

LAW REVIEW¹ 12025

March 2012

Federal Court Order Protects Military Voting Rights in New York

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

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

7.3—Voting in Non-Federal Elections

United States v. State of New York, Civ. Action No. 1:10-cv-1214 (N.D.N.Y. Jan. 27, 2012).

Under a federal law that was amended in 2009, local election officials (LEOs)³ *must* have absentee ballots printed and ready to mail by the 45th day before any primary or election for federal office, so that military personnel will have sufficient time to receive their ballots, mark them, and return them on time to be counted, no matter where the service of our country has

¹I invite the reader's attention to 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.

²BA 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 (VRRA—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 VRRA 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 VRRA 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.

³There are more than 7,500 local election offices that administer absentee voting for federal elections. Only Alaska, Maine, and the District of Columbia administer absentee voting at the state level. In most states, absentee voting is administered by county officials, but in the New England states plus Michigan and Wisconsin absentee voting is administered by many hundreds of officials at the city, town, or township level.

taken them. *Readers: Please contact your LEO and the LEOs in several surrounding counties to remind them of this requirement and to monitor their compliance.*

For my entire professional career, since I graduated from law school and passed the Texas bar exam in 1976, I have made the protection of the rights of those who serve in our armed forces the principal focus of my life. In the immediate aftermath of the 1976 general election, just days after I received my bar exam results and was sworn in as a lawyer, I represented a client who was a freshman Congressman who had just been elected to Congress in a special election six months earlier. He very narrowly lost the 1976 general election, and along with a much more senior lawyer I represented him in the recount and election contest. That Congressman was Ron Paul—yes, the same guy who is now running for President.

The rule in Texas at the time was that a mailed-in absentee ballot (whether from a nursing home in the same county or from a ship in the Indian Ocean) had to be *received* (not just postmarked) by the close of the polls at 7 p.m. Central Time on Election Day. In Harris County (Houston and vicinity), the County Clerk received absentee ballots at a post office box at the main Houston post office. An employee of the County Clerk checked the box at 1 p.m. on Election Day and not again until Wednesday morning, after the election. On Wednesday, there were 300 absentee ballots in the box, and most of them were from APO (Army Post Office) and FPO (Fleet Post Office) addresses. This was how I learned of the problem of disenfranchised military voters. I have been working the issue ever since, in many different capacities.

I became aware of the issue in 1976, but when I began my research into this problem, I learned that the issue was brought to the attention of the highest levels of our government in June-July 1952, just 14 months after I was born. The Subcommittee on Elections, Committee on House Administration, U.S. House of Representatives conducted hearings on military voting problems. The Honorable C.G. Hall, Secretary of State of Arkansas and President of the National Association of Secretaries of State, testified that most military personnel fighting the Korean War were likely to be disenfranchised in the 1952 presidential election. Because of late primaries, ballot access lawsuits, and other problems, LEOs would not have absentee ballots printed and ready to mail until just a few days before Election Day, and almost all states insisted upon *actual receipt* (not just postmark) of the ballot by Election Day. For the service member overseas, there just was not enough time for the ballot to get to the voter and back by Election Day, no matter how early the member applied for the ballot.

The 1952 congressional report includes a copy of a letter to Congress dated March 28, 1952, from President Harry S. Truman. In his letter, President Truman called upon the states to fix this problem, and he called upon Congress to enact *temporary* federal legislation for the 1952 presidential election. He wrote, “Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.”

Unfortunately, it did not work out that way. President Truman left office in January 1953, and the Korean War ground to an inconclusive halt six months later. This issue simply fell off our

national radar screen until 2000, when late-arriving military absentee ballots played a crucial role in determining the outcome of the presidential cliffhanger in Florida. I invite the reader's attention to Law Review 23 (March 2001) for a detailed discussion of the role of late-arriving military ballots in Florida 2000.

In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), consolidating two earlier federal statutes. UOCAVA is codified in title 42 of the United States Code, at sections 1973ff and following (42 U.S.C. 1973ff *et seq.*). UOCAVA gives "absent uniformed services voters" and "overseas voters" the *right* to vote by absentee ballot in primary, general, special, and runoff elections for federal office (President, U.S. Senator, and U.S. Representative). An absent uniformed services voter is a member of the uniformed services (Army, Navy, Marine Corps, Air Force, or Coast Guard, or the commissioned corps of the Public Health Service or commissioned corps of the National Oceanic and Atmospheric Administration) on active duty or the voting-age family member of a uniformed services member who because of such service is absent (whether within or outside the United States) from his or her place of residence. An overseas voter is a U.S. citizen of voting age who is outside the U.S. temporarily or permanently.

UOCAVA assigns to the Attorney General of the United States the authority and responsibility to sue any state that violates UOCAVA.⁴ Until 2009, UOCAVA did not explicitly mention a specific number of days of required ballot transmission time. Nonetheless, it is not a huge leap to argue that if absentee ballots are not printed and ready to mail sufficiently early that the overseas voter (military or civilian) can receive the ballot, mark it, and return it on time to be counted, UOCAVA has effectively been violated. Over the years, the Attorney General has brought several such lawsuits against states because of late mailing of absentee ballots. The usual remedy sought and obtained is a court-ordered extension of the deadline for the *receipt* of the ballot mailed in from outside the U.S. (including but not limited to APO and FPO addresses).

In 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), which amended UOCAVA in several important ways. The most important 2009 amendment was the addition of an explicit statutory requirement that each state must mail out ballots to UOCAVA voters by the 45th day prior to Election Day.

Congress recognized that because of late primaries and other problems some states would be unable to meet the 45-day standard in 2010. The MOVE Act provided for a waiver process. The Chief State Election Official (CSEO) was given 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 CSEO was required to show *both* an undue hardship (caused by something like a late primary) *and* that

⁴Whether an individual overseas voter (military or civilian) can bring his or her own UOCAVA suit, if the Attorney General fails to act, is a matter somewhat in dispute under current law, and Congress should amend UOCAVA to create an explicit private right of action. Please see Law Reviews 0950, 1064, 1091, 1121, 1177, and 1218.

the state had made satisfactory alternative arrangements (satisfactory to SECDEF) to ensure that overseas voters (military and civilian) will be able to cast ballots that really do get counted.

The New York State Board of Elections (NYSBOE) was one of 11 CSEOs that applied for MOVE Act waivers in 2010. In its waiver request, which SECDEF approved, the NYSBOE promised to have ballots mailed out by October 1 and to extend the deadline for the receipt of the mailed-in ballot for a sufficient number of days after Election Day to ensure that overseas voters will have a reasonable opportunity to vote.

The problem is that several New York counties missed the revised October 1 deadline by several days. Among the late LEOs were those from 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). New York City and these other major counties together account for more than 90% of the state's population.

In his Memorandum and Order dated January 27, 2012, Judge Gary L. Sharpe⁵ found that at least 36 of New York's 62 counties transmitted UOCAVA ballots after October 1, 2010, the date provided for by the SECDEF waiver, and at least 13 counties missed the October 10, 2010 deadline required by federal court order. Thus, the problem was much worse than we were led to believe in 2010.

In New York State, as in many states, the problem was a late primary—just 49 days before the general election. The LEOs could not make the 45-day deadline because it takes a lot more than four days to certify the results of the primary and print the general election ballots.

The problem is that a late primary benefits incumbents, and the legislators who make the rules and set the schedule. The state legislators in Albany refused to move back the primary, even after it was made abundantly clear to them that doing so was necessary to comply with UOCAVA and to enfranchise the brave young men and women who serve in our armed forces overseas.

Based on the problems in 2010, SECDEF made it clear to New York that no waiver would be forthcoming for 2012 and that the state needed to find a permanent solution, which would necessarily involve holding the primary earlier in the year. After the legislators adamantly refused to change the primary date, the federal court changed it for them. Under the federal court order, New York will conduct its primary for the U.S. Senate (Senator Kristen Gillibrand's term expires this year) and the U.S. House of Representatives on June 26, 2012 (133 days before the November 6 general election).

⁵Judge Sharpe is the Chief Judge of the United States District Court for the Northern District of New York.

Judge Sharpe opened his Memorandum and Order with the following most eloquent paragraph:

Nothing is more critical to a vibrant democratic society than citizen participation in government through the act of voting. It is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone. To some extent, that is exactly what New York has done. Having had ample opportunity to correct the problem, it has failed to find the political will to do so. While matters of comity ordinarily counsel federal courts to refrain from becoming embroiled in state election schemes, New York has left the court no choice. If federally-guaranteed voting rights are to be protected, the court must act.

Based on this federal court order, the primary for U.S. Senator and U.S. Representative will be held on June 26. What remains unclear is whether the June 26 primary will also include state legislators and other state and local offices, or whether the non-federal primary will be held at a later date, closer to the general election. If the non-federal primary is held later, New York will continue to disenfranchise overseas voters with respect to non-federal offices.

As explained in Law Reviews 1056 and 1093, Maryland attempted to comply with UOCAVA in 2010 by mailing out ballots on the 45th day prior to Election Day *for federal offices only*—ballots for non-federal offices were mailed several days later. Eric Eversole⁶ and his Military Voter Protection Project (MVPP) sued the Maryland State Board of Elections (MSBOE) and won. UOCAVA is limited to federal elections, but the constitutional right to vote is not so limited. The United States District Court for the District of Maryland found that Maryland's untimely mailing of absentee ballots for non-federal elections violated the U.S. Constitution. As a remedy, the court ordered Maryland to count (for non-federal offices as well as federal offices) ballots arriving after Election Day. If New York attempts to continue the disenfranchisement of overseas New Yorkers with respect to non-federal elections, Eric Eversole and the MVPP will likely bring and win a similar suit against New York.

The bottom line is that the states have had 60 years to solve this problem, since it was brought to the attention of the nation by the 1952 congressional hearings. Although President Truman predicted that all the states would have the problem fixed by 1954, the problem has not been solved and it still remains today. *No more excuses! No more waivers! All 7,500 LEOs must get the ballots printed and distributed by the 45th day before Election Day, so that military personnel will be able to vote, no matter where the service of our country has taken them.*

In his letter to Congress in 1952, President Truman's emphasizes the right to vote those in the Armed Forces deserve:

About 2,500,000 men and women in the Armed Forces are of voting age at the present time. Many of those in uniform are serving overseas, or in parts of the country distant

⁶Eversole is a Commander in the Navy Reserve Judge Advocate General's Corps and a member of ROA.

from their homes. They are unable to return to their States either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in this election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve.

I respectfully submit that President Truman's powerful words about the brave young men and women fighting the Korean War in 1952 apply equally to their grandsons and granddaughters, and great-grandsons and great-granddaughters, fighting the Global War on Terrorism today. Please contact your LEO and *read these words to the LEO. Don't let your LEO make military personnel wait another 60 years to enjoy a basic civil right that the rest of us take for granted.*

Update – April 2022

UOCAVA

The location of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) within the United States Code changed. UOCAVA was previously cited at 42 U.S.C. §§ 1973ff—1973ff-7. After an editorial reclassification, the UOCAVA is now codified at 52 U.S.C. §§ 20301—20311. The changes in codification have not changed the substance or application of the sections.

2012 New York election

In 2012, the elections for the office of New York State Senate were held in New York on November 6, 2012.⁷ New York is still holding their State Assembly elections in November.⁸ The general election is on November 8, 2022, with a primary scheduled for June 28, 2022.⁹

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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

⁷*New York State Senate elections, 2012*, BALLOT PEDIA, https://ballotpedia.org/New_York_State_Senate_elections,_2012 (last visited Apr. 13, 2022).

⁸*New York State Assembly elections, 2022*, BALLOT PEDIA, https://ballotpedia.org/New_York_State_Assembly_elections,_2022 (last visited Apr. 13, 2022).

⁹*Id.*

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.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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