

LAW REVIEW¹ 16085

August 2016

ROA Files Amicus Brief Supporting Military Voting Rights

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.

On August 24, 2016, the Reserve Officers Association (ROA) filed an *amicus curiae* (friend of the court) brief in the United States District Court for the Northern District of New York, in the case styled *Pidot v. New York State Board of Elections*, Civil Action Number 1:16-cv-00859-FJS-CFH. You can find a link to the brief at the end of this article.

ROA thanks attorneys Laurence Levy, Robert M. Harding, and Jennifer M. Gomez of the New York City office of Greenberg Traurig LLP for their excellent work, under severe time constraints, in drafting and filing this brief, at no cost to ROA.

In our brief, we asked the Court to withdraw its hasty and ill-advised order requiring state and local election officials to conduct a Republican primary for the Third Congressional District of New York on October 6, 2016, just 33 days before the November 8 general election.

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.

Alternatively, we asked the Court to order a delay of the general election, only for United States Representative for the Third District, to a date that is at least 45 days after the official certification of the results of the October 6 primary. The idea is to ensure that the brave young men and women in our nation's armed forces who are from this Congressional District will be able to receive absentee ballots in time to cast them effectively, so that they will be counted, no matter where the service of our country has taken the service member.

In drafting and filing this brief, we were very careful not to take any position as to which candidate should win the primary or the general election. Our only interest is in ensuring that those who serve our country in uniform—those who protect the rights we all enjoy, including the right to vote in free elections—are able to enjoy the rights that they are sometimes asked to fight and die to preserve.

Let me explain how this situation developed, wherein the right to vote of overseas military personnel was called into serious question. The Third Congressional District of New York consists of part of Nassau County and part of Suffolk County on Long Island and part of the Borough of Queens in New York City. The incumbent, Representative Steve Israel, chose not to seek reelection this year.

New York conducted its primaries for the United States Senate and House of Representatives on June 28, 2016. Two Republicans, Phillip Pidot and Jack Martins, sought to be candidates for the U.S. House of Representatives in the June primary. To qualify for the ballot, a candidate needed a nominating petition signed by at least 1,250 registered voters in the Third Congressional District.

Martins and Pidot both submitted nominating petitions. It seemed clear that Martins had enough valid signatures, but the New York State Board of Elections held that Pidot's petition did not have enough valid signatures. Pidot challenged that determination in state court. On June 23, 2016, just five days before the primary, Judge Arthur Diamond held that Pidot's petition had 1,261 valid signatures, exceeding the minimum by 11, but Judge Diamond did not order that Pidot's name be added to the primary because the time was too short and there was no practicable way to add the name at that late date. Accordingly, no primary was held on the Republican side in the Third District, and Martins won the nomination by default.

On July 13, 2016, Pidot brought this civil action in the United States District Court for the Northern District of New York. On August 17, the Court ordered the state and local election officials to hold a new primary, on the Republican side, on October 6, just 33 days before the November 8 general election. Certifying the winner of the October 6 primary will take about nine days, so absentee ballots for the Third District will go out on or about October 15. For military personnel serving at sea or at isolated overseas duty stations, where mail service is slow and intermittent, there will not be enough time for the ballot to get to the voter by Election Day, much less to the voter and back.

As I have explained in Law Review 16082 (August 2016) and other articles, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) gives certain persons the right to vote in primary, general, special, and run-off elections for federal office (President, United States Senator, and United States Representative). Those persons include members of the United States armed forces and their voting-age family members, within or outside the United States, and United States citizens who are outside the United States temporarily or permanently.

Although UOCAVA voters have had the right to vote for many decades, they have often been effectively disenfranchised by the late mailing of absentee ballots by local election officials around the country. Because of late primaries, ballot access lawsuits, and other problems, election officials have sometimes not had ballots printed and ready to transmit until a few days before Election Day. Although the voter may have applied for an absentee ballot months in advance, there often just is not enough time for the voter to receive, mark, and return the ballot in time for it to be counted.

Finally, in 2009, Congress amended UOCAVA by adding an explicit requirement that each state transmit absentee ballots to UOCAVA voters at least 45 days before any primary, general, special, or runoff election for federal office.³ States that had September primary dates moved their primaries back to earlier in the year, in order to make it possible for election officials to comply with the 45-day rule.

In New York, the Legislature refused to move back the primary. Incumbents benefit from a late primary, and those who write the rules and set the election calendar are by definition incumbents. It was necessary for the United States District Court for the Northern District of New York to order New York to move its federal primary from September to June.⁴ But legislators refused to move the primary for non-federal offices back from the traditional September date.

If the Court does not withdraw its order for a new Republican primary in the Third District on October 6, UOCAVA voters in the Third District are likely to be confused because they will be receiving four absentee ballots in rapid succession in September and October. Ballots for the October 6 primary will be mailed about 30-35 days before that primary. Ballots for the general election, for President and United States Senator only, will be mailed 45-50 days before the November 8 general election. Ballots for non-federal offices in the general election will be mailed about 30 days before the general election. Ballots for the general election in the Third Congressional District will be mailed about 20 days before Election Day.

Uniquely among military associations, ROA stepped into the breach and spoke up for the rights of military voters in this difficult and complex lawsuit. We will keep the readers informed of developments in this most important case.

³52 U.S.C. 20302(a)(8).

⁴See *United States v. New York*, 2012 U.S. Dist. LEXIS 10101 (N.D.N.Y. Jan. 27, 2012); *United States v. New York*, 2012 U.S. Dist. LEXIS 16126 (N.D.N.Y. Feb. 9, 2012).

Readers: Please contact your own local election official. The titles vary from state to state—County Clerk, County Auditor, County Supervisor of Elections, County Board of Elections, Town Clerk, etc. Check out your voter registration card, which you should have in your wallet. That card should show the name, title, and contact information of your local election official.

Please visit your local election official in person, or at least by telephone. Is the official aware of the federal statutory requirement that ballots go out to UOCAVA voters by the 45th day preceding Election Day? Does the official expect to meet the September 24 deadline for transmission of ballots? If you find that the official is not aware of the deadline or expects to miss the deadline, for whatever reason, please let me know as soon as possible. You can reach me by telephone at (800) 809-9448, extension 730, or by e-mail at SWright@roa.org.

Attachments:

- Brief For *Amici Curiae* Reserve Officers Association⁵
- Motion For Leave To File Brief Of *Amici Curiae*, Reserve Officers Association⁶
- Declaration In Support Of Motion For Leave To File *Amicus Curiae*⁷
- 2016 New York State Undue Hardship Waiver Request⁸

UPDATE September 2016

The Reserve Officers Association (ROA) amicus curiae brief was timely filed and was considered, but unfortunately the District Court judge did not withdraw his order that election officials conduct a new Republican primary for United States Representative for the 3rd District of New York on October 6, nor did he postpone the general election for the 3rd District congressional seat.

The special do-over Republican primary will be held on October 6, just 33 days before the November 8 general election. It is expected that it will take nine days, until October 15, to certify the results of the October 6 primary and to transmit general election ballots for the general election, to Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) voters.⁹ As

⁵https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/2016/16085_AmicusBrief.pdf

⁶https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/2016/16085_Motion4Leave2FileAmicu.pdf

⁷https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/2016/16085_LevyDeclaration.pdf

⁸https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/2016/16085_UndueHardshipWaiverReq.PDF

⁹UOCAVA voters include military personnel and their accompanying voting-age spouses and family members, within or outside the United States, and U.S. citizens outside the United States temporarily or permanently. UOCAVA requires that absentee ballots go out to UOCAVA voters not later than the 45th day before any primary, general, special, or runoff election for federal office. In 26 of New York's congressional districts, absentee ballots for President and United States Representative (New York does not have a Senate seat open this year) will go out on or before September 24, to meet the UOCAVA deadline. In the 3rd District, the ballots that go out by September 24 will be for President only.

to the general election for the 3rd District, the UOCAVA voter must receive and mark the ballot and put it in the return mail by Election Day, November 8 (24 days after the projected transmission date for these ballots). To be counted, the marked ballot must be received by the local election official by November 29.

I am concerned that the local election officials may miss the projected October 15 transmission date, and I am concerned that in some cases it may take more than 24 days (October 15 to November 8) for the ballot to get to the UOCAVA voter at sea. The 21-day extension on the deadline for the return of the marked ballot does not help the voter who does not have his or her ballot in hand by November 8, because the requirement that the ballot be marked by Election Day has not been waived.

I am also concerned that it will be impossible in some cases to verify that the UOCAVA voter marked the ballot and placed it in the mail to the election official back home (in the Borough of Queens or Nassau County or Suffolk County) by November 8. UOCAVA authorizes local election officials all over the country to print ballot return envelopes that include a frank that means that no postage is necessary in the United States Postal Service and the Military Postal System. Because these envelopes (containing marked ballots) do not require postage, they do not ordinarily receive postmarks, unless someone makes a special effort to ensure that the envelope receives a postmark.

Moreover, the postmark may be affixed a day or two or even three after the service member put the ballot in the hands of the Military Postal System. For example, Seaman Archie Bunker V of Queens, New York is serving on a U.S. Navy destroyer that is part of a Carrier Battle Group. He receives his ballot for the 3rd District race on Monday, November 7, and he immediately marks the ballot and puts it in the mailbox on his ship. Small ships (like destroyers) do not have postal clerks on board, so the ballot return envelope does not receive a postmark until it arrives at the aircraft carrier two days later (November 9, the day after Election Day). Even if Bunker's ballot arrives by November 29, it will likely be rejected because of the November 9 postmark.

I am also concerned that this court decision makes a mockery of the UOCAVA requirement (enacted in 2009) that ballots go out to UOCAVA voters by the 45th day before Election Day. All over the country, but especially in New York, it is very common for candidates to challenge the nominating petitions of their primary opponents. Disputes about ballot access can and very often do delay the printing and transmission of absentee ballots and result in the disenfranchisement of overseas military personnel, in the primary and the general election. State and local election officials must not be permitted to use these ballot access disputes as an excuse for non-compliance with the 45-day rule.

In June 1952 (13 months after I was born), the Subcommittee on Elections, Committee on House Administration, United States House of Representatives conducted hearings on voting participation in the 1952 presidential election by 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 in Korea and

elsewhere would likely be disenfranchised. Because of late primaries, ballot access lawsuits, and other problems, local election officials would not have ballots printed and available to be mailed until a few days before Election Day, in many cases. There simply was not enough time for the ballot to go from the election official to the voter and back in time for the ballot to be counted.

The 1952 committee report includes a copy of a letter to Congress from President Harry S. Truman.¹⁰ In his letter, he 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.”

Well, it did not work out that way. The Korean War ground to an inconclusive halt in 1953 and this issue (disenfranchisement of military personnel) dropped off our national radar screen until November 2000, when late-arriving military absentee ballots played a critical role in the Florida 2000 presidential cliffhanger.¹¹ The states did not fix this problem, because late primaries benefit incumbents and the state legislators who write the rules and establish the election calendar are by definition incumbents.

Finally, in 2009, Congress got tired of waiting on the states and amended UOCAVA to include the explicit requirement that ballots go out to UOCAVA voters by the 45th day before Election Day. That solved the problem—we thought. But now federal judges apparently think that they can ignore the 45-day rule when states find it inconvenient to comply.

I invite the reader’s attention to the most eloquent opening paragraph of President Truman’s 1952 letter to Congress:

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.

An immediate appeal was filed with the United States Court of Appeals for the Second Circuit, the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont. On September 2, the Second Circuit granted an emergency motion for expedited appeal. The appellants’ briefs have been filed, and the

¹⁰Captain Harry Truman was one of the founders of ROA, in 1922. As President, in 1950, he signed our congressional charter.

¹¹Please see Law Review 23 (March 2001).

appellees' briefs are due by September 8. We will keep the readers informed of developments in this most important case.

Readers: We need to know if there are problems like this elsewhere in the United States—situations where a ballot access lawsuit or some other local problem has delayed or will delay the transmission of absentee ballots for the November 8 general election. Please contact your local election official—County Clerk, County Auditor, County Board of Elections, Town Clerk, etc. Check out your voter registration card, in your wallet. The card should show the title, name, and contact information of your local election official.

Please visit the election official in person if possible, or at least contact the official by telephone. Is the official aware of the requirement that absentee ballots must be transmitted to UOCAVA voters not later than Saturday, September 24 (45 days before Election Day)? Does the official expect to meet that deadline?

If you find that your election official does not expect to meet the September 24 deadline for whatever reason, please contact me immediately. You can reach me by telephone at (800) 809-9448, extension 730, or by e-mail at SWright@roa.org.

I also want to hear from you if you are a UOCAVA voter in the 3rd Congressional District of New York (Borough of Queens, Nassau County, and Suffolk County). I want to have at least one real-live example of a voter who is likely to be disenfranchised because he or she is serving at a place (like a ship at sea) where mail service is slow and intermittent.

Second Supplement, September 24, 2016

By Captain Samuel F. Wright, JAGC, USN (Ret.)¹²

The Third Congressional District of New York (NY-3) consists of part of the Borough of Queens in New York City and part of Suffolk County and part of Nassau County on Long Island. The incumbent, Representative Steve Israel, chose not to seek reelection this year. A primary for the United States House of Representatives was conducted on June 24.

On the Republican side there were two potential candidates for the House of Representative in NY-3, Jack Martins and Phillip Pidot. To qualify for the primary ballot, a candidate needed to submit a nominating petition signed by at least 1,250 registered voters in the congressional district. Martins clearly had enough valid signatures, but the sufficiency of Pidot's petition was in doubt. The New York State Board of Elections held that Pidot did not have enough signatures and invalidated his petition.

¹²Captain Wright is a life member of ROA and for six years (2009-15) was the Director of ROA's Service Members Law Center (SMLC). He is the author of more than 1300 of the 1500 "Law Review" articles available at www.servicemembers-lawcenter.org. He is retired from the Judge Advocate General's Corps of the Navy Reserve. He can be reached toll-free at (800) 809-9448 or SWright@roa.org,

Pidot challenged the Board's determination in state court. Judge Diamond held, after a hearing, that Pidot had 1,261 valid signatures, exceeding the minimum by 11. But Judge Diamond did not order that Pidot's name be added to the primary ballot because at the time of the ruling there were only four days remaining until the primary, and there was no practicable way to include Pidot's name. Accordingly, no primary was held on the Republican side in NY-3, and Martins won the Republican nomination by default.

After the primary, Pidot filed a lawsuit in the United States District Court for the Northern District of New York (NDNY), and the NNDNY federal judge ordered the local election officials to conduct a new Republican primary for NY-3 on October 6, just 33 days before the November 8 general election.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) is a federal statute enacted in 1986. It gives active duty members of the seven uniformed services and their voting-age spouses and dependents accompanying them the right to register and vote by absentee process in primary, general, special, and runoff elections for federal office, whether the voter is within or outside the United States. UOCAVA also enfranchises U.S. citizens who are outside our country temporarily or permanently.

In 2009, Congress amended UOCAVA, and this federal law now explicitly requires each state to transmit ballots to UOCAVA voters (military and civilian) at least 45 days before any primary, general, special, or runoff election for federal office.¹³ The deadline is today (September 24), which is 45 days before the November 8 general election. The idea is to ensure that the service member has sufficient time to receive, mark, and return his or her absentee ballot in time for that ballot to be counted, no matter where the service of our country has taken the member.

Of course, the local election officials cannot print general election ballots, much less send them out, until the primary has been conducted and its results officially certified. Our concern here at the Reserve Officers Association (ROA) was that the October 6 date for the do-over primary would almost guarantee that service members serving at sea or at isolated overseas duty stations would be disenfranchised with respect to the election of a new U.S. Representative for NY-3.

ROA filed an amicus curiae (friend of the court) brief in the NNDNY, urging the judge to reconsider his hasty and ill-considered order for a new Republican primary on October 6. In the alternative, we asked the judge to order a delay of the NY-3 general election until 45 days after the certification of the results of the October 6 special primary. We were very careful to avoid taking a position on the question of who should be the Republican nominee or who should be the next Congressman from NY-3. Our only interest was in ensuring that those who serve our country in uniform and who are prepared to lay down their lives to protect the rights that we all enjoy should be able to enjoy those rights themselves. They should not be disenfranchised by

¹³52 U.S.C. 20302(a)(8).

the fact that the service of our country has taken them to a place where mail service is slow and intermittent.

The District Court judge refused to withdraw his order to hold a new primary on October 6, and he refused to order a delay in the general election. There was an immediate appeal to the United States Court of Appeal for the Second Circuit, the federal appellate court that sits in New York City and hears appeals from district courts in New York, Connecticut, and Vermont. Because of the emergency situation, there was an expedited briefing schedule in the appellate court and oral argument was held on Friday, September 16.

In our federal appellate courts, the decision of the three-judge panel is usually not released until months after the oral argument, sometimes well in excess of one year. In this case, the three appellate judges ruled from the bench, deciding the case immediately after the conclusion of the oral argument. You can find a link to the court's summary order at the end of this article.

On September 16, the Second Circuit summarily reversed the District Court's injunction and dismissed Pidot's lawsuit. This resolution occurred eight days before the September 24 deadline for transmission of general election absentee ballots to military personnel and family members and overseas citizens. As a result, service members and others will receive their ballots in time to cast them and have them counted.

ROA congratulates and thanks attorneys Laurence Levy, Robert M. Harding, and Jennifer M. Gomez of the New York City office of Greenberg Traurig LLP for drafting and filing an excellent brief under severe time constraints, at no cost to ROA. We are most pleased that military and overseas citizens from NY-3 will have the opportunity to participate in the election of the new Representative from NY-3, as well as the President of the United States, no matter where the service of our country has taken them.

Readers: Please contact your local election official—County Clerk, County Board of Elections, Town Clerk, etc. Your voter registration card likely shows the name, title, and contact information for your local election official. Did absentee ballots for the November 8 general election go out to UOCAVA voters not later than Saturday, September 24, 2016? If your local election official missed this deadline for whatever reason, please let me know immediately at SWright@roa.org or by telephone at (800) 809-9448, extension 730.