

**Testimony of Mr. Eric Eversole**  
**Hearing on**  
***Problems for Military and Overseas Voters:***  
***Why Many Soldiers and Their Families Can't Vote***

**Before the United States Senate Committee on**  
**Rules and Administration**  
**May 13, 2009**

**Executive Summary**

For many Americans, the 2008 election was an historic election, both in its outcome and the number of citizens who were able to vote for the first time. Election officials in many states reported record turnout and participation by many voters who were traditionally left out of the process. The same, however, cannot be said for America's military members and their families. For these voters, especially those serving in war zones, the 2008 presidential election was an embarrassing reminder that military voters are frequently disenfranchised by a voting process that does not work.

For example, in Minnesota, only 15.7 percent of its military voters were able to cast a vote that counted in the 2008 presidential election, even though 78 percent of the general population voted in the same election. In Florida, home to nearly 340,000 military voters, only 66,007 or 19.4 percent of military voters cast an absentee ballot that counted in the 2008 election. Other states, like California, Missouri, and Arkansas, witnessed similar levels of military disenfranchisement.

Congress must take immediate action to protect our military voters by addressing two significant obstacles. First, it must ensure that the Federal Voting Assistance Program—the federal agency within the Department of Defense designated to assist military voters—provides military voters with the assistance necessary to register and request an absentee ballot. Second, Congress must ensure that military voters are provided with sufficient time to receive and cast their ballots, even if they are located in a war zone. At a minimum, Congress should mandate that overseas military ballots be sent at least 45 days before the state election deadline and require expedited delivery of military absentee ballots from war zones.

While Americans may disagree on numerous aspects of election policy, no one questions our military members' right to vote or America's obligation to provide them with an opportunity to vote. Given their daily sacrifices and their willingness to defend our liberties at all costs, including their lives if necessary, America must do more to ensure that military members are provided with the same rights they are asked to defend.

## Testimony of Mr. Eric Eversole

### Hearing on

### *Problems for Military and Overseas Voters: Why Many Soldiers and Their Families Can't Vote*

### Before the United States Senate Committee on Rules and Administration

May 13, 2009

Mr. Chairman and members of the Committee, thank you for holding this hearing and discussing the problems faced by our military members and their families when they attempt to vote. I greatly appreciate the opportunity to testify before this Committee.

For many Americans, the 2008 election was an historic election, both in its outcome and the number of citizens who were able to vote for the first time. Election officials in many states reported record turnout and participation by many voters who were traditionally left out of the process. The same, however, cannot be said for America's military members and their families (collectively, military voters). For these voters, especially those serving in war zones, the 2008 presidential election was an embarrassing reminder that military voters are frequently disenfranchised by a voting process that does not work.

While Americans may disagree on numerous aspects of election policy, no one reasonably questions our military members' right to vote or America's obligation to provide them with an opportunity to vote. Given their daily sacrifices and their willingness to defend our liberties at all costs, including their lives if necessary, America must do more to ensure that military members are provided with the same rights they are asked to defend.

#### **2008 Election**

While official data for the 2008 election is still being collected by the Election Assistance Commission (EAC), the data that has been collected paints a dismal picture for military voters in 2008:

- **Minnesota:** in a state where 78 percent of the general population was able to vote in the 2008 election, only 5,745 of Minnesota's more than 21,000 military voters requested an absentee ballot—that is, 27.4 percent of the eligible military

voters requested an absentee ballot. Of this total, however, only 3,703 absentee ballots were returned and 3,362 were counted. In other words, only 15.7 percent of military voters in Minnesota cast an absentee that counted in the 2008 election. Military absentee voters were nearly twice as likely to have their absentee ballot rejected by local election officials, as compared to other, non-military absentee ballots (8.1 percent for military voters compared to 4.1 percent for non-military voters). The majority of the military absentee ballots were rejected because they arrived after the state deadline for receiving ballots.

- **Florida:** out of nearly 340,000 military voters, Florida election officials sent out 86,926 absentee ballots. Of the sent ballots, only 66,668 were returned and only 66,007 were counted. In other words, only 19.4 percent of Florida's 340,000 military voters cast an absentee ballot that counted in the 2008 presidential election. The rejection rate for military absentee ballots was nearly identical to the rejection rate for non-military absentee ballots (1 percent for both).
- **California:** of California's nearly 225,000 military voters, only 39,563 were able to request an absentee ballot for the 2008 election—that is, only 17.4 percent of the eligible number of military voters in the state requested an absentee ballot.
- **Missouri:** of the approximately 43,000 military voters in Missouri, only 8,101 were able to cast an absentee ballot in the 2008 general election—that is, a participation rate of 18.8 percent. Nearly 79 percent of the 635 rejected military and overseas ballots were rejected for being received after the state deadline.
- **Nebraska:** only 17.9 percent of eligible military voters requested an absentee ballot for the 2008 election and only 14.0 percent were able to return a completed absentee ballot. Nearly 8.8 percent of all military and overseas ballots were rejected because they were received after the state deadline.
- **Arkansas:** of the state's estimated 18,686 military voters, only 2,518 (13.5 percent) were able to return an absentee ballot to be counted in the 2008 election. Sixty-six percent of military and overseas ballots were rejected for being late.

## **Why Military Voters Are Disenfranchised**

There are two fundamental factors preventing military voters from voting: (1) the voter did not understand the complex, multi-state process for absentee voting and did not receive the necessary assistance from the Department of Defense (DoD); and (2) even if the military voter navigated the registration and absentee ballot process, state law did not provide the voter with sufficient time to receive, cast and return his or her ballot.

### **1. Lack of Assistance**

The DoD agency responsible for providing military voters with assistance, the Federal Voting Assistance Program (FVAP), has long failed to provide the assistance needed by military voters to participate in elections. In fact, after the 2004 election, the DoD Inspector General found widespread problems with FVAP's voter assistance program, noting that only 40 to 50 percent of military members received voting information from FVAP.<sup>1</sup> The primary failure was FVAP's reliance "on a labor-intensive, DoD-wide infrastructure of part-time voting assistance officers [VAOs] at all echelons whose attention to voting is periodic, despite the program's perennial schedule."<sup>2</sup> The report found that the VAO program, where officers are assigned VAO duties as a collateral duty, did not "get the consistent, focused attention" necessary to achieve FVAP's responsibilities.<sup>3</sup> The Inspector General concluded that "senior leadership can expect significant improvement only if a radically different approach is applied."<sup>4</sup>

That different approach has not been forthcoming. Like the 2004 election, the Inspector General found widespread failures by FVAP and VAOs during the 2006 election.<sup>5</sup> In particular, the Inspector General found that only 40 percent of military members received voting information from FVAP and VAOs in 2006.<sup>6</sup> His report further found that only 33 percent of military voters knew about the Federal Post Card

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<sup>1</sup> DoD Inspector General, *Evaluation of the Voting Assistance Program*, Report No. IE-2005-001, at 22 (Mar. 31, 2005) ([http://www.dodig.mil/inspections/IE/Reports/Final\\_VoterAssistanceProgram.pdf](http://www.dodig.mil/inspections/IE/Reports/Final_VoterAssistanceProgram.pdf)) (2004 Report).

<sup>2</sup> *Id.* at 25.

<sup>3</sup> *Id.* at 22.

<sup>4</sup> *Id.* at 26.

<sup>5</sup> DoD Inspector General, *Evaluation of the Voting Assistance Program*, Report No. IE-2007-004 (Mar. 31, 2007) ([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).

<sup>6</sup> *Id.* at 6.

Application—that is, the federal form that allows a military voter to register and request an absentee ballot.<sup>7</sup>

The effect of this failure is clear. When VAOs fail to provide military voters with voting assistance, military voters are significantly less likely to complete a Federal Post Card Application (or complete it accurately) and, thus, are unable to participate in the election. That is why only 22 percent of the military voted in the 2006 federal election.<sup>8</sup> It also explains the low number of military voters that requested an absentee ballot for the 2008 election. These participation rates will increase significantly if FVAP provides, as stated by the Inspector General in 2004, consistent and focused approach to voting assistance.

## 2. Insufficient Time

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 Military Postal Service Agency, 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>9</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. Anything less than 45 days guarantees that a significant number of military voters will be disenfranchised.

Unfortunately, nearly half of the states refuse to follow the 45-day standard. In fact, 10 states and the District of Columbia give military voters *less than* 35 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 not time for the military vote receive and cast his or her absentee ballot. The following states provide less than 35 days: Arizona, California, Colorado, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, Oklahoma and Vermont. Eight additional states (Alabama, Alaska, Iowa,

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<sup>7</sup> *Id.*

<sup>8</sup> 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).

<sup>9</sup> 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.

Nevada, New Jersey, North Dakota, Wisconsin, and Wyoming) allow military voters less than 40 days to receive and return their absentee ballots.

Not surprisingly, military voters in these states are more likely to be disenfranchised, especially if the state does not permit the electronic transmission of absentee ballots (*e.g.*, facsimile or email). 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. Take for example, the treatment of military voters in Minnesota, where absentee ballots are sent approximately 30 days before the election. In Minnesota, military absentee ballots were twice as likely to be rejected as compared to non-military absentee ballots. The higher rejection rate is caused primarily by the number of absentee ballots that were delivered after the election deadline. If Minnesota would have met the 45-day standard (*i.e.*, it would have given military voters 10 or 15 more days to receive and return their ballots), a vast majority (if not all) of the late arriving military ballots would have been counted.

### **Recommendations**

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. Three 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. There also must be greater enforcement of federal voting laws for military voters by the Voting Section of the Department of Justice.

**1. Designate Military Voter Registration Agencies.** To the extent that Congress wants to ensure that military voters receive adequate assistance, it must legislate the different approach FVAP has been unwilling to implement. Like state agencies designated as voter registration agencies under section 7 of the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg-5, the DoD could provide voting-related assistance at locations where military members already receive administrative support or social services (*e.g.*, pay offices, ID offices, etc.). Not only would such a program greatly improve the consistency of FVAP's program, it would ensure that military voters receive information when they need it most—*i.e.*, 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 (PSD) 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 forms to update their contact information, the location 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 Soldiers and Sailors have an opportunity to complete a new Federal Post Card Application when their addresses have changed. This change would greatly increase participation rates, as well as the accuracy of information maintained by state election officials.

**2. Make 45-Day Standard Mandatory under UOCAVA.** Currently, the federal law that requires states to mail absentee ballots to military voters, the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff-1(a)(1), does not specify when states are required to mail absentee ballots to military and overseas citizens. This oversight has allowed numerous states, as noted above, 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 (additions shown in underline): “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 by ensuring that absentee ballots are sent at least 45 days before the state deadline for receiving absentee ballots”.

**3. Require the Military to Provide Expedited Return Delivery.** In 2008, Senator John Cornyn introduced the Military Voter Protection (MVP) Act of 2008 (S. 3073), which required the Department of Defense to use expedited delivery methods to return ballots from overseas military members. While the Senate passed the MVP Act, the House failed to bring the legislation to a floor vote and the legislation expired at the end of last term. I strongly urge the Senate to re-introduce the MVP Act and send it back to the House for a vote. This has to be done quickly so that it can be implemented before the 2010 federal election.

Even if Congress mandates a 45-day standard, as discussed above, the MVP Act serves an important function of providing an expedited delivery 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. While mail delivery to and from war zones should take between 12 and 18 days, not all mail arrives within that time frame. In fact, a 2004 Government Accountability Office study found that nearly 25 percent of its test letters to Iraqi war zones took more than 18 days to be delivered.

Legislation like the MVP Act helps to resolve the uncertainty regarding mail delivery times and provides a guarantee that an overseas military voter’s ballot will be delivered in timely manner.

**4. Conduct a Hearing Regarding DOJ’s Lack of Enforcement.** Despite substantial evidence of systemic military voter disenfranchisement, the primary entity responsible for protecting military voters, the Voting Section of the Department of

Justice, has shown little interest lately in protecting their rights. Part of the problem is the Voting Section's refusal to require states to provide military and overseas voters with at least 45 days to receive and return their absentee ballots. Instead, the Voting Section, in conjunction with FVAP, has arbitrarily adopted a 30-day enforcement standard—that is, the Voting Section will not initiate a UOCAVA case until a state provides a military voter or overseas citizen with less than 30 days to receive and return an absentee ballot. The use of this 30-day standard is mind-boggling given the well established evidence that military voters need at least 45 days to receive and return their ballots. The Voting Section should be called to explain this standard.

Additionally, it appears that the Voting Section is unwilling to enforce federal laws against the FVAP. In August 2008, more than 20 members of Congress wrote a letter to the Attorney General requesting an investigation of whether FVAP was complying with its obligations to provide voter assistance, as required by section 701 of the Help America Vote Act (HAVA). The Department of Justice responded in a letter dated September 23, 2008, declining to investigate and saying that the "Attorney General's authority does not extend to enforcing the duties assigned to the Defense Department [FVAP] under that provision." Again, the Department should explain its refusal to enforce laws against FVAP.

Finally, even where the Voting Section has filed military voting lawsuit, those cases are filed too late to benefit many military voters. For example, after discovering widespread evidence that numerous counties in Virginia failed to mail military absentee ballots in a timely manner, the McCain campaign filed a lawsuit in the Eastern District of Virginia to protect these voters.<sup>10</sup> The Voting Section, however, did not intervene in the case until 10 days after the election, at which time it was too late to order any relief because Virginia already certified the election. This failure raises serious questions regarding the Voting Section's investigative efforts before the election (*e.g.*, why didn't the Voting Section discover these violations) and why did it take the Voting Section nearly two weeks to intervene after the suit was filed.

Ultimately, Congress can pass laws, but if the Voting Section is unwilling to enforce those laws, military voters will continue to be disenfranchised. Congress needs to have some assurances that the Voting Section will actively investigate and pursue violations of military voting laws.

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<sup>10</sup> See *McCain-Palin 2008, Inc. v. Cunningham*, 3:08-cv-709 (E.D. Va. 2008).

## M. ERIC EVERSOLE

Mr. Eversole formerly worked as a litigation attorney in the Voting Section of the United States Department of Justice, Civil Rights Division, from September 2005 until December 2007. In that position, he investigated, litigated or worked on nearly a half-dozen cases under the Uniform and Overseas Citizen Absentee Voting Act (UOCAVA) including: *United States v. Connecticut*, No. 3:06-cv-1192 (D. Conn.); *United States v. North Carolina*, No. 5:06-cv-00118-H (E.D.N.C.), *United States v. Pennsylvania*, No. 1:CV-04-830 (M.D. Pa.). Mr. Eversole also litigated numerous cases under the Help America Vote Act (HAVA), Sections 2 and 203 of the Voting Rights Act of 1965, and the National Voter Registration Act (NVRA).

During the 2008 election cycle, Mr. Eversole served as an advisor to the McCain-Palin campaign. In that role, he led the campaign's efforts on military voter registration and military voter participation. Mr. Eversole also investigated and oversaw the campaign's UOCAVA lawsuit against Virginia. See *McCain-Palin 2008, Inc. v. Cunningham*, No. 3:08-cv-709 (E.D. Va.).

Mr. Eversole also served as an officer on active duty in the United States Navy's Judge Advocate General's Corps from 1999 until 2001.