

LAW REVIEW 14086¹

October 2014

Why two Absentee Ballots in 2014? When Can I Expect To Receive my State Ballot?

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7.0—Military voting rights

United States of America v. State of New York, 2012 U.S. Dist. LEXIS 10101 (N.D.N.Y. Jan. 27, 2012).

United States of America v. State of New York, 2012 U.S. Dist. LEXIS 16126 (N.D.N.Y. Feb. 9, 2012).

Q: I am an active duty Soldier in the United States Army, currently serving in Afghanistan. My mail service here is slow and intermittent. I really want to vote in the 2014 general election, because my older sister is running for the lower house of the New York state legislature. It is a marginal district, and the outcome is expected to be very close. If she loses by one vote and my ballot is not counted, I may not be invited to her house for Christmas this year or for many years to come. I expect to depart from Afghanistan just before Christmas, and I am really looking forward to seeing my sister and other family for Christmas this year.

I applied for my 2014 general election ballot months ago. My home is in upstate New York, and I have maintained my legal residence there. I have received, marked, and returned my 2014 general election ballot, but only for federal offices (U.S. Senator and U.S. Representative). I am glad to have had the opportunity to vote in the federal election, but I really want to vote in the non-federal elections, and especially to vote for my sister.

I inquired as to why the ballot I received was limited to federal offices. I was told that a separate ballot for non-federal offices would arrive later. Why am I receiving two absentee ballots this year? When can I expect to receive my non-federal ballot?

A: A federal court order caused New York to move its *federal* primary (for U.S. Senator and U.S. Representative) from September to late June, in order to make it possible for New York's local election officials (LEOs) to send out ballots at least 45 days before the general election, so that

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,300 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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military personnel will have the opportunity to cast ballots that really do get counted, no matter where the service of our country has taken them. Unfortunately, the New York legislature chose to bifurcate the primary and to continue to hold the non-federal primary in September. As a result, it was possible for your LEO to get you your federal general election ballot to you in a timely manner, but your non-federal ballot is still in the works.

A federal law called the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)³ gives “absent uniformed services voters”⁴ and “overseas voters”⁵ the *right* to vote in primary, general, special, and runoff elections *for federal office*.⁶ As amended in 2009, UOCAVA explicitly requires each state to send out ballots to UOCAVA voters not later than 45 days prior to any primary, general, special, or runoff election for federal office.⁷

UOCAVA gives the United States Attorney General the authority to bring an appropriate civil action, in federal court, for declaratory or injunctive relief under UOCAVA.⁸ In recent years, New York has been among the worst states with respect to making it possible for overseas military personnel and other overseas citizens to vote. The problem is the September primary. Until the results of the primary have been officially certified, the local election official (LEO) cannot *print* general election ballots, much less mail them out.

Several times in recent years, the United States Department of Justice (DOJ) has filed suit against New York, asserting that untimely mailing of absentee ballots disenfranchised military and overseas voters and violated UOCAVA. New York has responded with promises to change its election calendar but has failed to follow through on its promises. Finally, DOJ sought and obtained a federal court order requiring the state to move its primary for federal offices to the fourth Tuesday in June. Judge Gary L. Sharpe, the Chief Judge of the United States District Court for the Northern District of New York, ordered New York to make this change in its election calendar. *United States of America v. State of New York*, 2012 U.S. Dist. LEXIS 10101 (N.D.N.Y. Jan. 27, 2012).

When New York officials continued to drag their feet in implementing Judge Sharpe’s order, he really came down hard on them in a follow-up order, as follows:

New York has once again demonstrated its intransigent refusal to comply with a federal mandate protecting the federal voting rights of those serving in the military overseas and those

³ UOCAVA is codified in title 52 of the United States Code, sections 20301 through 20311 (52 U.S.C. 20301-20311).

⁴ An absent uniformed services voter is an active service member of one of our nation’s seven uniformed services (Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service commissioned corps, or National Oceanic & Atmospheric Administration commissioned corps) or Merchant Marine or the voting-age family member of an active service member, whether within or outside the United States. 52 U.S.C. 20310(1).

⁵ Overseas voters are U.S. citizens of voting age who are outside the United States temporarily or permanently. 52 U.S.C. 20310(5).

⁶ 52 U.S.C. 20302(a)(1).

⁷ 52 U.S.C. 20302(a)(8).

⁸ 52 U.S.C. 20302(a).

otherwise living on foreign soil. Responding to the court's prior Memorandum-Decision and Order, see [United States v. New York, No. 1:10-cv-1214, 2012 U.S. Dist. LEXIS 10101, 2012 WL 254263 \(N.D.N.Y. Jan. 27, 2012\)](#), the sole-ordered defendant—the New York State Board of Elections (NYSBOE)—acting through lead and co-counsel, have filed two competing submissions in contravention of the court's order. Indeed, these submissions remind the court of Strother Martin's (Captain, Florida Road Prison 36) admonition to Paul Newman (Prisoner Luke): "What we've got here is a failure to communicate." Cool Hand Luke (Jalem Productions 1967.)

On behalf of Commissioners James Walsh and Gregory Peterson and Co-Executive Director Todd Valentine, lead counsel has filed the "Walsh-Peterson submission," which erroneously interprets the prior order. (See Dkt. No. 60.) Specifically, the Walsh-Peterson submission asserts that "we have not interpreted [the] order to mean that in promulgating said calendar that you are either requiring or expecting the NYSBOE to make wholesale changes to those statutes in an effort to cure any possible infirmities therein." (*Id.* at 1.) Furthermore, the submission provides only a partial calendar applying current State law electoral deadlines to the new primary date, but suggests that the NYSBOE lacks authority to recommend any necessary modifications to the resulting calendar. (See *id.*)

On the other hand, and on behalf of Commissioners Evelyn Aquila and Douglas Kellner and Co-Executive Director Robert Brehm, co-counsel has filed the "Aquila-Kellner submission," which includes a completely modified election calendar based on the court's prior order, which established the primary date as the fourth Tuesday in June. (See Dkt. No. 61 at 10-16.)

The court is aware of the public and political outcry caused by its having selected a June primary date and it is also aware of the adverse economic consequences that may result if New York feels constrained to hold multiple primaries. However, the court has not ordered multiple primaries and the public deserves to know the history of this litigation.

By virtue of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), [42 U.S.C. §§ 1973ff to 1973ff-7](#), as amended by Congress in 2009 as part of the Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009), overseas military personnel and other overseas voters cannot be disenfranchised. Indisputably, the [Supremacy Clause of the United States Constitution](#) requires that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." [Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108, 112 S. Ct. 2374, 120 L. Ed. 2d 73 \(1992\)](#) (internal quotation marks omitted). Since the MOVE Act amendment more than two years ago, New York has failed to comply with federal law, and continues to disenfranchise military and overseas voters.

After the 2009 amendment, New York applied for a hardship waiver from the Secretary of Defense, citing many of the road blocks to compliance it continues to argue now. Following its promise of future compliance, New York was granted the waiver for the November 2, 2010 federal general election, which resulted in the disenfranchisement of federally protected voters. When subsequent federal-state negotiations failed to remedy New York's violations, the

United States Department of Justice filed suit on October 12, 2010. In a Consent Decree executed seven days later—now almost sixteen months ago—New York agreed to take certain steps to ensure that absentee ballots cast in the 2010 election would be counted and that New York's primary date would be changed to guarantee UOCAVA compliance. Yet, New York failed to honor its commitment. And it was this failure—which demonstrated New York's inability to resolve its political differences in order to comply with federal law—that forced the court's hand two weeks ago. While New York may now confront new issues as it seeks a primary solution, the fact remains that it has squandered over two years in its attempts to solve the problem.

Once again, the court is left with no choice since the NYSBOE Commissioners have failed to agree, and only the Aquila-Kellner submission complies with the court's prior order. Therefore, the court adopts the Aquila-Kellner calendar. Furthermore, the court observes that while the NYSBOE filed the calendar, New York State is also a defendant. The court expects full compliance by all defendants, regardless of how they choose to effectuate such compliance.

Lastly, the court paraphrases the admonition from its last decision: This decision by no means precludes New York from reconciling their differences and selecting a different primary date, or a different modified election calendar, all of which is UOCAVA compliant.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the court adopts the Aquila-Kellner calendar (Dkt. No. 61 at 10-16); and it is further

ORDERED that the parties shall file a status report on or before March 9, 2012, and every thirty (30) days thereafter, which, among other things, informs the court of New York's progress in complying with the court's orders; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

February 9, 2012
Albany, New York

/s/ Gary L. Sharpe
Chief Judge, U.S. District Court ”

United States of America v. State of New York, 2012 U.S. Dist. LEXIS 16126 (N.D.N.Y. Feb. 9, 2012).

Thus, New York was dragged kicking and screaming into making it possible for overseas military personnel and other overseas voters to participate in the general election, at least for federal

offices. It was thought that the legislature would go along with moving the non-federal primary to June as well, but the legislature chose to continue holding the non-federal primary at the traditional September date. Holding a separate non-federal primary in September is an unnecessary expenditure of millions of dollars at a time of considerable budget stringency. Moreover, holding the non-federal primary in September guarantees that overseas New Yorkers like you will continue to be disenfranchised.

The problem is that a late primary benefits incumbents, and the legislators who get to make these rules are by definition incumbents. They are more interested in maximizing their own chances for reelection than they are in enfranchising brave young men and women like you.

Q: It is all well and good that I have been able to vote for federal offices, but I am really interested in voting for non-federal offices, and especially for my sister, running for the state legislature. When I receive my non-federal ballot, I will of course mark it and send it back immediately, by the most expeditious means available. If I don't receive the ballot in time to return it to my local election official by Election Day, is any remedy available?

A: Perhaps. I invite your attention to Law Review 1064 (“Suit Filed To Protect Military Voting Rights in Maryland”).⁹ In 2010, Maryland met the 45-day rule by bifurcating the absentee ballots, sending out the federal ballots before the 45-day deadline and the state ballots later. UOCAVA only gives you the right to vote in federal elections, but you can make an argument that you have a constitutional right to vote in non-federal elections. My friend Eric Eversole and his Military Voter Protection Project sued the State of Maryland in the United States District Court for the District of Maryland. The state agreed to extend the deadline for the receipt of mailed-in overseas ballots, as a remedy for their untimely mailing. These late-arriving ballots were counted for all offices, not just federal offices.

SUPPLEMENT TO LAW REVIEW 14086

Thank you to Ms. Catherine Simicich of Suffolk County, New York for contacting the Board of Elections of Suffolk County. Suffolk County sent out *federal only* absentee ballots to military and overseas voters on September 15, a date that was 50 days before Election Day and five days before the 45-day minimum mandated by federal law. This performance demonstrates that moving the *federal* primary from September to June, as ordered by the United States District Court for the Northern District of New York, solved the disenfranchisement problem *but only for federal offices*.

Because New York held its non-federal primary at the traditional September date, the non-federal ballots did not go out until October 3, a date that was only 32 days before the November 4 general election. This means that New Yorkers serving in Afghanistan or on ships at sea (where mail service is unavoidably slow and intermittent) were able to vote for federal

⁹ You will find almost 1100 “Law Review” articles at www.servicemembers-lawcenter.org.

offices this year but were likely disenfranchised in the election of the Governor, state legislators, and other non-federal offices.

Readers in New York and elsewhere: I need you to contact your local election official (LEO) with a simple question—when did absentee ballots for the 2014 general election go out? If ballots were not in fact available to be sent out by September 20 (at least for federal offices), your LEO is in violation of federal law. But if nobody is checking up on them LEOs will send out the ballots when they get around to it.

Readers in New York—please contact your state legislators and ask them to move the non-federal primary to June (in 2016 and thereafter) and consolidate it with the federal primary. Consolidating the primaries will save millions of precious taxpayer dollars, and more importantly it will make it possible for the brave young men and women from New York who serve our country in uniform to cast ballots that really do get counted, for all offices, no matter where the service of our country has taken them.

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