

New York Continues to Disfranchise Military Personnel in Non-Federal Elections

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

Q: I am a Chief Petty Officer (E-7) in the Navy, and I serve on a nuclear-powered ballistic missile submarine. In a few days, the submarine will deploy on a cruise that is expected to last for 77 days, and we will be submerged for most or all that time. We cannot send or receive mail while submerged.

I have been on active duty for almost 20 years, and I have voted or at least tried to vote in every major election, but several times I have not been able to vote, or my ballot was not counted, because I have served most of my career in submarines.

I am particularly interested in voting in the 2018 mid-term election because my sister is a general election candidate for a seat in the lower house of the New York state legislature. I

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.

have maintained my domicile (legal residence) at the place where I lived with my parents and siblings when I graduated from high school and enlisted in the Navy in 1999.³ I have never voted or registered to vote at any other address. My father died in 2014, and my mother sold the house and moved to Florida, but that address is still my domicile for voting and other purposes, and it is in the legislative district that my sister seeks to represent in Albany. I really want to vote for my sister, and to ensure that my ballot is counted, because the district is marginal—it has changed hands between Republicans and Democrats several times in the last two decades.

I recently received an absentee ballot that listed only two offices—those of United States Senator and Representative. Why did I receive this two-office absentee ballot? When will I receive a ballot for all the other offices? If I don't have the ballot in hand by the time that my submarine deploys in a few days I won't even see that ballot until after Election Day. Help!

A: New York conducted its federal primary on 6/26/2018. The names of candidates for U.S. Senator and Representative have been known for many weeks, so New York was able to get federal office ballots out by 9/22/2018 as required by federal law.⁴ The primary for other offices was not held until 9/13/2018, just 54 days before the November 6 general election. New York was unable to get the non-federal absentee ballots out by the 45th day before the general election because it takes more than nine days to determine and certify the names of primary winners and to print the ballots. As soon as the names of all candidates for all offices have been officially determined, your local election official will print the ballots and send them out—likely by mid-October. It is grossly unfair that you will be disenfranchised again this year, and righting that injustice has been a major focus of my life for the last 42 years.

I graduated from law school in 1976 and took the Texas bar exam in July of that year. I learned that I had passed and took the oath of office as an attorney on 11/1/1976. In my first case as an attorney, I represented (along with a more senior attorney) a freshman Republican Congressman (Ron Paul) who had been elected to the U.S. House of Representatives in a special election six months earlier and who very narrowly lost the 1976 general election. Hundreds of mailed-in absentee ballots, mostly from Army Post Office (APO) and Fleet Post Office (FPO) addresses, arrived in the days after Election Day. Those ballots were not counted. If they had been counted, they could have changed the outcome of this exceedingly close election.

Mine was a lonely crusade for the first 24 years, until the immediate aftermath of the 2000 Presidential election, when late-arriving military and overseas ballots played a crucial role in deciding the election in Florida.⁵ After the issue of disenfranchised military voters was thrust onto the national consciousness in 2000, many folks joined the effort to reform federal and

³Please see Law review 18016 (February 2018).

⁴52 U.S.C. § 20302(a)(8).

⁵Please see Law Review 23 (March 2001).

state absentee laws and procedures to ensure that those who serve our country in uniform are able to enjoy the rights that they are called upon to fight and sometimes to die to preserve.

The principal federal law is the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).⁶ UOCAVA accords the right to vote in primary, general, special, and runoff elections to the following classes of persons:

1. Members of the uniformed services⁷ on active duty who are away from their domiciles (legal residences, where they are eligible to vote) because of uniformed service, either within or outside the United States.⁸
2. Members of the Merchant Marine who are absent from their domiciles because of their service.⁹
3. Voting-age spouses and family members of active duty service members or Merchant Marine members who are absent from their domiciles because of the sponsor's uniformed service or Merchant Marine service.¹⁰
4. Citizens of the United States who are away from the United States temporarily or permanently.¹¹

In 2009, Congress amended UOCAVA by adding an explicit requirement that each state transmit absentee ballots to UOCAVA voters who have applied at least 45 days before any general, primary, or special election for federal office.¹² The 45-day rule is not just a suggestion. It is a mandate of federal law, enforceable in federal court.¹³ A federal court can and must order a state to remove any impediment to compliance with the 45-day rule, and that includes moving back September primaries.

⁶52 U.S.C. §§ 20301-20311. The citation refers to title 52 of the United States Code, sections 20301 through 20311. Congress enacted UOCAVA in 1986, as a consolidation of and replacement for the Federal Voting Assistance Act of 1955 (pertaining to members of the uniformed services and their voting-age spouses and dependents accompanying them) and the Overseas Citizens Voting Rights Act of 1975 (pertaining to overseas civilians).

⁷The uniformed services are the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic & Atmospheric Administration. 10 U.S.C. § 101(a)(5).

⁸52 U.S.C. § 20310(1)(A).

⁹*Id.* § 20310(1)(B)

¹⁰*Id.* § 20310(1)(C).

¹¹*Id.* § 20310(5).

¹²52 U.S.C. § 20302(a)(8). For runoff elections, including runoff primaries, a state must establish a written plan whereby UOCAVA voters will have enough time to vote in the runoff election. 52 U.S.C. § 20302(a)(9). One way to do this is the "instant runoff." In that system, voters in the first election are asked to rank the candidates by order of preference, from the most favored to the least favored. If no candidate secures a majority (50% plus one vote) in the first election, the individual's ballot for the runoff will be counted for the voter's highest ranked candidate who has made it to the runoff. See "Louisiana overseas voters have extra hurdle" by Bob Carey, Sam Wright, and Josh Flynn-Brown, *Stars & Stripes*, September 5, 2014.

¹³"The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this title." 52 U.S.C. §. 20307(a).

The worst problem for military and overseas voters has always been in the states that hold primaries in September, because until the results of the primary have been officially certified the election official cannot print general election absentee ballots, much less transmit them. After Congress adopted the 45-day rule in 2009, all the states with September primaries moved their primaries to earlier in the year, except for New York and New Hampshire.

In New York, the legislature adamantly refused to move the primary. Late primaries benefit incumbents, and the legislators who write the rules are of course incumbents. The Attorney General found it necessary to sue New York, and the federal court ordered New York to conduct its federal primary in June instead of September.¹⁴ Accordingly, the 2018 federal primary was conducted on 6/26/2018.

The legislators were so insistent that their own primary should be in September that they bifurcated the primary, even though doing so added tens of millions of dollars of cost to the taxpayers and ensured that overseas military personnel would be disenfranchised with respect to non-federal offices. Hence, the 2018 non-federal primary was held on 9/13/2018.

Q: Why didn't the federal court order New York to move its entire primary from September to June?

A: The federal court did not have authority to order New York to move its non-federal primary to June because UOCAVA, by its terms, only applies to *federal* primaries and elections (President, United States Senator, and United States Representative).

Q: Does Congress have the constitutional authority to require the states to give UOCAVA voters a reasonable opportunity to cast ballots that really do get counted for non-federal as well as federal offices?

A: I believe that Congress has that authority with respect to military personnel and family members, but probably not for overseas civilians.

In the federal system of government established by the Founders, the states have *plenary power* and the Federal Government has *certain enumerated powers* provided by the Constitution.¹⁵ UOCAVA is apparently based on Article I, Section 4, Clause 1, which provides:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any*

¹⁴See *United States v. State of New York*, 2012 U.S. Dist. LEXIS 10101 (N.D.N.Y. January 27, 2012); *United States v. State of New York*, 2012 U.S. Dist. LEXIS 16126 (N.D.N.Y. February 9, 2012).

¹⁵During the 20th Century, the Supreme Court read certain constitutional provisions (especially the Interstate Commerce Clause) so broadly as to derogate the concept that the Constitution limits federal powers. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

time by Law make or alter such regulations, except as to the Place of Chusing Senators."¹⁶

Article I, Section 8 contains 18 clauses giving Congress the power to enact laws, and six of the 18 clauses pertain to war and national defense. Clause 11 gives Congress the power "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Clause 12 gives Congress the power to "raise and support Armies." Clause 13 gives Congress the power "To provide and maintain a Navy." Clause 14 gives Congress the power "To make Rules for the Government and Regulation of the land and naval forces." Clause 15 gives Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions." Clause 16 gives Congress the power "To provide for organizing, arming, and disciplining the Militia" when in federal service. These six clauses are collectively referred to as the War Powers Clauses.

When I was a toddler, the Supreme Court relied upon the War Powers Clauses in upholding the constitutionality of the Soldiers' and Sailors' Civil Relief Act (SSCRA).¹⁷ The Court held:

The constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service cannot be doubted. Generally, similar relief has been accorded to other types of federal operations or functions. And we [the Supreme Court] have upheld the validity of such enactments. ... Nor do we see any distinction between those cases and this. ... We have, in fact, generally recognized the especial burdens of required service with the armed forces in discussing the compensating benefits Congress provides. ... Petitioner's [Dameron's] duties are directly related to an activity which the Constitution delegated to the National Government [national defense]. ... Since this is so, congressional exercise of a "necessary and proper" supplementary power such as this statute [the SSCRA] must be upheld.¹⁸

If it is constitutional for Congress to protect service members from taxation of their personal property and their military incomes by the states where they serve but are not domiciled, it is also constitutional for Congress to protect service members and military family members from state laws and procedures that serve to disenfranchise them based on the circumstances of their service to our country. Indeed, such protections are even more important today than in 1953, because in 1973 Congress abolished the draft and established the All-Volunteer Military. Without laws like UOCAVA, the SCRA, and the Uniformed Services Employment and

¹⁶U.S. CONST., art I, sec. 4, cl 1 (emphasis supplied). The capitalization, spelling, and punctuation are correct, as in the original, in accordance with the style of the late 18th Century.

¹⁷In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA) as a long-overdue rewrite and update of the SSCRA, which was originally enacted in 1917.

¹⁸*Dameron v. Brodhead*, 345 U.S. 322, 324-25 (1953). See also *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). I discuss *Dameron* and *Rumsfeld* in detail in Law Review 09017 (April 2009).

Reemployment Rights Act (USERRA), qualified young men and women would not enlist in our country's armed forces and our nation would go undefended.¹⁹

I call upon Congress to act on this issue early in the 116th Congress (2019-20) and to amend UOCAVA by adding a provision giving service members and their voting-age spouses and dependents the right to vote by absentee ballot for non-federal as well as federal offices and to require the states to ensure that ballots go out on time for non-federal as well as federal elections.

In a 1952 letter to Congress, President Harry S. Truman²⁰ wrote:

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.

President Truman's paean to the brave young men and women fighting the Korean War in 1952 applies equally to the brave young men and women fighting the Global War on Terrorism today. I call upon Congress to enact legislation requiring New York and all the other states to make it possible for military personnel and family members to cast ballots that really do count, no matter where the service of our country has taken them, and that should be for non-federal as well as federal offices.

Please join or support ROA

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

¹⁹Please see law review 17055 (June 2017).

²⁰In 1922, Captain Harry S. Truman was one of the founders of ROA. In 1950, as President, he signed our congressional charter. He also signed several important military-related bills into law, including the 1948 law that provides for the Reserve Component retirement system. At ROA headquarters, we have several pens that President Truman used in signing these bills into law.

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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