

# Legal Memorandum

No. 45

July 28, 2009

Revised and updated March 9, 2010



Published by The Heritage Foundation

## America's Military Voters: Re-enfranchising the Disenfranchised

*Hans A. von Spakovsky and M. Eric Eversole*

For many Americans, the 2008 presidential election was historic, both in its outcome and the number of citizens who voted, many for the first time. The overall turnout of the voting-eligible population was 61.7 percent, the highest turnout since the 1964 presidential election.<sup>1</sup> Local election officials in many states reported high levels of voting by many individuals who have not traditionally participated in the election process. The same, however, cannot be said for America's military members and their voting-age dependents ("military voters"). For these voters, especially those serving in dangerous combat zones like Iraq and Afghanistan, the 2008 presidential election was an embarrassing reminder of the difficulties faced by America's men and women in uniform when they attempt to vote.

Military voters have long been disenfranchised—both at the state and federal level—by a voting process that fails to recognize the unique challenges created by a military voter's transitory existence or the delays associated with delivering an absentee ballot to a war zone halfway around the world. Given these soldiers' daily sacrifices and their willingness to defend this nation's freedom, it is incumbent on Americans to remedy this problem and provide U.S. soldiers with the same rights they are being asked to protect. Unless Congress (and the states) finally act to remedy this problem, military personnel will continue to be the largest group of disenfranchised voters in the United States.

### Talking Points

- In recent elections, only 5 to 20 percent of eligible military voters cast absentee ballots that were counted.
- This shockingly low participation rate is as severe as any in our nation's history, including that which resulted in the passage of the Voting Rights Act of 1965 to strike down barriers to voting for black Americans.
- The major reason for this disenfranchisement is the transient lives of military voters, the Pentagon's failure to provide these voters with timely registration and absentee voting assistance, and the delays associated with mailing ballots to and from remote locations and war zones.
- These problems could be alleviated with a comprehensive solution that: (1) designates certain military offices as voter registration agencies; (2) mandates that all absentee ballots be mailed to military personnel at least 45 days prior to the election; and (3) requires the military to provide expedited return of completed absentee ballots by international express mail.

This paper, in its entirety, can be found at:  
[www.heritage.org/Research/LegalIssues/lm0045.cfm](http://www.heritage.org/Research/LegalIssues/lm0045.cfm)

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002-4999  
(202) 546-4400 • [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

## Current Law

All military personnel and their dependents, as well as overseas citizens, are guaranteed the right to vote by absentee ballot in federal elections by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>2</sup> President Ronald Reagan designated the Department of Defense (DOD) to administer the statute, and the department organized the Federal Voting Assistance Program office (FVAP) to provide support to UOCAVA voters.<sup>3</sup> Enforcement of the UOCAVA is the responsibility of the U.S. Department of Justice.

In short, the UOCAVA requires all states to “permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.”<sup>4</sup> The UOCAVA does not specify the exact number of days prior to the election that absentee ballots must be mailed to overseas voters. However, since 1988 the Department of Justice has filed 35 civil lawsuits against states and local governments arguing that the statute’s guarantee of the right to vote by absentee ballots requires states to mail out such ballots in time to be received and returned by overseas voters.<sup>5</sup> In 1986, Congress found that

“[b]ased on surveys of the U.S. Postal Service and of military postal authorities, ballots should be mailed to overseas addresses at least 45 days prior to an election in order to ensure adequate time for a ballot to reach a voter and be returned.”<sup>6</sup> The U.S. Election Assistance Commission recommended the same 45-day transit time in 2004 when it released a report on the best practices for facilitating voting by overseas citizens covered by the UOCAVA.<sup>7</sup>

## Disenfranchised Heroes

Despite many states reporting record turnout in 2008, data from the election demonstrates a shockingly low level of participation among military voters.<sup>8</sup> Take, for example, the treatment of military voters in Minnesota. In a state that prides itself on the nation’s highest voter participation rate—78.2 percent of the eligible population participated in the 2008 presidential election—only 15.8 percent of Minnesota’s 23,346 military members and their voting-age dependents were able to cast an absentee ballot in the same election.<sup>9</sup> To make matters worse, even if the military voter in Minnesota cast his or her absentee ballot, that ballot was two times more likely to be rejected by local election officials, as compared to other absentee voters statewide.<sup>10</sup>

1. 2008 General Election Turnout Rates, United States Elections Project, *available at* [http://elections.gmu.edu/Turnout\\_2008G.html](http://elections.gmu.edu/Turnout_2008G.html).
2. 42 U.S.C. § 1973ff *et seq.* The UOCAVA was passed in 1986 to “update and consolidate provisions of current law relating to absentee registration and voting in elections for Federal office by members of the uniformed services and by citizens of the United States who reside abroad.” H.R. Rep. No. 765, 99th Cong., 2nd Sess., at 5 (1986). The predecessor statutes were the Overseas Citizens Voting Rights Act, 42 U.S.C. § 1973dd, and the Federal Voting Assistance Act, 42 U.S.C. § 1973cc.
3. Exec. Order No. 12,642, 53 Fed. Reg. 21,975 (June 8, 1988).
4. 42 U.S.C. § 1973ff-1(1).
5. Cases Raising Claims Under The Uniformed and Overseas Citizens Absentee Voting Act, Civil Rights Division, U.S. Department of Justice, *available at* [http://www.usdoj.gov/crt/voting/litigation/caselist.php#uocava\\_cases](http://www.usdoj.gov/crt/voting/litigation/caselist.php#uocava_cases)
6. H.R. Rep. No. 765, 99th Cong., 2d Sess. 10-11 (1986).
7. Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act, Report of the U.S. Election Assistance Commission (2004); *available at* [www.eac.gov](http://www.eac.gov).
8. The authors collected data by e-mail and telephone inquiries from 19 of the largest states with military voting populations, including: Alaska, Arizona, Arkansas, California, Delaware, Florida, Idaho, Illinois, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, Pennsylvania, Rhode Island, Texas, West Virginia, and Wisconsin. These states combined have nearly 60 percent of the military voting population.
9. The FVAP collects and provides data regarding the total number of military voters in each state, including Minnesota. These figures are *available at* <http://www.fvap.gov/reference/laws/state-initiatives.html>.

A vast majority of the rejected military and overseas ballots—nearly 70 percent—were rejected because the ballot was returned after the election deadline, whereas only 10 percent of non-military and regular absentee ballots were rejected for being received after the deadline. Ultimately, only 14.5 percent of Minnesota’s eligible voters were able to cast a vote that counted in the 2008 presidential election.

Military personnel move frequently and receive scant assistance from both the military and state voting officials. Consequently, the absentee ballot request rate is extremely low. In the three states with the largest number of military voters—Florida, Texas, and California (accounting for nearly 40 percent of all military voters)—data from each state shows that less than a quarter of military voters and their dependents requested an absentee ballot for the 2008 presidential election. Florida had the highest number of requests with 27.8 percent of nearly 324,000 military voters requesting an absentee ballot. Texas was second with 22.9 percent and California was third with 17.8 percent. All told, of the estimated 943,879 military voters in these three states, only 23.4 percent or 220,595 requested an absentee ballot to vote in the 2008 presidential election. The rate of return of those same absentee ballots was even lower. Only 11.3 percent of the eligible military voters in California actually returned their ballots compared to 20.6 percent in Florida and 13.1 percent in Texas.

These low participation rates, however, were not isolated to Florida, Texas, and California. Other states, like Alaska, Louisiana, Maryland, Missouri, and Pennsylvania—all of which have significant military populations—experienced similar levels of disenfranchisement. The number of military voters that requested an absentee ballot in these five states

ranged from 18.5 percent in Alaska to 25.2 percent in Pennsylvania. However, the number of military voters that were able to cast and have their absentee ballots counted was much lower, ranging from 11.9 percent in Maryland to 19.1 percent in Pennsylvania. Said another way, nearly 80 to 85 percent of military voters were unable to cast an absentee ballot that counted during the 2008 presidential election and, thus, were likely disenfranchised during the election. This low participation rate is as severe as any in the nation’s recent history, including that which resulted in the passage of the Voting Rights Act of 1965 to strike down the barriers to registration and turnout that kept black Americans out of the polls.<sup>11</sup>

The state data further shows that a large number of ballots were mailed, but never returned by the absentee military voter or were returned undelivered to local election officials because they had the wrong mailing address. For example, in California, Florida, and Texas, nearly 34.8 percent of the military absentee ballots that were requested were not returned to the local election official or were returned because of an undeliverable address (*i.e.*, the military voter no longer lived at that address). According to a recent study by the Overseas Vote Foundation (OVF), many of these overseas military ballots may have been lost or significantly delayed by the postal service. The OVF found that nearly 22 percent of respondents to a survey, which included military and overseas voters, never received their requested absentee ballot for the 2008 presidential election.<sup>12</sup> In addition, 10 percent received their absentee ballots less than seven days before the election and 1 percent received their ballots after November 4, 2008. In other words, the 2008 OVF Report found that nearly

10. Minnesota state data indicates that election officials rejected nearly 8.2 percent of cast military absentee ballots, whereas only 4.0 percent of all absentee ballots statewide were rejected. See *Sheehan v. Franken*, No. 62-CV-09-56, Findings of Facts, Conclusions of Law, and Order for Judgment, at 9 (Minn. Dist. Ct. Apr. 13, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNfinalorder.pdf>.

11. See Edward Blum, *An Assessment of Voting Right Progress in Mississippi*, American Enterprise Institute, available at [www.aei.org/docLib/20060417\\_MississippiStudy.pdf](http://www.aei.org/docLib/20060417_MississippiStudy.pdf); Edward Blum and Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act*, American Enterprise Institute, available at [www.aei.org/docLib/20060515\\_BlumCampbellreport.pdf](http://www.aei.org/docLib/20060515_BlumCampbellreport.pdf).

12. Overseas Vote Foundation, *2008 OVF Post Election UOCAVA Survey Report and Analysis*, at 20 (Arlington, VA: Feb. 2009) (2008 OVF Report).

one-third of its respondents either did not receive their absentee ballot or received it with insufficient time to return it to election officials.

Unfortunately, the 2008 presidential election was not an anomaly. Data collected by the Defense Manpower Data Center and the U.S. Election Assistance Commission showed a similar pattern of disenfranchisement of military voters in the 2006 election. In particular, the Defense Manpower Data Center stated that only 22 percent of active duty military members (which does not include military dependents) voted in the 2006 election.<sup>13</sup> Of that 22 percent, approximately 16 percent attempted to vote by absentee ballot and 7 percent voted in person.<sup>14</sup> This data corresponds with data collected by the Election Assistance Commission, which found that only 16.5 percent of the estimated 6 million eligible military and overseas voters requested an absentee ballot and only 5.5 percent of these ballots were returned and counted.<sup>15</sup> As was the case in 2008, many military and overseas absentee ballots (nearly 70 percent) were not returned by the voter or were returned as undeliverable.<sup>16</sup> The Election Assistance Commission also found that many ballots were rejected because they were received after the deadline for receipt.<sup>17</sup>

## Why Military Voters Are Disenfranchised

### 1. Inability to Participate

The 2008 election data makes it clear that a vast majority of military voters (an estimated 75 to 80

percent)<sup>18</sup> were disenfranchised by their inability to request an absentee ballot. This failure rests squarely on the DOD and FVAP.

Unlike most Americans, who receive voting assistance from various state agencies in their local communities, military voters frequently live in remote locations far from their voting residences. Overseas military voters cannot simply walk into their local registrar's office, driver's license bureau, or public assistance office and register to vote or update their voter registration information.<sup>19</sup> Nor do they receive voting assistance from third-party voter registration groups because military installations are closed to the public. In short, military voters do not have access to the same level of voting assistance as other Americans and that lack of assistance directly affects their ability to participate in elections.

Recognizing this fact after the 2000 election, Congress enacted the Help America Vote Act of 2002 (HAVA), in part, to ensure that the FVAP provided military voters with sufficient voting assistance. As Congress made clear, the FVAP must "ensure that members of the Armed Forces and their dependents who are qualified to vote have ready access to information regarding voter registration requirements and deadlines (including voter registration), absentee ballot application requirements and deadlines, and the availability of voting assistance officers to assist members and dependents to understand and comply with these requirements."<sup>20</sup> The HAVA also requires the FVAP to ensure

13. Defense Manpower Data Center, Human Resources Strategic Assessment Program, *2006 Survey Results on Voting Assistance Among Military Members and DoD Civilian Employees*, Survey Note No. 2007-010, at 2 and Table 1 (May 7, 2007) ("2006 DMDC Survey").

14. *Id.*

15. *Uniformed and Overseas Citizens Absentee Voting Act Survey Report Findings*, September 2007, U.S. Election Assistance Commission, at 1, Tables 21c and 22; available at [www.eac.gov](http://www.eac.gov).

16. *Id.* at Tables 21c, 22, and 25a (showing that 658,855 ballots were not returned by the voter (992,034 – 333,179) and 34,458 ballots were returned to the local election jurisdiction as undeliverable).

17. *Id.* at 1 and Table 25a.

18. The estimate is based on data collected from 19 states (see footnote 8, *supra*) which showed that only 325,000 military voters out of approximately 1.5 million requested an absentee ballot for the 2008 presidential election.

19. Under Sections 5 and 7 of the National Voter Registration Act, state motor vehicle driver's license offices as well public assistance agencies must provide voter registration opportunities to individuals using those offices. 42 U.S.C. §§ 1973gg-3 and 1973gg-5.

20. See 10 U.S.C. § 1566(i)(1).



that military personnel assigned to voting assistance duty (commonly referred to as voting assistance officers (VAOs)) have the time and the resources needed to provide voting-related services.<sup>21</sup>

Unfortunately, the FVAP's voting assistance program has been a failure. In a post-2004 election report by the DOD Inspector General (IG),<sup>22</sup> the IG found that the FVAP was ineffective because only 40 to 50 percent of military members, and a lesser percentage of family members, received voting information from the FVAP or VAOs.<sup>23</sup> The main failure, according to the report, was the FVAP's use of VAOs as the primary means of distributing voting information.<sup>24</sup> The report found that the VAO program failed to provide "the consistent, focused attention" necessary to achieve the FVAP's federally mandated mission because the military assigned VAO duty as a collateral duty—that is, the VAO responsibility was a secondary duty to an officer's primary obligations.<sup>25</sup> The IG concluded that "senior leadership can expect significant improvement only if a radically different approach is applied."<sup>26</sup>

That different approach has not been forthcoming. In the 2006 election cycle, the IG once again found that the VAO program did not provide military voters with the necessary registration or absentee ballot information needed to participate in the election.<sup>27</sup> As in the 2004 election, the IG found

that less than 40 percent of military members and their families received voting information and assistance from the FVAP and VAOs.<sup>28</sup> In fact, the IG noted that *only 33 percent* of military voters even knew about the Federal Post Card Application (FPCA), the federal form provided by the UOCAVA that allows a military voter to register, update his or her address, or request an absentee ballot.<sup>29</sup>

The result of this failure is clear: When the FVAP does not provide the requisite assistance to military voters, which civilians receive through numerous state agencies, these voters are significantly less likely to participate in elections. That is at least one reason why only 22 percent of military voters participated in the 2006 federal election,<sup>30</sup> even though 41.3 percent of the general population voted in the same election.<sup>31</sup> It also largely explains the low percentage of military voters who participated in the 2008 presidential election, even though 61.7 percent of the general population voted in that election.<sup>32</sup> Military voter participation rates will only increase, as noted by the IG's 2004 report, when the FVAP dramatically changes its voting assistance program and provides consistent and timely voter-related services.

## 2. Lost and Undeliverable Ballots

The 2008 data also shows that a significant number of military ballots (approximately 33 percent of the total requested)<sup>33</sup> were never returned to local

21. *Id.* § 1566(f)(2).

22. Department of Defense Inspector General, *Evaluation of the Voting Assistance Program*, Report No. IE-2005-001 (Mar. 31, 2005), [http://www.dodig.mil/inspections/IE/Reports/Final\\_VoterAssistanceProgram.pdf](http://www.dodig.mil/inspections/IE/Reports/Final_VoterAssistanceProgram.pdf).

23. *Id.* at 17, 22.

24. *Id.* at 25.

25. *Id.* at 22.

26. *Id.* at 26.

27. DOD Inspector General, *Evaluation of the Voting Assistance Program*, Report No. IE-2007-004 (Mar. 31, 2007), available at [http://www.dodig.mil/inspections/IE/Reports/Final\\_2006%20Federal%20Voting%20Assistance%20Program\\_Mar%202007.pdf](http://www.dodig.mil/inspections/IE/Reports/Final_2006%20Federal%20Voting%20Assistance%20Program_Mar%202007.pdf); see also H. Con. Res. 388, 110th Congress (2008).

28. *Id.* at 6.

29. *Id.*

30. Defense Manpower Data Center, Human Resources Strategic Assessment Program, *2006 Survey Results on Voting Assistance Among Military members and DoD Civilian Employees*, Survey Note No. 20007-010, Table 1 (May 7, 2007).

31. 2008 General Election Turnout Rates, United States Elections Project.

32. *Id.*

election officials or were returned as undeliverable. Once again, both the DOD and FVAP are primarily responsible for this failure.

Given the transitory nature of military voters, who typically move every two to three years and often deploy for months on end, mailing addresses frequently change and quickly become obsolete. It is difficult for the military voter, as well as their state of residence, to keep up with these changes. As a result, many military ballots are sent to wrong addresses and, thus, are returned as undeliverable.

The failure, again, rests with the FVAP and, more specifically, its failure to provide consistent and timely voter assistance—as noted in the IG’s 2004 election report. If military voters were provided voting assistance on a consistent and timely basis (*i.e.*, each time they move or deploy to a new duty station), such aid would ensure that states receive timely updates regarding a military voter’s change of address and, thus, reduce the number of absentee ballots sent to the wrong address.

In addition, the Military Postal Service Agency (MPSA) must do more to ensure that ballots are sent and received in a timely manner. The delivery of mail, especially to war zones, is a difficult task. In 2004, the Government Accountability Office (GAO) found that while ballot transit times (one way) generally met the 12- to 18-day standard required by Army regulations,<sup>34</sup> nearly 25 percent of all mail took *more* than 18 days to deliver.<sup>35</sup> Further, GAO reported that “[n]early half [of interviewed military members] said that, after arriving in theater, they waited more than 4 weeks to get their mail, and many commented that some mail took as long as 4 months to work its way through

the system.”<sup>36</sup> The 2008 OVF study also demonstrates that mail delivery problems continue to hamper the delivery of absentee ballots to foreign locations. Ballot delivery has to be a priority for the DOD and the MPSA.

### 3. Not Enough Time to Vote

Every federal agency and non-profit group examining the issue of ballot delivery times to military voters in war zones has concluded that ballots need to be sent *at least* 45 days before the state deadline for receiving absentee ballots. In fact, some government officials, like the chief of operations for the MPSA, recommend that absentee ballots be sent *60 days* before the state deadline. These recommendations are based on two critical factors: (1) it takes *at least* 12 to 18 days for a ballot to make the one-way transit from an election official to a designated mailbox in a combat zone;<sup>37</sup> and (2) military exigencies (*i.e.*, fighting the war) further delay the delivery of ballots to military voters. In other words, it takes at least 36 days of mail time (18 days each way) for a ballot to be sent to and from a war zone and some additional amount of time to account for military exigencies.

Unfortunately, nearly one-third of the states refuse to follow the 45-day standard.<sup>38</sup> In fact, ten states (Arizona, California, Colorado, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, Oklahoma and Vermont) give military voters 35 *or less* days to receive, cast, and return their ballots before the state deadline. Not only does 35 days fail to account for mail delivery times, it provides no time for the military voter to receive and cast the absentee ballot. By refusing to follow the 45-day standard, these ten states led the nation in a

33. The estimate is based on data collected from 19 states (see footnote 8, *supra*) which showed that approximately 106,000 of the 325,000 that were sent to military voters in the 2008 presidential election were not returned by the voter.

34. U.S. Government Accountability Office, *Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved*, Report No. GAO-04-484, at 13 (Washington, D.C.: 2004).

35. *Id.*

36. *Id.* at 15.

37. See Government Accountability Office, *Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved*, GAO-04-484, at 10-12 (April 14, 2004). However, the same study found that nearly 25 percent of test letters sent to war zones took more than 18 days. *Id.* at 13.

38. The state deadlines for mailing and receiving absentee ballots from military voters have been compiled in the FVAP’s “Voting Assistance Guide,” available at <http://www.fvap.gov/vao/guide.html>.

rather dubious category: the systematic disenfranchisement of military voters.. Six additional states (Alabama, Alaska, Nevada, New Jersey, Wisconsin, and Wyoming) allow military voters less than 40 days to receive and return their absentee ballots.

Unfortunately, the voters in these states receive their ballots so close to the election that the voter does not have time to return it or, even if the ballot is returned, it arrives after the election. This fact was evident in the 2008 presidential election in Minnesota, where absentee ballots were sent to military voters only 30 days before the election. According to data provided by the state, approximately 8 percent of military absentee ballots that were returned to local election officials were rejected, whereas only 4.0 percent of 300,000 absentee ballots were rejected statewide.<sup>39</sup> The higher rejection rate is caused primarily by the number of absentee ballots (nearly 70 percent of the rejected military and overseas absentee ballots) that were delivered after the election deadline. If Minnesota had used the 45-day standard (*i.e.*, it would have given military voters an additional 10 or 15 days to receive and return their ballots), a vast majority (if not all) of the late arriving military ballots would have been counted—potentially changing the outcome of one of the closest Senate races in the state's history.

#### 4. Rejected for Other State Law Reasons

In addition to ballots that are rejected for being late, states also reject ballots that fail to adhere to a variety of state laws. For example, ballots are frequently rejected because the absentee ballot or absentee ballot envelope are not signed or dated by the voter or do not have the voter's address. Some states also reject ballots if they are sent to the wrong jurisdiction or if they lack a postmark showing that the ballot was cast before the election. In addition, some states require a witness or notary to sign the military voter's absentee ballot or the absentee ballot envelope to verify the identity of a voter. Finally, a few states have rejected absentee ballots when the absentee ballot or absentee ballot envelope was not printed on the

correct paper weight or were printed on the wrong size paper.

While some of the state law bases for rejecting military absentee ballots are dubious at best, these requirements impact relatively few absentee ballots. For example, in Florida during the 2008 presidential election, only 1 percent of the 66,668 ballots that were returned by absentee military voters were rejected. Approximately one-half of these ballots appeared to be rejected because they arrived after the state deadline. The other half (about 330 ballots) were rejected for a variety of reasons, including (1) the ballot or ballot envelope was not signed by the voter; (2) the absentee voter's signature did not match the one on file; (3) the voter sent two ballots and, thus, one was rejected for being a duplicate; and (4) the voter no longer lived in the county or was registered to vote in a different county.

Pennsylvania also had a low rejection rate for absentee military ballots in the 2008 presidential election. According to data provided by state election officials, only 0.4 percent of 15,523 military absentee ballots were not counted in the election. Like Florida, approximately one-half of the absentee ballots were rejected because they were returned after the state's deadline. The other half was rejected for some other state law requirement.

Florida's and Pennsylvania's experiences appear to be consistent with other states that were surveyed for this study. Excluding ballots that were returned after the election deadline, most states had a rejection rate of military ballots between 1 and 4 percent.

#### Failure to Act

If the disenfranchisement of military voters was a freight train, Congress heard its whistle long before the 2008 presidential election and, nevertheless, stood by as the train ran over military voters. The leadership in both the U.S. House of Representatives and the U.S. Senate share equal responsibility for this failure.

Congress was well aware of the difficulties faced by military voters prior to the 2008 presidential election, as evidenced by the reports and studies

39. Sheehan v. Franken, No. 62-CV-09-56, Findings of Facts, Conclusions of Law, and Order for Judgment, at 9 (Minn. Dist. Ct. Apr. 13, 2009), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNfinalorder.pdf>.

issued on prior elections by various agencies including the U.S. Election Assistance Commission. In response to these studies, Representative Kevin McCarthy (R–CA) introduced legislation in May 2008 that would have required the DOD and FVAP to collect absentee ballots from overseas military members on the Friday before the election and deliver them stateside by express air transport.<sup>40</sup> Senator John Cornyn (R–TX) sponsored a nearly identical bill in the Senate.<sup>41</sup> Both bills would have shortened the delivery time for overseas ballots from three or four weeks to four to seven days—meaning that thousands of ballots that were rejected in 2008 would have counted.

Representative Roy Blunt (R–MO) also introduced a congressional resolution in July 2008 to address the FVAP's failure to provide sufficient assistance to military voters.<sup>42</sup> The resolution required the FVAP to provide military voters with monthly notices regarding their opportunities to request an absentee ballot. The resolution also would have provided Congress with critical pre-election reports regarding the FVAP's efforts to ensure that military voters were provided with election assistance.

Unfortunately, the leadership in the House and the Senate either ignored the legislation or refused to act until it was too late for the bills to be effective. For example, even though Representative Blunt introduced his resolution in July 2008, House leadership did not allow a vote on the resolution until September 17, 2008—that is, 48 days before the November 4, 2008, election. The two-month delay prevented the resolution from providing any real benefit to military voters.

Likewise, Representative McCarthy's bill never made it out of the House Administration Committee chaired by Representative Robert Brady (D–PA). Senator Cornyn's bill fared a little better and was voted out of the Senate on October 1, 2008. However, House Speaker Nancy Pelosi (D–CA) did not bring the legislation to the floor for a vote and the bill ultimately expired at the end of the 110th Congress.

## Practical Solutions

Military voters should not suffer another election where only 15 to 20 percent of them are able to vote. Significant improvement, however, does not require significant change. Four minor modifications to existing federal law would directly address the lack of assistance and timing issue and, more importantly, would substantially improve participation rates among military voters.

**1. Designate Military Offices as Voter Registration Agencies.** To the extent that Congress wants to ensure that military voters receive adequate assistance, it must legislate a different approach—an approach that the FVAP has been unwilling to implement. Like state driver's license and public assistance offices designated as voter registration agencies under section 7 of the National Voter Registration Act, certain military offices should be designated as voter registration agencies through an amendment to the NVRA. The DOD could provide voting-related assistance and registration at locations where military members already receive administrative support or social services (e.g., pay offices, military ID offices, etc.). Not only would such an approach greatly improve the consistency of the FVAP, it would ensure that military voters receive information when they need it most—when they have a permanent change of duty station or when they deploy.

For example, in the Navy, sailors are required to visit their personnel support detachment when they check in to a new base. Soldiers in the Army have a similar obligation. As part of that visit, sailors and soldiers are required to complete various federal forms to update their contact information, the address of their dependents, and their Servicemen's Group Life Insurance. Having the military member complete one additional form, the federal post card application, will not materially burden the process. It would, however, ensure that military personnel have an opportunity to complete a new federal post card application when their addresses have changed. Completion of this form and its for-

40. H.R. 5673.

41. S. 3073.

42. H. Con. Res. 388.



warding to the relevant state election official by the designated DOD office would greatly increase participation rates, as well as the accuracy of information maintained by state election officials on military voters.

Senator Cornyn has introduced a bill that would implement just such a procedure by amending the NVRA and require DOD to “designate an office on each installation of the Armed Forces” as a voter registration agency.<sup>43</sup> Senator Charles Schumer (D-NY) likewise has incorporated this concept in a bill that he recently introduced.<sup>44</sup>

**2. Make the 45-Day Standard Mandatory under the UOCAVA.** Currently, the federal law that requires states to mail absentee ballots to military voters, the UOCAVA, does not specify when states are required to mail absentee ballots to military and overseas citizens. As noted previously, this oversight has allowed numerous states to avoid sending ballots at least 45 days before an election. This failure can be easily rectified with a minor modification to 42 U.S.C. § 1973ff-1:

Each State shall—(1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office, and

(2) ensure that absentee ballots are sent at least 45 days before the state deadline for receiving absentee ballots unless such ballots are sent by express mail or other electronic means that will ensure that the ballots are received with sufficient time to be returned to state election officials.

Such a change would greatly reduce the number of ballots that are rejected because they were

received after the state’s deadline for receiving absentee ballots. This statutory change would complement a bill already introduced by Senator Schumer that would amend the UOCAVA to require states to send military and overseas ballots at least 45 days before the election.<sup>45</sup>

**3. Require the Military to Provide Expedited Return Delivery.** Senator Cornyn and Representative McCarthy have re-introduced their legislation to require the FVAP to use expedited delivery methods to return ballots from overseas military members in the 111th Congress.<sup>46</sup> Even if Congress mandates a 45-day standard, as discussed above, this legislation serves an important function: providing an expedited delivery and return mechanism for overseas military absentee ballots.

Notwithstanding the best efforts of states to send ballots at least 45 days before the state deadline, there are numerous factors that delay the delivery of mail to and from war zones. In fact, as noted in the 2004 GAO report, a sizeable percentage of mail (25 percent) took longer than 18 days to deliver and some mail took as much as 4 months to arrive overseas. Senator Cornyn’s and Representative McCarthy’s legislation helps to resolve the uncertainty regarding mail delivery times and provides a guarantee that an overseas military voter’s ballot will be delivered to state election officials by the election deadline.

One serious shortcoming in the bills introduced by Cornyn, McCarthy, and Schumer is that they limit the DOD to using the United States Postal Service for express mail service, despite the fact that there are a number of other private companies that provide such service. The DOD should be allowed to accept competitive bids from all companies that provide international express mail service, including the USPS, so that this service is

43. S. 1265.

44. S. 1415, Sec. 9. Schumer’s bill was passed by the Senate on July 23, 2009 as Amendment No. 1764 to S. 1390, the FY10 National Defense Authorization Act.

45. S. 1415, Sec. 5. See also Amendment No. 1764 to S. 1390, the FY10 National Defense Authorization Act.

46. H.R. 2393 and S. 1026. Such a requirement is also contained in Senator Schumer’s bill, S. 1415, in section 5. However, the bill does not provide the DOD with a date certain by which it must collect absentee ballots or guarantee the return delivery of these ballots. In short, this bill fails to provide any assurance that the overseas military ballot will be returned to the United States in order to be counted.

provided at the lowest cost possible for the American taxpayer.<sup>47</sup>

**4. Eliminate Non-Material State Law Reasons for Rejecting a Ballot.** There are certain state requirements for the absentee ballot process that could be eliminated. For example, absentee ballot requests and absentee ballots, including the official UOCAVA post card ballots, should not be rejected by state election authorities because of state restrictions on the paper type, weight, or size of such election materials. Senator Schumer's bill, S. 1415, would eliminate such requirements.

However, state requirements that the signatures of absentee ballot voters be witnessed or notarized are necessary to protect the security and integrity of the absentee ballot process. Absentee ballots are unfortunately one of the biggest sources of voter fraud. Contrary to what some would think, neither of these requirements is difficult for military voters to meet. All military personnel, regardless of their location, should be able to obtain the signature of a witness. Further, federal law mandates that a wide variety of military personnel, including Judge Advocate General Corps, are federal notaries and, thus,

overseas military members should have little trouble finding a notary.<sup>48</sup> The most that needs to be done is to ensure that all states that require notaries will accept the notarization of JAGs and any other military personnel who are authorized notaries.

If Members of Congress and their leadership are serious about protecting the rights of all voters, and, as they often claim, concerned about the welfare of American military personnel, they can provide actual proof of those sentiment by ensuring that this country's military men and women have the same right to vote as all other Americans. These four very simple legislative changes could make the difference in guaranteeing the right to vote of the largest group of disenfranchised American voters. They deserve America's support.

—Hans A. von Spakovsky is a Legal Scholar in the Center for Legal and Judicial Studies at the Heritage Foundation and a former Commissioner on the Federal Election Commission. Eric Eversole is a former active duty officer in the Navy JAG Corps and former lawyer in the Voting Section of the Civil Rights Division of the U.S. Department of Justice.

---

47. This limitation is apparently in the bill because John E. Potter, United States Postmaster General, protested to the Senate that no private company should be allowed to interfere with the USPS's monopoly on mail service. See Letter from John E. Potter to Senator Robert F. Bennett, Ranking Member, Committee on Rules and Administration, United States Senate (June 10, 2008).

48. 10 U.S.C. § 1044 (2008).