

## **Ballot Dispute Delays Absentee Ballot Mailing on Long Island**

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.  
7.3—Voting in Non-Federal Elections

A dispute about the way that a candidate will be listed on the ballot in Nassau and Suffolk Counties (Long Island), in New York, threatens to disenfranchise military and overseas citizens not only for the one affected office but for all non-federal offices. The office involved is the New York Supreme Court. In New York, unlike other states, the “Supreme Court” is not the state’s high court—that court is called the Court of Appeals in New York. The Supreme Court is the trial court.

New York has an unusual system whereby the same individual can be listed on the ballot with more than one party line. Being listed more than once is advantageous because a candidate’s

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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).

vote is totaled, from all the party lines, in determining whether the candidate has received enough votes to be elected.

Richard Ambro is listed on the ballot as the Democratic Party candidate for the New York Supreme Court for the Long Island district. The Working Families Party (WFP) had its own candidate for that office, but that candidate withdrew. Now, the WFP seeks to list Ambro as its candidate, and the Republican Party and its candidate object. The ballots are being delayed pending resolution of this dispute, because the two counties do not want to bear the expense of sending out revised ballots for just one office.

In recent years, New York has been one of the worst states with respect to making it possible for military and overseas citizens to cast absentee ballots that really do get counted. A September primary date has prevented local election officials (LEOs) from having general election ballots printed and ready to mail by the 45th day preceding the general election. Until the primary results have been officially certified, the LEO cannot print general election ballots, much less mail them out.

In 2009, Congress amended the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>3</sup> As amended, UOCAVA now explicitly requires each state to send out ballots to UOCAVA voters by the 45th day prior to the day of the primary or election. *See* 42 U.S.C. 1973ff-1(a)(8)(A). Congress also provided a waiver procedure, for states that could not meet the 45-day requirement because of late primaries or other logistical difficulties. In 2010, New York applied for and received a waiver, but several major counties (including the five boroughs of New York City) missed even the revised deadline.<sup>4</sup>

The New York Legislature was required to come up with a date for an earlier primary in 2012 and beyond, but the Legislature could not agree on such a date. Finally, the United States District Court for the Northern District of New York ordered the state to move back the congressional primary to late June.<sup>5</sup> In 2012, the primary for the United States Senate<sup>6</sup> and House of Representatives<sup>7</sup> was conducted on June 26. Although New York State is in a serious fiscal crunch, and although conducting separate primaries on different dates is expensive, the New York Legislature refused to move the primary for state and local offices back to June 26.

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<sup>3</sup>UOCAVA gives covered voters the right to vote in primary, general, special, and runoff elections for federal office (President, United States Senator, and United States Representative). Covered voters are active duty members of the uniformed services and Merchant Marine and voting-age family members of those service members, as well as United States citizens who are outside the United States temporarily or permanently. UOCAVA applies to service members and family members whether they are within or outside the United States.

<sup>4</sup>New York has not applied for a waiver in 2012.

<sup>5</sup>*See United States v. State of New York*, 2012 U.S. Dist. LEXIS 10101 (N.D.N.Y. Jan. 27, 2012) and 2012 U.S. Dist. LEXIS 16126 (N.D.N.Y. Feb. 9, 2012).

<sup>6</sup>Senator Kirsten E. Gillibrand is seeking reelection in 2012. Senator Charles E. Schumer's six-year term does not expire until 2016.

<sup>7</sup>Because New York's population grew more slowly than the overall national population during the last decade, as shown by the 2010 Census, New York's representation in the United States House of Representatives has been reduced from 29 to 27.

The state primary was conducted on September 13, 2012, just 54 days before the November 6 general election.

Because the federal primary was held in June, Nassau County, Suffolk County, and all other New York counties met the 45-day rule for the November 6 general election, sending out ballots on September 21 or 22. These general election ballots were limited to President, United States Senator, and United States Representative. Ballots for all other offices, including the New York Supreme Court, are still in doubt in Nassau County and Suffolk County<sup>8</sup>, because of the unresolved dispute as to whether Richard Ambro will be listed on the ballot once or twice. As of the publication of this article (October 17), Election Day is only 20 days away. With respect to non-federal offices, the brave young men and women from Nassau and Suffolk Counties serving our country on ships at sea or in places like Afghanistan will be disenfranchised again this year.

In June of 1952, the Subcommittee on Elections, Committee on House Administration, United States House of Representatives conducted hearings on voting for military personnel fighting the Korean War. 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 would likely be disenfranchised in the 1952 presidential election. Because of late primaries, ballot access lawsuits, and other problems, LEOs would not have ballots printed and ready to mail until a few days before Election Day, in many cases. There simply would not be enough time for the absentee ballot to go from the LEO to Korea and back before the election.

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.<sup>9</sup>

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<sup>8</sup>Suffolk County sent out ballots with Ambro's name listed once, as the Democratic Party candidate. The county may yet be required to resend the ballots, with Ambro's name listed twice. The county will apparently resend the entire ballot, not just a ballot for the Supreme Court, because state law requires a unified absentee ballot. I have been assured that either ballot that comes back on time will be counted for all offices. The situation in Nassau County is unclear as we go to press.

<sup>9</sup>I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 801 articles about military voting rights, reemployment rights, and other military-legal topics. You will also find a detailed Subject Index and a

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 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 don't make Long Island's sons and daughters in our armed forces wait another 60 years to enjoy a basic civil right that the rest of us take for granted.*<sup>10</sup>

#### **Update – April 2022**

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.

The relevant section cited throughout the article can be found at:

See 42 U.S.C. § 1973ff-1 discussing state responsibilities is located at 52 U.S.C. § 20302.

#### **Please join or support ROA**

This article is one of 1800-plus "Law Review" articles available at [www.roa.org/page/lawcenter](http://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.

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search function, to facilitate finding articles about very specific topics. Category 7.0 in the Subject Index is about military voting rights.

<sup>10</sup>The New York State Board of Elections (NYSBOE) makes ballot downloads (all offices, not just federal) available through its website. A New York UOCAVA voter (military or civilian) who has made a timely application for his or her absentee ballot can download and print the ballot and then mark it and send it in. So far in 2012, more than 6,500 New York UOCAVA voters have utilized this system. In 2010 (the first year that the system was available), only 700 New York UOCAVA voters utilized this system. You can access the NYSBOE website or any state absentee voting website through the website of the Federal Voting Assistance Program, [www.fvap.gov](http://www.fvap.gov).

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.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://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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