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A President's Opportunity: Making Military Voters a Priority

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Abstract: *The MOVE Act, like previous voting rights laws, was supposed to help military members exercise their right to vote. The MOVE Act, however, cannot succeed in delivering on its promise until it is fully implemented and enforced. President Obama has a clear opportunity to help deliver the promise of the MOVE Act, but his Administration must be willing to make the issue a priority. It must address the shortcomings from the 2010 election and ensure a top-down commitment from the President's agencies to promote and protect U.S. service members' voting rights. At a time when members of America's military are in harm's way in remote parts of the world, this nation should spare no expense or effort in making sure that the MOVE Act's promise is realized.*

In October 2009, Congress passed the most comprehensive military voting reform of the past 20 years. This legislation, known as the Military and Overseas Voter Empowerment Act (MOVE Act),¹ promised to revolutionize the military voting process by increasing the use of technology, removing unnecessary obstacles to absentee voting, and providing greater opportunities to register and request an absentee ballot. According to one of its primary authors, Senator Charles Schumer (D-NY), the MOVE Act was supposed to “bring[] overseas voting into the 21st century.”² Senator John Cornyn (R-TX), the bill's co-sponsor, added that the “law represented the most meaningful reform in this area in decades.”³

The MOVE Act's promise was not fully realized, however, and in 2010, many military voters were again

Talking Points

- Notwithstanding the promise of a 2009 federal law designed to improve the ability of members of the military to exercise their franchise, military voters continue to be the most disfranchised voting group in the United States.
- Data from the 2010 election show that only 4.6 percent of eligible military voters were able to cast an absentee ballot that was counted.
- Evidence further shows widespread failures by the Department of Justice and Department of Defense in the enforcement and implementation of the new law that had a clear and negative impact on the ability of military service members to vote.
- Unless and until the President and his Administration make protection of military voting rights a priority, military voters will continue to have their voices silenced on Election Day.

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disenfranchised. Evidence from the 2010 election demonstrates that the current Administration failed to implement and enforce the law—a failure that had an undeniable impact on military voters' ability to vote.

Ultimately, if military voters are to realize the benefits of the MOVE Act before the 2012 elections, the Administration must make the implementation and enforcement of the law a priority. Without such action, military voters will continue to be the most disenfranchised group of voters in the United States.

Uniformed and Overseas Absentee Voting Act

With frequent deployments to war zones, constant moves between duty stations, and confusing state absentee voting laws, military members face an uphill battle trying to register and request an absentee ballot.⁴ Even if a military member requests an absentee ballot, it is frequently lost or delayed in the mail or delivered too late to be returned and counted because of long overseas transit times.

In 1986, Congress attempted to address these issues by passing the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).⁵ At its core, UOCAVA provided active-duty service members and their voting-age dependents (collectively “military voters”) with a basic right to vote by absentee ballot in federal elections. It also required states to accept certain standardized forms, including a federal registration and absentee ballot request form, and the Department of Defense (DOD) was directed to provide basic voting assistance to service

members and their families.⁶ Finally, UOCAVA also authorized the Department of Justice (DOJ) to bring federal lawsuits to enforce the rights of military voters under the statute.

While the creation of voting rights for military voters in federal elections was significant, UOCAVA left most of the implementation details to the states and two federal agencies—the Department of Defense and the Department of Justice. For example, UOCAVA did not prescribe specific deadlines for receiving registration applications or the mailing of absentee ballots by local election officials. Similarly, it did not provide instructions regarding DOJ's obligation to enforce the law or DOD's obligation to provide voting assistance.

This lack of specificity created significant problems for military voters. Not only were they confused by the myriad of differing state absentee voting laws, but many states failed to account for the transitory nature of military life or the delays associated with overseas and wartime mail delivery. It was not uncommon for a majority of absentee military ballots to be sent to the wrong address, lost in the mail, or never delivered. In fact, one post-election study in 2006 found that only 26.5 percent of nearly 1 million military and overseas absentee ballots were returned and counted in that election.⁷

These problems were compounded by the fact that DOJ—more specifically, the Voting Section of the Civil Rights Division (Voting Section)—demonstrated an unwillingness to enforce UOCAVA aggressively. Prior to the MOVE Act, the Voting Section would bring a UOCAVA case only if the state or

1. Pub. L. No. 111-84 §§ 577 to 582, 583(a), 584 to 587, 123 Stat. 2190 (2009).
2. CONG. REC. S10682 (daily ed. Oct. 22, 2009) (statement of Sen. Charles Schumer).
3. Letter from Sen. John Cornyn to Attorney General Eric Holder, Sept. 17, 2010, *available at* <http://www.texasgovvote.com/elections/2010/cornyn-disenfranchisement-military-voters-must-end-001849>.
4. See Hans A. von Spakovsky and M. Eric Eversole, *America's Military Voters: Re-enfranchising the Disenfranchised*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 45 (2009), *available at* <http://www.heritage.org/Research/Reports/2009/07/Americas-Military-Voters-Re-enfranchising-the-Disenfranchised>.
5. 42 U.S.C. § 1973ff et seq. 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.
6. UOCAVA provides that the “Presidential Designee” shall be responsible for carrying out the federal obligations under the statute. By executive order, President Reagan designated the Secretary of Defense as the Presidential Designee in 1988. See Exec. Order No. 12,642, 53 Fed. Reg. 21,975 (June 8, 1988).
7. See U.S. ELECTION ASSISTANCE COMM'N, UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT SURVEY REPORT FINDINGS Table 15 (2009).

jurisdiction mailed their absentee ballots less than 30 days before the election. The problem with this policy, according to many experts, was that mail delivery to a war zone might take 30 days just to be delivered one way. In other words, the Voting Section's arbitrary 30-day policy provided enough time for the ballot to be delivered to the service member but did not provide sufficient time for the ballot to be returned.⁸

Nor did military voters receive sufficient voting assistance as mandated by UOCAVA. Election after election, DOD's Inspector General (IG) found significant flaws with DOD's voting assistance program, also known as the Federal Voting Assistance Program (FVAP). In one 2004 report, the IG specifically found that FVAP's voter assistance program failed to provide the consistent, focused attention needed to achieve its statutory mission. As the IG bluntly stated, "senior leadership can expect significant improvement only if a radically different approach is applied." In subsequent elections, however, that different approach never materialized.⁹

These failures were devastating to military voters. In 2006, for example, only 22 percent of nearly 2.6 million military voters voted in that election compared to 41 percent of the general voting-age population. Similarly, in 2008, only 30 percent of military voters cast a vote that counted, whereas 62 percent of the voting-age population voted in the

same election.¹⁰ By 2009, it was clear to many that UOCAVA needed to be overhauled.¹¹

The MOVE Act

In 2009, Congress amended UOCAVA by passing the MOVE Act. The MOVE Act attempted to address every facet of military voting by clarifying and expanding the state and federal obligations under UOCAVA. At the state level, the MOVE Act required states to send absentee ballots to military voters at least 45 days before a federal election, except under certain limited circumstances. The act also required each state to provide at least one form of electronic delivery (e.g., e-mail, facsimile, or Web-based system) for sending blank absentee ballots and other election materials. Finally, it prohibited states from requiring a notary's signature as part of the absentee voting process.

The MOVE Act also required significant action by the federal government. Specifically, the law required DOD to use expedited mail delivery services to ensure that overseas military ballots were returned by Election Day.¹² It further required DOD to create installation voting assistance offices on every military base that, upon approval by the Secretary of Defense, would become designated voter registration agencies covered by the National Voter Registration Act (NVRA).¹³ These new offices, much like a state driver's license branch or public assis-

8. See, e.g., U.S. ELECTION ASSISTANCE COMM'N, BEST PRACTICES FOR FACILITATING VOTING BY U.S. CITIZENS COVERED BY THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT (2004).

9. H. Res. 388, 110th Cong. (2008); *Evaluation of the Voting Assistance Program*, Inspector General, Department of Defense, Report No. IE-2005-001 (2005), page 26.

10. M. Eric Eversole, *Military Voting in 2010: A Step Forward, But A Long Way to Go*, MILITARY VOTER PROTECTION PROJECT & AMVETS CLINIC AT THE CHAPMAN UNIVERSITY SCHOOL OF LAW, at 2 (2011).

11. As one of the MOVE Act's lead authors, Senator Charles Schumer, stated after seeing preliminary data from the 2008 election, "This data provides only a snapshot of the problem, but it is enough to show that the balloting process for service members is clearly in need of an overhaul." See *Schumer Releases Survey Suggesting Ballots of One in Four Overseas Military Voters Went Uncounted in '08 Election*, SENATOR CHARLES E. SCHUMER, May 13, 2009, http://schumer.senate.gov/new_website/record.cfm?id=312970.

12. Unfortunately, due to pressure from United States Postal Service (USPS) unions, the USPS was made the exclusive carrier for this expedited international mail service, rather than DOD opening it up to competitive bids from private carriers such as Federal Express. Because the USPS could not meet the three-day international service guaranteed by most private carriers, the statute also allows USPS seven days to return completed ballots to election officials in the United States. 42 U.S.C. § 1973ff-2A(b)(3).

13. 42 U.S.C. § 1973gg et seq. Once a state agency is designated as a voter registration agency, it must distribute mail-in voter registration forms to individuals it services, as well as provide assistance in completing the form, and then accept and transmit the completed forms to the appropriate state election officials. 42 U.S.C. § 1973gg-5(a)(4)(A).

tance office, would provide a “one-stop shop” for military voting assistance and ensure higher participation rates among military voters.¹⁴ Finally, the MOVE Act provided DOD with limited authority to grant waivers from the 45-day standard, after consulting with DOJ, when a state experienced an undue hardship and could not mail ballots at least 45 days before the election.

All of these changes had to be implemented by the November 2010 election.

Two Tales of Implementation

The implementation of the MOVE Act was both a great success and a great failure. Without question, the act accomplished a great deal. Many states, for example, expended significant resources to implement the MOVE Act. In a short period of time, many states introduced and passed a host of legislative changes to comply with the new federal law.

Two states, Vermont and Minnesota, undertook the significant burden of moving their primary schedule to meet the 45-day deadline. Other states, like Alabama, California, Florida, and Indiana, undertook a comprehensive review of their military voting procedures and made significant changes to improve those procedures. All of the states had to provide extensive training to local election officials to ensure compliance with the MOVE Act.

DOD also worked hard to implement the MOVE Act. Through FVAP, DOD collaborated with states and their legislatures to enact necessary changes in state law. FVAP also revamped its Web site and provided a number of Web-based solutions that

allowed military voters to download election materials electronically, including blank absentee ballots. Finally, FVAP implemented the express mail delivery requirements, ensuring the timely delivery of absentee military ballots from overseas locations.

Yet the implementation of the MOVE Act was far from flawless, and in many ways, the failures outweighed the successes. At the state level, there were at least 14 states with one or more counties that failed to mail absentee ballots at least 45 days before the election.¹⁵ Although some of the errors were minor, other mistakes were far more consequential. In New York and Illinois, for example, local election officials waited until October 5, 2010, or later to mail absentee military ballots—that is, more than two weeks after the deadline and less than 30 days before the election. These violations affected more than 45,000 military and overseas voters who requested an absentee ballot in these two states.¹⁶

To make matters worse, the Voting Section once again appeared to be unwilling or unprepared to enforce the MOVE Act aggressively. From day one, the Voting Section appeared to drag its feet when implementing the new law and lacked a clear strategy to enforce it.¹⁷ For nearly a year, the Voting Section and DOD promised to provide states with detailed implementation guidance on the MOVE Act, but that guidance never came, and the states were forced to guess how the Voting Section would enforce the new law. This failure left several states with no choice but to file last-minute waiver applications and, when DOD denied half of those applications, caused a rash of last-minute litigation on the eve of the election.¹⁸

14. Press Release, Schumer, Cornyn Announce Pentagon Heeds Call to Provide Unprecedented Voting Assistance to Every Single Service Member and Family Member (Dec. 18, 2009), available at <http://schumer.senate.gov/record.cfm?id=321033&>.

15. The states that had violations included Arkansas, Alabama, California, Indiana, Illinois, Kansas, Maryland, Mississippi, Nevada, New Mexico, New York, North Dakota, Virginia, and Wisconsin.

16. Assistant Attorney General Thomas E. Perez, Address at the MOVE Act Pen-and-Pad Briefing (Oct. 27, 2010), available at <http://www.justice.gov/crt/opa/pr/speeches/2010/crt-speech-101027.html>.

17. As one example of foot dragging, the Voting Section waited more than nine months (i.e., three months before the election) to post the new law and update its UOCAVA Web page. And the Voting Section bothered to update its Web site only after a story critical of its efforts appeared on Fox News. See Jana Winter, *DOJ Accused of Stalling on MOVE Act for Voters in Military*, FOX NEWS, July 28, 2010, <http://www.foxnews.com/politics/2010/07/28/exclusive-doj-stalls-voter-registration-law-military/>.

18. See M. Eric Eversole, *Military Voting in 2010: A Step Forward, But A Long Way to Go*, MILITARY VOTER PROTECTION PROJECT & AMVETS CLINIC AT THE CHAPMAN UNIVERSITY SCHOOL OF LAW (2011).

More problematic was the Voting Section's attempt to dispose of waiver cases by advising jurisdictions that it was permissible to send federal-only ballots to military voters—that is, a ballot that contains federal races, but not state or local races.¹⁹ This federal-only ballot presumably would allow the state to meet the strict requirements of UOCAVA (which applies only to federal elections) but would affect the military voter's right to vote in state and local races and could lead to other violations of the law.²⁰ In Maryland, for example, a federal judge found a violation of a military member's fundamental right to vote in state and local elections when Maryland sent federal-only ballots, based on ill-advised guidance from the Voting Section, during the 2010 election.²¹

Bad advice was not the Voting Section's only problem. Even when it filed cases, several of the Section's settlement agreements did not provide adequate relief or protection for military voters. Consider, for example, the settlement agreement negotiated with

New York. As noted, mail delivery to a war zone may take 30 or more days for the one-way delivery of a ballot.²² The Voting Section, however, allowed several counties to mail their absentee ballots using standard mail delivery even though the ballots were being sent only 22 days before the election. At the very least, the Voting Section should have required New York to use express mail delivery for overseas ballots.²³

Another problem that plagued the Voting Section was its failure to discover and pursue cases in a timely manner. Of the 14 cases where a state or local jurisdiction failed to meet the 45-day deadline and did not have a waiver,²⁴ the Voting Section pursued cases against only eight of those jurisdictions. Moreover, many of those cases were discovered by third parties.²⁵ The delay caused most of the eight cases to be settled three or four weeks after the passage of the 45-day deadline—only two or three weeks before the election. Such last-minute litigation creates significant uncertainty for military voters.

19. There is evidence that at least three jurisdictions received this advice, including Maryland, the District of Columbia, and the Virgin Islands (VI.). See Letter from Linda H. Lamone, State Administrator, Maryland State Board of Elections, to Robert Carey, Director of the Federal Voting Assistance Program (Aug. 25, 2010), available at http://www.fvap.gov/resources/media/md_waiver_withdrawal.pdf; see also Letter from Carol Thomas-Jacobs, Chief, Civil Division, Virgin Islands, U.S. Department of Justice, to Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice (Sept. 2, 2010), available at http://www.justice.gov/crt/about/vot/misc/vi_uocava_letter.pdf; see also <http://www.youtube.com/overseasvote#p/c/3A63B59A550D845D/13/x5VALB712o8> (Webcast of Rokey Suleman, the Elections Director for the District of Columbia, saying that the Voting Section offered the District a federal-only solution).
20. In explaining why the District of Columbia did not accept the federal-only solution, Rokey Suleman noted that such a solution was unacceptable because it was an offer to disenfranchise military voters in local races. Suleman's Webcast is available at <http://www.youtube.com/overseasvote#p/c/3A63B59A550D845D/13/x5VALB712o8>.
21. *Doe v. Walker*, No. 10cv2646, at 13–25 (D.Md. Oct. 29, 2010).
22. The challenges associated with mail delivery to a war zone were documented in 2004 by the Government Accountability Office, which found that 25 percent of military mail took more than 18 days to make the one-way trip to Iraq. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 04-484, OPERATION IRAQI FREEDOM: LONG-STANDING PROBLEMS HAMPERING MAIL DELIVERY NEED TO BE RESOLVED, pp. 9–13 (2004), available at <http://www.gao.gov/new.items/d04484.pdf>. The Military Postal Service Agency recommends that absentee ballots be sent at least 30 days before the election. See *Federal Voting Information*, MILITARY POSTAL SERVICE AGENCY, <http://hqdainet.army.mil/mpsa/vote.htm> (last visited July 17, 2011).
23. The Voting Section had negotiated at least two agreements—one with Hawaii and one with Nevada—requiring the use of expedited mail delivery services. See, e.g., Memorandum of Agreement Between the United States of America and Hawaii Regarding Compliance with the Uniform and Overseas Citizen Absentee Voting Act for the November 2010 Federal General Election (Sept. 16 2010), available at http://www.justice.gov/crt/about/vot/misc/hi_uocava_moa.pdf; Letter from T. Christian Herren, Chief, Voting Section, to Ross Miller, Secretary of State, Nevada (Oct. 4, 2010), available at http://www.justice.gov/crt/about/vot/misc/nv_uocava_ltr.pdf.
24. The 14 states or local jurisdictions do not include four states that had their waiver applications granted by DOD (Delaware, Massachusetts, Rhode Island, and Washington). However, they do include New York because New York violated the terms of its waiver and, thus, violated the mailing deadlines under UOCAVA.

As for the remaining six cases, it appears that the Voting Section may have ignored these violations based, in part, on a faulty interpretation of the MOVE Act. As noted, the MOVE Act (and now UOCAVA) requires a state to mail absentee ballots “not later than 45 days before the election.”²⁶ While the language is clear, the Voting Section interpreted this provision to mean that military voters were only entitled to 45 days of total time to receive and return their ballot, disregarding whether those 45 days accrued before the election as required by the law. In other words, so long as a state provided a total of 45 days to receive and return absentee ballots, then the Voting Section refused to pursue a case or a remedy.

Consider, for example, Illinois, where state law provides military voters with an additional 14 days after the election to return their absentee ballot. Thus, as part of the Voting Section’s settlement with Illinois, even though more than 35 counties violated the law, the Voting Section pursued remedies only against the six counties that sent their absentee ballots more than 14 days after the deadline.²⁷

Not only does this interpretation effectively rewrite UOCAVA, but it creates a situation where absentee military voters in one state are treated differently and disparately as compared to other military voters in the same state. For example, in Illinois, military voters in most counties (the ones following state and federal law) received a total of 59 days to receive and return their absentee ballots (45 days before the election plus 14 days after the election).

In the 35 counties that violated the law, however, the Voting Section permitted the state and counties to treat the military voters much differently based solely on their counties’ failure to comply with the law. Such disparate treatment creates a potential violation of these voters’ right to equal protection.²⁸

Finally, DOD had one major implementation failure—its failure to create installation voting assistance offices that would be covered by the NVRA.²⁹ These offices were supposed to provide the same type of voting assistance received by civilians at their local driver’s license branch or public assistance office.³⁰ Not only would these offices provide voter registration assistance to military voters when they moved to a new duty location (which helps to provide up-to-date address information to the states), but they would ensure that any completed registration or absentee ballot request form was transmitted to the appropriate state or local election official in a timely manner.³¹ The creation of these offices was the “capstone” of the MOVE Act because it addressed chronically low participation rates among military voters.³²

Unfortunately, DOD failed to comply (or fully comply) with this requirement before the 2010 election. Worse yet, there may be several branches of the military that still have not complied with this requirement. While DOD designated these offices as voter registration agencies under the NVRA on November 15, 2010 (nearly two weeks after the 2010 election), it does not appear that all of the military branches even have such voter registra-

25. Of the 14 cases mentioned above, eight cases were discovered by third parties including violations in Alabama, Arkansas, California, Illinois, Indiana, Nevada, New Mexico, and Virginia. In fact, six cases were identified in a September 27, 2010, letter from the MVP Project. See Letter from M. Eric Eversole, Executive Director of the Military Voter Protection Project, to Hon. Eric Holder, U.S. Attorney General (Sept. 27, 2010), available at <http://www.mvpproject.org/document/s/2010.09.27HolderLetter.pdf>. The Voting Section sent a single e-mail in response to the letter but provided no further information regarding the results of its investigations or how the violations were resolved.

26. 42 U.S.C. §1973ff-1(8)(A).

27. Consent Decree, *United States v. The State of Illinois*, No. 10-cv-06800 (D. Ill., Oct. 22, 2010).

28. As the Supreme Court emphasized, “Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person’s vote over another.” *Bush v. Gore*, 531 U.S. 98, 104 (2000).

29. 10 U.S.C. § 1566a(a). While the MOVE Act did not require the Secretary of Defense to make the NVRA designation, Secretary Gates promised to make such a designation in December 2010. See Press Release, *supra* note 14.

30. See Press Release, *supra* note 14.

31. *Id.*

32. *Id.*

tion agencies. For example, a March 2011 letter from the Under Secretary of Defense, Personnel and Readiness to Congress indicates that several military branches are still in the process of creating such offices.³³ In any event, the continuing low enfranchisement rate leaves no doubt that military voters did not benefit from these voter registration offices in 2010.

Another Disappointing Election

Notwithstanding the MOVE Act's promise, the 2010 election proved to be another disappointing election for military voters. By nearly every performance measure, including the total number of absentee ballots requested by military voters, the total number returned, and the overall participation rate, it appears that military voters continue to experience significant difficulties when they request and return their absentee ballots. While there are a few bright spots in the data, they do not overcome the simple fact that military voters still appear to be the most disenfranchised group in the United States, matching rates not seen since before the civil rights movement of the 1960s.

According to a recent report by the Military Voter Protection Project and AMVETS Clinic at Chapman University School of Law, military voters continue to have a voting participation rate well below the national average.³⁴ Of the 24 states covered by the report, only 4.6 percent of the nearly 2 million military voters covered by the report were able to request and return an absentee ballot that counted in the 2010 election. The report further notes that while a certain number of military voters voted in person, that number was only 7 percent in the 2006 mid-term general election. If a similar percentage of military voters voted in person in 2010, it would yield an overall participation rate of 11.6 percent for military voters. In comparison, the national participation rate for the 2010 election was 41.6 percent.

The report further underscores the critical need for voting assistance among military voters. Of the

nearly 2 million military voters covered by the report, 310,625 (15.8 percent) requested an absentee ballot for the 2010 election. While the report notes that it has been difficult to draw conclusions based on the number of absentee ballot requests in past elections (due in part to the large number of stale absentee ballot requests that are carried over from previous elections in many states), there were two states, Nevada and Minnesota, that eliminated all absentee ballot requests from previous election cycles. Shockingly, only 2,656 of the 42,672 (6.2 percent) of the military voters in Nevada and Minnesota requested an absentee ballot in 2010.

The data also show that military voters returned a low percentage of absentee ballots. Of the 310,625 absentee ballots that were sent, military voters returned only 95,535 to local election officials to be counted—a return rate of 30.8 percent. Minnesota and Nevada were the general exception to this low rate of return. In those two states, military voters returned between 66 percent and 74 percent, respectively, of the absentee ballots that were sent to them. As the report emphasizes, the much higher return rate is a direct result of efforts by Minnesota and Nevada to eliminate stale absentee ballot requests from the 2008 election.³⁵

On the positive side, the report indicates that states, with one major exception noted below, did a good job of counting absentee military ballots if the ballot was returned by the military voter. Overall, states counted 89,887 of the 95,535 ballots that were returned—an absentee ballot count rate of 94.1 or, conversely, a rejection rate of only 5.9 percent. As the report notes, this is a significant improvement compared to the 2006 mid-term election rejection rate of 7.5 percent and can be attributed to several changes made by the MOVE Act.

However, the 2010 post-election data also demonstrate the fundamentally flawed nature of the settlement agreement between New York and the Justice Department's Voting Section, which allowed the state to mail absentee ballots less than 30 days

33. See Letter from Clifford L. Stanley, Under Secretary of Defense, Personnel and Readiness, to President Barack Obama and Congress, Mar. 17, 2011, at 11–14, available at http://www.fvap.gov/resources/media/2010_180_day_report.pdf.

34. Eversole, *supra* note 10.

35. Because service members move so often, absentee ballot requests from prior elections will often result in absentee ballots being sent by election officials for a subsequent election to an address that is no longer valid.

before the election using standard, first-class mail delivery. New York rejected 1,609, or 32 percent, of the 5,090 absentee military ballots that were returned by military voters in 2010. Many of the ballots appeared to have been rejected because they arrived after the deadline negotiated between the Voting Section and New York. Clearly, the Voting Section's settlement agreement did not adequately protect military voters in New York.

A President's Opportunity

Military voters, like other groups of voters that have been underrepresented in America's electoral process, have long faced significant roadblocks to the exercise of their right to vote. Over the past 50 years, this nation has worked vigorously to remove these obstacles by enacting such laws as the Voting Rights Act of 1965 and the Help America Vote Act of 2002.³⁶ These federal laws have made significant improvements in Americans' ability to vote and have opened the polling places to millions of citizens who in the past had been unable to vote.

The MOVE Act, like previous voting rights laws, was supposed to help military members exercise their right to vote, but it cannot succeed in delivering on its promise until it is fully implemented and enforced. There should be no doubt that failures by DOJ and DOD in 2010 had a significant impact on U.S. service members' ability to vote. These problems will only continue to exist unless the Administration makes military voting a priority in 2012.

The President, both as Commander in Chief and as Chief Executive, is in the unique position of being able to deliver on the promise of the MOVE Act. He has the ability to ensure that DOD fully implements the law and takes other steps to maximize military voter participation in the next election. Likewise, the President can ensure that the Justice Department's Voting Section actively monitors compliance and aggressively enforces the law in a timely manner.

As the 2012 elections quickly approach, the Administration and Congress should take the following actions.

1. Make registration/absentee ballot requests a priority.

When such a small percentage of eligible military voters request absentee ballots, as was the case in 2010, serious questions must be raised and addressed regarding the impediments that America's men and women in uniform face when attempting to obtain an absentee ballot. While the MOVE Act was intended to resolve low participation rates by requiring DOD to create voter registration offices on every military base, the evidence shows that, prior to the 2010 election, DOD failed to implement this provision. Until the low absentee ballot request rate is resolved, military voters will continue to be the most disenfranchised group of voters in the United States.

As a first step, DOD must immediately create the installation voting assistance offices that were required under the MOVE Act. These offices were supposed to provide military voters with a "one-stop shop" for military voting assistance whenever they moved to a new duty station or deployed overseas. Yet many, if not most, of these offices were not created before the 2010 election, and some still have not been created. Moreover, these offices must be designated as NVRA voter registration agencies, at least with regard to any service being provided to military and overseas voters, to ensure consistent service and proper accountability. President Obama could make the NVRA designation mandatory through an executive order, or Congress could do so through an amendment to UOCAVA.

Given the long-standing difficulties faced by military voters, however, the creation of these installation voting assistance offices may not be enough. Unlike other groups of voters who are significantly underrepresented, military voters do not benefit from registration/absentee ballot voting efforts by third-party groups.

DOD should consider allowing nonpartisan veteran groups, like the Veterans of Foreign Wars or the American Legion, to provide voting assistance at base commissaries or other public locations on bases. Since many of these groups already have

36. 42 U.S.C. § 1973 et seq. and 42 U.S.C. § 15301 et seq.

access to military installations, they could provide a tremendous service to military voters, especially dependents, while not creating security concerns for installation commanders. DOD could make this revision as part of an amendment to DOD Directive 1000.04, which governs the voting assistance services provided by DOD.

2. Ensure timely and better enforcement of UOCAVA.

Military voters should not be forced to suffer through another election where the Justice Department's Voting Section does not make protection of service members' voting rights a priority. President Obama should direct the Attorney General to improve the Voting Section's enforcement of UOCAVA, including requiring a detailed public plan that outlines not only how DOJ will ensure compliance with this federal law, but also how it will set up a program that allows early detection of problems. To better ensure compliance with the law in 2012, such a plan should also include clear guidelines for the states on the requirements of UOCAVA.

However, military voters should not be forced to rely on the Voting Section to bring cases on their behalf. Accordingly, UOCAVA should be amended to provide military voters and their dependents with a private right of action to file suit to enforce their federal voting rights.³⁷ Both the NVRA and the Voting Rights Act have private rights of action in addition to authorizing the Attorney General to file suit to enforce these laws. In order to seek remedies directly from a court, military voters must be given the same right to pursue litigation that other voters have under the NVRA and Voting Rights Act.

3. Provide effective penalties.

Congress also should consider amending UOCAVA to provide clear penalties for violations, especially when a state or local jurisdiction fails to meet the 45-day deadline for mailing absentee ballots. As noted, the Voting Section negotiated several settlement agreements that failed to provide military voters with sufficient time to vote.

At a minimum, in any case involving an overseas service member that is deployed, a state or local jurisdiction should be required to use international express mail delivery when that jurisdiction fails to comply with the 45-day standard. Such a clear penalty not only will help to protect the voting rights of military voters, but also will be a clear deterrent to prevent egregious conduct like that which occurred in New York and Illinois.

4. Eliminate the waiver process.

The post-election evidence raises serious questions about the manner in which the waiver process was implemented and whether the provision continues to serve a useful purpose. In large part, the waiver provision was intended to be a short-term bridge to allow certain states—especially those that needed to make wholesale changes in their election codes—additional time to implement the 45-day deadline for mailing absentee ballots.

Nearly two years after the passage of the MOVE Act, states have had more than sufficient time to amend their primary schedule (and their laws governing special elections); thus, the need for a waiver based on a late primary or a special election has been significantly diminished. Congress should consider amending UOCAVA either to eliminate the waiver process or to eliminate a waiver based on a late primary or special election. At a minimum, DOD should notify the states as soon as possible that no more waivers will be granted in such circumstances.

Conclusion

The difficulties associated with military voting, especially during periods of prolonged conflict, have long existed. From the Civil War to World War II to America's current conflicts in Iraq and Afghanistan, the logistical challenges associated with delivering absentee ballots to a war zone have been significant and undeniable. They are not, however, insurmountable.

President Obama has a clear opportunity to help deliver on the promise of the MOVE Act, but his Administration must be willing to make the issue a

37. Senator John Barasso (R-WY) has introduced such a bill, S. 331, which would provide a private right of action as well as attorneys' fees to the prevailing party.

priority. It must address the shortcomings from the 2010 election and ensure a top-down commitment from the President's agencies to promote and protect U.S. service members' voting rights. At a time when members of America's military are in harm's way in remote parts of the world, this nation should spare no expense or effort in making sure that the MOVE Act's promise is realized.

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