballots to military personnel and family members (within or outside the United States) and to overseas Americans by the 45th day prior to the election (e.g., Sept. 18, 2010).

The MOVE Act also provides for a waiver provision. The chief state election official had the opportunity to apply to the Secretary of Defense (SECDEF) for a one-time waiver of the 45-day rule. To obtain the waiver, the state needed to show *both* an undue hardship (caused by something like a late primary) that prevented the state from mailing out ballots by September

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>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. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

18 *and* that the state had made satisfactory alternative arrangements (satisfactory to SECDEF) to ensure that UOCAVA voters (military and civilian) will have sufficient time to cast ballots that really do get counted, despite the state having missed the 45-day deadline.

Ten states plus the District of Columbia and the Virgin Islands applied for waivers, and five states (including New York) were granted waivers. In its waiver request, which the SECDEF approved, the New York State Board of Elections promised to have the ballots mailed by October 1 and to extend the deadline for the receipt of mailed-in overseas ballots, to provide at least 45 days of round-trip ballot transit time. You can find the New York waiver request and the SECDEF response at [www.fvap.gov](http://www.fvap.gov), the website of the Federal Voting Assistance Program (FVAP).

The problem is that each of the five New York City boroughs (Bronx, Brooklyn, Manhattan, Queens, and Staten Island) plus Erie County (Buffalo), Niagara County (Lockport), Putnam County (Carmel), and Westchester County (White Plains) all missed the October 1 deadline. New York City and these four major counties make up more than 90% of New York State's population.

As of today, just 20 days before Election Day, these nine jurisdictions (each New York City borough is treated like a county for election administration purposes) still have not mailed out the ballots. Thus, there will not be time for the absentee ballot to get to the voter in Afghanistan, Iraq, or a ship at sea, much less to the voter and back, by November 2.

As a remedy, these jurisdictions should be ordered to count overseas ballots received up to December 31, 2010 and to waive the requirement that the ballot be marked and placed in the return mail by Election Day. Make these local election officials come in on New Year's Day to count these ballots, instead of watching football on television.

There are 60, 076 active duty military personnel who are eligible to vote in New York. Only Texas, Florida, and California have more military voters. Senator Charles Schumer of New York said, "Put these ballots on the next plane to Afghanistan. These soldiers sacrifice their lives to protect our freedoms; they should never, ever be denied their right to vote. I wrote and passed this law [the MOVE Act] so our brave men and women overseas would no longer be disenfranchised, and there is no excuse for failing to get this done. The boards of elections should immediately get these ballots to each and every one of our service members around the world—no ifs, ands, or buts."

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This article is one of 1800-plus "Law Review" articles available at <https://www.roa.org/page/lawcenter>. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

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