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# Military Voting in 2010: A Step Forward, But A Long Way To Go

BY ERIC EVERSOLE



*A Study Published By*

MILITARY FAMILIES UNITED'S MILITARY VOTER PROTECTION PROJECT *and*  
AMVETS LEGAL CLINIC AT THE CHAPMAN UNIVERSITY SCHOOL OF LAW

## **About the Military Voter Protection Project**

The Military Voter Protection Project (MVP Project), a program of Military Families United, is dedicated to promoting and protecting our military members' right to vote and ensuring that their votes are counted on Election Day. Utilizing media, education, and litigation, the MVP Project fights to ensure military voters have an opportunity to register, request an absentee ballot, and cast a vote regardless of their location in the world. The MVP Project fights as hard for their rights as they fight to protect our rights.

## **About Military Families United**

Military Families United is a not-for-profit 501(c)(3) charitable organization whose mission is to Honor the Fallen, Support Those Who Fight, and Serve Their Families. We are a national coalition of Gold Star and Blue Star families, veterans, and patriotic Americans who share a deep appreciation for our men and women in uniform and support them in their mission to keep America safe. Together, we ensure that the sacrifices of our courageous military do not go unnoticed and that these men and women and their families receive the support they need and deserve. More information about our organization can be found at [MilitaryFamiliesUnited.org](http://MilitaryFamiliesUnited.org).

## **About the Chapman University AMVETS Legal Clinic**

The AMVETS Legal Clinic at Chapman University School of Law is part of Chapman University's Institute for Military Personnel, Veterans, Human Rights and International Law. It is headed by Kyndra Rotunda, Associate Professor of Military and International Law. Professor Rotunda also serves as a Lecturer at Berkeley School of Law and supervises some students working in Berkeley's Veterans Practicum.

The AMVETS Legal Clinic provides an opportunity for law students to represent military families and veterans in all types of civil legal claims. Since the clinic opened in January 2009, students and the faculty have helped to recover nearly \$5 million for their clients. The program is funded by AMVETS, Department of California. In addition to direct client representation, students in the AMVETS Legal Clinic pursue relevant policy and research initiatives.

## **Acknowledgements**

Particular gratitude is owed to Professor Kyndra Rotunda and the AMVETS Legal Clinic, as well as Professor John Yoo and the Veterans Practicum at UC Berkeley School of Law. Without their support and steadfast devotion to our men and women in uniform, this report would not have been possible. In addition, the author must thank the dedicated and talented law students that participated in these programs and worked on this report, including Daniel Bilotti, Brandon Erickson, Robert Farrell, Joshua Flynn-Brown, Crystal Gunder, Laura Hall, Jason Hensely, Joseph Lloren, Katherine McGrath, and Claire Thompson. Finally, special thanks are due Bill Brown Jr., Margaret Thomas, and Kiana Boyce for their incredible work at the AMVETS Legal Clinic and their longstanding support.

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BY ERIC EVERSOLE<sup>1</sup>

- I. Executive Summary..... 1
- II. Background.....2
- III. Report Overview..... 3
- IV. Findings..... 4
  - A. Military Voter Participation Rates..... 4
  - B. Requests for Absentee Ballots ..... 5
  - C. Transmission of Absentee Ballots..... 5
    - 1. Requests for Waivers..... 6
    - 2. Late Mailed Ballots..... 6
    - 3. Use of Electronic Delivery Methods..... 8
  - D. Return of Absentee Ballots ..... 9
  - E. Counted Ballots and Rejection Rates ..... 9
- V. Conclusion..... 10
  
- Appendix A ..... 12
- Endnotes..... 13



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## I. EXECUTIVE SUMMARY

In October 2009, Congress passed the Military and Overseas Voter Empowerment Act (MOVE Act),<sup>2</sup> which required states to implement several key changes to provide active duty military members and their voting age dependents<sup>3</sup> (collectively, “military voters”) with greater opportunities to vote. Specifically, the MOVE Act required states to mail absentee ballots to all military voters at least 45 days before a federal election, to provide electronic delivery options for election materials, and to eliminate the notary requirement for absentee ballots.

The MOVE Act also required significant action by the federal government. It required the Department of Justice (DOJ) to provide clear implementation guidance to states and to work with the Department of Defense (DOD) to implement the new law. It also included specific requirements of DOD. In particular, it required DOD to return all overseas military ballots via express mail delivery and to create voter registration agencies on every military installation, which would provide greater opportunities for service members to register and request absentee ballots. The MOVE Act specified that all of the changes had to be implemented by the November 2010 election.

The question now is: did the MOVE Act work? Did the 45-day standard and electronic delivery options help military voters? Were more military voters able to vote and have their votes counted? What else needs to be done to protect military voters in 2012 and beyond?

The short answer is that while the MOVE Act made strides forward, especially at the state and local level, more must be done to protect the voting rights of our men and women in uniform and to provide them with greater opportunities to register and request an absentee ballot. Our key findings include:

- Of the 2 million military voters covered by this report, only 4.6 percent of those voters cast an absentee ballot that counted in 2010. This percentage represents a significant decrease from the last mid-term election in 2006, when 5.5 percent of military and overseas voters were able to cast an absentee ballot that counted.
- Only 15.8 percent of military voters requested an absentee ballot for the 2010 election, which shows a decrease in participation as compared to the 2006 election.
- Notwithstanding exceptional efforts by many states, local election officials in 14 states and the District of Columbia failed to comply with the 45-day standard for mailing absentee ballots. These failures impacted more than 65,000 military and overseas voters.
- States generally did a good job of counting absentee military ballots if the ballot was returned. Overall, the states in this report counted more than 94 percent of all ballots that were returned. Unfortunately, one state in particular, New York, rejected nearly one-third of all absentee ballots cast and returned by military voters.
- Electronic delivery options provided military voters with greater opportunities to vote in 2010.

## II. BACKGROUND

Military members have long faced difficulties when they attempt to vote. 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.<sup>4</sup> To make matters worse, even if a military member requests an absentee ballot, his or her ballot is frequently lost or delayed in the mail or delivered too late to be returned and counted.

In 1986, Congress attempted to address these problems by passing the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>5</sup> At its core, UOCAVA provided active duty military members and their dependents with a basic right to vote by absentee ballot in all federal elections. UOCAVA also required states to accept a standardized registration and absentee ballot request form, as well as an emergency blank federal write-in ballot.

While UOCAVA was significant because it created basic federal voting rights for military voters, the law failed to address many of the problems faced by these voters. In 2006, for example, the Election Assistance Commission (EAC) found that only 5.5 percent of military and overseas voters were able to cast an absentee ballot that counted in the election.<sup>6</sup> The EAC also reported that thousands of military voters were disenfranchised when their ballots were sent to the wrong address, lost in the mail, or mailed too close to the election to be returned.

These problems continued to plague military voters in 2008. Notwithstanding the historic nature of that election—and the fact that 62 percent of

eligible citizens were able to vote nationwide—only 30 percent of military voters voted in the same election.<sup>7</sup> Once again, data from the EAC surveys showed that more than 25 percent of ballots requested by deployed military personnel, as well as overseas voters, went uncollected or uncounted.<sup>8</sup> As one of the MOVE Act's lead authors Senator Charles Schumer stated, "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."<sup>9</sup>

That overhaul came in 2009. The MOVE Act was the most comprehensive military voting reform in 25 years and attempted to address every facet of military voting. The Act's key provisions included:

- Requiring states to send absentee ballots at least 45 days before a federal election, unless the state received an undue hardship waiver from DOD;
- Requiring states to use electronic delivery mechanisms (e.g., fax, email, or online ballot delivery);
- Prohibiting states from requiring a notary's signature on absentee ballots and other election materials;
- Allowing states to clean up their absentee ballot request lists by requiring military voters to file a new absentee ballot request for each new election cycle;
- Requiring DOD to create and operate military voter registration agencies on every military installation; and
- Requiring DOD to use expedited mail delivery service for overseas military ballots.

### III. REPORT OVERVIEW

UOCAVA requires the EAC to collect data and issue a biennial report regarding the ability of military voters to participate in federal elections.<sup>10</sup> As part of that report, each state is required to complete a survey questionnaire regarding the number of military voters that request, receive, and return absentee ballots.<sup>11</sup> The survey also collects data regarding the total number of ballots that were rejected and, in some cases, identifies why the ballot was rejected.

While the EAC's report is the government's "official postmortem" on military voting,<sup>12</sup> the EAC does not issue its report until nearly a year after the election (usually in September). In the past, this late report date has made it difficult for Congress and the states to implement changes in time for the next election.

To overcome this delay, the MVP Project in conjunction with the AMVETS Legal Clinic at Chapman University School of Law and the Veterans Practicum at UC Berkeley School of Law, collected and analyzed the EAC's 2010 survey questionnaire data from 24 states (see Appendix A). Our data is the same data being collected and analyzed by the EAC. The MVP Project is simply releasing a snapshot of the data in time for lawmakers to act prior to the 2012 elections.

The 24 states in this report account for nearly two million military voters—that is, 80 percent of the total military voting population in the United States.<sup>13</sup> The five largest states in this report—Texas, Florida, California, Virginia, and North Carolina—have nearly 1.1 million military voters or more than 40 percent of the total military voting population.

Like the EAC's report, our report focuses on four key data sets: (1) the total number of absentee ballots requested by military voters in each state; (2) the total number of absentee ballots that were transmitted to military voters in each state; (3) the number of absentee military ballots that were returned, cast, and counted in each state; and (4) the number of absentee military ballots that were rejected in each state and the reason why the ballot was rejected.

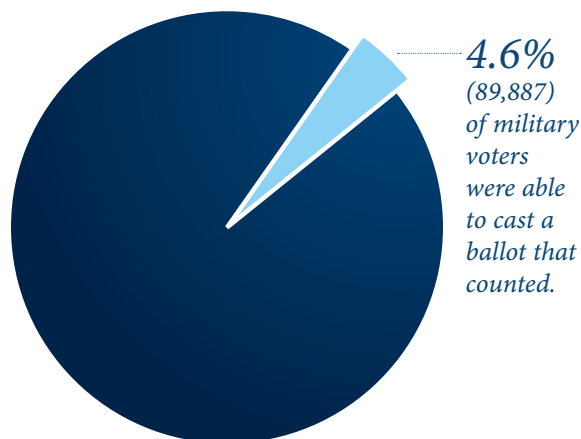
Finally, our report compares the 2010 survey data to the EAC's data from the last mid-term election in 2006. We are using the 2006 data because voter turnout in a presidential election (e.g., the 2008 election) is much higher and, thus, makes it difficult to compare a presidential election with a mid-term election. By using the 2006 data, we are making an "apples to apples" comparison between two similar sets of data.

## IV. FINDINGS

### A. Military Voter Participation Rates

The single most important criteria for judging the effectiveness of the MOVE Act is the overall participation rate by military voters. Simply put, were more military voters able to vote and have their votes counted in 2010 as compared to previous elections? On this front, the survey data paints a disappointing picture.

Of the 1,962,761 military voters accounted for in this report, only 89,887 (or 4.6 percent) of these voters were able to cast an absentee ballot that counted in 2010. *See Chart 1.* By comparison, the EAC's 2006 survey data shows that 5.5 percent of military and overseas voters were able to cast an absentee ballot that counted in that election.<sup>14</sup> In other words, the 2010 data shows that military voters suffered a significant decrease in the overall number of absentee ballots counted in the 2010 election.



*Chart 1*

Percentage of the 1,962,761 military voters accounted for in this report who were able to cast a vote that counted in the 2010 general election.

On the individual state level, as set forth in Appendix A, the percentage of military voters whose absentee ballots were counted ranged from 1.3 percent in North Carolina, where only 8,323 of 111,550 eligible military voters had an absentee ballot that counted, to 15.7 percent in Washington. In total, 18 of the 24 states had military absentee voting participation rates that fell below 5 percent. Nine states had a participation rate below 3 percent.

While the 2010 survey data does not include military members who voted in person (with two exceptions discussed below), that percentage has been relatively small in the past. In 2006 for example, only 7 percent of military members voted in person.<sup>15</sup> If a similar percentage voted in person in 2010, the total military voter participation rate for 2010 would have been 11.6 percent.

Our estimated participation rate of 11.6 percent is further supported by data from Washington and Oregon. Unlike other states, Washington and Oregon captured data on the total number of military voters that voted in their elections.<sup>16</sup> According to their 2010 survey data, the total military voter participation rate was 9.9 percent in Oregon and 15.7 percent in Washington.<sup>17</sup> Obviously, an estimated participation rate of 11.6 percent falls within this range.

One final point of comparison: the overall national participation rate for the 2010 election was 41.6 percent.<sup>18</sup> If our estimate of 11.6 percent is correct, it means that military voters were 3.5 times *less likely* to vote in the 2010 election as compared to other voting-age citizens.

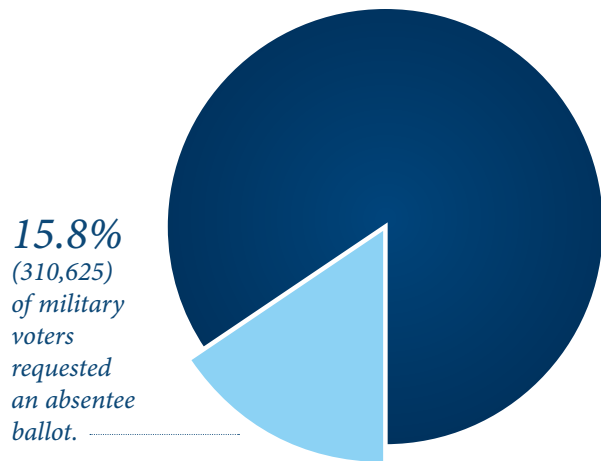
## B. Requests for Absentee Ballots

Many states saw little or no increase in the number of absentee ballots being requested by military voters in 2010. Take, for example, the five largest military voting states: Texas, Florida, California, Virginia and North Carolina. Of the 1,078,720 military voters in these states, the survey data shows that only 159,918 requested absentee ballots for the 2010 election. In other words, only 14.8 percent of the eligible military voters in these states requested an absentee ballot.

The nationwide data is little better. Of the 24 states examined in this report, only 310,625 of nearly 2 million military voters requested an absentee ballot. That is an absentee ballot request rate of 15.8 percent. *See Chart 2.* By comparison, in 2006 the EAC reported that 16.5 percent of military and overseas voters requested absentee ballots.

In the past, it was difficult—if not impossible—to draw sound conclusions based on the reported number of absentee ballots being requested by military voters. The difficulty was due, in large part, to a provision in UOCAVA that required states to send absentee ballots to military voters for two federal election cycles. In other words, if a military voter requested an absentee ballot in 2006, states not only had to send an absentee ballot for that election, but also had to send ballots for all federal elections in 2008. Since military members move every two or three years,<sup>19</sup> this provision caused thousands of ballots to be sent to the wrong address. It also grossly inflated the number of actual absentee ballot requests for an election.

The MOVE Act, however, eliminated this requirement and allowed (but did not require) states to remove absentee ballot requests after one



*Chart 2*

Percentage of military voters in 24 states that requested an absentee ballot in 2010.

election cycle. At least two states, Minnesota and Nevada, took advantage of this change in 2010 and required military voters to request absentee ballots for that specific election.<sup>20</sup> In other words, the 2010 survey data from these states reflects the total number of absentee ballots requested by military voters in 2010. Once again, the data paints a disappointing picture.

In these two states, the absentee ballot request rate ranged from 5.8 percent of the total number of military voters in Nevada to 6.9 percent in Minnesota. Collectively, only 2,656 of the 42,672 military voters in these states requested an absentee ballot in 2010—that is, an overall absentee ballot request rate of 6.2 percent. In our view, this data underscores the critical need for greater registration and absentee voting assistance for our men and women in uniform.

## C. Transmission of Absentee Ballots

Many states undertook great efforts and expended significant resources to implement



the MOVE Act in time for the 2010 election. In some cases, states had to make relatively minor legislative changes to comply with the MOVE Act. In other cases, states had to move their primary schedule and re-write much of their election code. The states that undertook these efforts should be commended.<sup>21</sup>

There were, however, several major lapses related to the transmission of absentee military ballots impacting thousands of military voters. These lapses include:

### **1. Requests for Waivers**

When Congress passed the MOVE Act, it recognized that some states may not be able to implement the 45-day standard in time for the 2010 election. Accordingly, the MOVE Act allows states to seek a one-time waiver of the 45-day standard if the state can show: (1) it has an undue hardship (including late primaries under certain circumstances); and (2) it has a comprehensive plan to provide military voters with sufficient time to vote.<sup>22</sup> After consulting with DOJ, DOD has final authority to grant or deny a waiver application.

While the waiver provision was intended to create upfront certainty for military voters, as well as the states, it had the opposite effect in 2010. In total, 10 states and the District of Columbia requested an undue hardship waiver under the MOVE Act.<sup>23</sup> Most of the applications were submitted less than 50 days before the deadline for mailing absentee ballots. In other words, less than two months before the deadline for mailing absentee ballots, military voters in 10 states and the District of Columbia had no clear guidance on when their ballots would be sent.

This uncertainty impacted more than 400,000 military voters in these states.

To make matters worse, DOD and DOJ waited until August 27, 2010—that is, three weeks before the 45-day deadline—to decide whether to grant the waiver applications. Of the 11 waiver applications that were filed, DOD granted five waivers (Delaware, Massachusetts, New York, Rhode Island, and Washington) and denied five waivers (Alaska, Colorado, the District of Columbia, Hawaii, and Wisconsin). On the same day, DOJ notified these latter jurisdictions that they faced an imminent lawsuit for violating the MOVE Act. Such last-minute litigation hardly creates the upfront certainty envisioned by Congress.

Last minute litigation, however, was not the only problem created by DOJ. In particular, DOJ advised numerous jurisdictions, including Maryland, that it could avoid the need for a waiver by sending a ballot that contained federal races at least 45 days before the election, even if that meant depriving military voters of their right to vote in state races. When Maryland accepted this advice and withdrew its waiver application,<sup>24</sup> the MVP Project was forced to file a federal lawsuit arguing, in part, that Maryland's plan—which was approved by DOJ—violated our service members' fundamental right to vote in state races. A federal district court agreed and issued a preliminary injunction on October 29, 2010.<sup>25</sup> But for the lawsuit, hundreds of military voters would have been denied their right to vote in state races based on advice from DOJ.

### **2. Late Mailed Ballots**

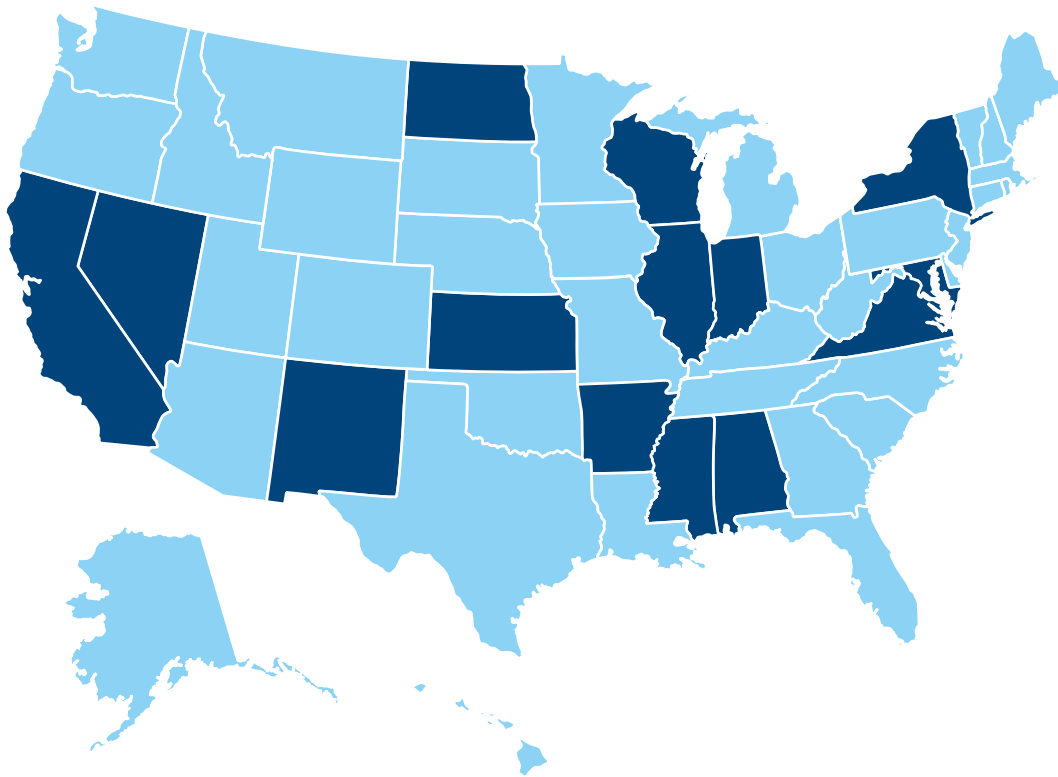
As noted above, most states and local jurisdictions effectively implemented the MOVE

Act and mailed absentee military ballots at least 45 days before the election. However, there were 14 states with one or more counties that violated the 45-day standard and these violations impacted more than 65,000 military and overseas voters.<sup>26</sup> See *Chart 3*. While a vast majority of these violations were inadvertent errors, there were at least two states, New York and Illinois, where the violations were more egregious.

As noted above, New York was one of the five states that received a waiver from the 45-day standard. Under the terms of its waiver with DOD, New York was required to mail absentee ballots no later than October 1, 2010 (i.e., 32 days before the election). In return for the waiver, New York agreed to count any ballot received

on or before November 15, 2010 (i.e., 13 days after the election).

Unfortunately, at least 13 counties in New York, including three boroughs in New York City, failed to meet the agreed upon October 1st deadline. Most of the counties missed the deadline by more than a week and sent ballots on October 12, 2010—that is, only three weeks before the election. More than 43,000 military and overseas voters were affected by this failure.<sup>27</sup> Similarly, at least 35 counties in Illinois failed to meet the 45-day deadline and, like New York, several counties waited until October 5, or later, to mail absentee ballots. One of the counties, St. Clair County (home to Scott Air Force Base), mailed more than a thousand absentee ballots



*Chart 3*

States with one or more counties that failed to mail absentee military ballots at least 45 days before the election as required by the MOVE Act.

on October 4, 2010, or 16 days after the deadline.

While DOJ ultimately filed UOCAVA lawsuits against both states, the media and other military voting advocates questioned the sufficiency of DOJ's settlement agreements and whether they fully protected our service members. Unfortunately, the 2010 survey data, especially the data from New York, shows the fundamentally flawed nature of these agreements.

In New York, for example, the 2010 survey data shows that election officials rejected 1,789 of the 5,090 absentee ballots returned by military voters—that is a rejection rate in excess of 30 percent. Many of these ballots—approximately 15 percent of 1,789—were rejected because they arrived after the deadline negotiated by DOJ in its settlement agreement. Clearly, DOJ's settlement agreement with New York did not go far enough to protect military voters.

### **3. Use of Electronic Delivery Methods**

The MOVE Act attempted to modernize the military and overseas absentee voting process by requiring states to use electronic delivery mechanisms (i.e., online ballot system, fax, or email) to send blank absentee ballots. This quick transmission was intended to drastically reduce the amount of time needed for ballots to be delivered and, thus, better ensure that military voters were able to receive and return their ballots.

A vast majority of states met the electronic delivery requirement by transmitting blank ballots via email or allowing service members to download their ballots via a website. A few states, including Colorado, allowed for the limited use of email if the military voter was stationed overseas. Only two states—Alaska and Rhode

Island—used fax as their only method of electronic transmission.

While the 2010 survey data provides limited information about the usefulness of electronic delivery methods, the data from one state, Colorado, indicates that a significant number of military voters used electronic delivery options, especially those stationed overseas. According to Colorado's data, of the 1,222 ballots sent to overseas troops, 263 were sent via email (21.5 percent) and 7 were sent via facsimile (0.6 percent). Overall, more than 22 percent of the absentee ballots sent to overseas military members were sent electronically.<sup>28</sup> As more military voters become aware of these electronic delivery options, we believe that the use of such methods will continue to increase.

However, the survey data also raises a question about the continued viability of fax delivery, especially if it is the only form of electronic delivery available to military voters. As noted above, only 7 out of the 1,222 overseas absentee military ballots in Colorado were sent via a fax machine. At the very least, Alaska and Rhode Island should consider expanding their electronic delivery options beyond the use of fax machines.

One final point: while electronic delivery options provide military voters as a whole with increased opportunities to vote, it must be emphasized that not all service members have access to a computer with a printer (which is necessary to print the ballot) or a fax machine. This is especially true for military voters located in remote locations or serving at the front lines. Those voters must rely on their state and local election officials to mail absentee ballots at least 45 days before the election. The failure to meet

this standard has a disproportionate negative impact on these voters.

#### **D. Return of Absentee Ballots**

The rate of return for absentee military ballots in each state varied significantly. As set forth in Appendix A, the percentage of absentee ballots that were returned as compared to the number that were transmitted ranged from 13.5 percent in Louisiana to 73.6 percent in Nevada. Overall, of the 310,625 absentee ballots sent to military voters in 2010, only 95,535 were returned to state or local election officials. That is an overall return rate of just 30.8 percent.

While there are a number of factors that prevent military voters from returning their ballots (e.g., it may be received too late to be returned),<sup>29</sup> the data indicates that many of the ballots may not have reached their intended recipients. This conclusion is evidenced, in part, by the high rate of return in states that eliminated absentee ballot requests from previous election cycles. For example, the rate of return in Minnesota and Nevada ranged from 66 percent to 74 percent, whereas the rate of return in the other 22 states was 30 percent. As more states implement the one election cycle requirement, we anticipate that the absentee ballot return rate will continue to improve.<sup>30</sup>

#### **E. Counted Ballots and Rejection Rates**

The survey data shows that absentee ballots, if they were returned to local election officials, had a significant likelihood of being counted. Of the

95,535 ballots that were returned by military voters in this report, state and local election officials counted 89,887 or 94.1 percent of the ballots. In other words, state and local election officials only rejected 5.9 percent of absentee military ballots.

The rejection rates in each state ranged from 0.4 percent in Georgia (lowest) to 31.6 percent in New York (highest). Overall, 10 of the 24 states in the survey counted more than 97 percent of the ballots that were returned to them in 2010. Only seven states (Alabama, Colorado, Indiana, Louisiana, New York, North Carolina, and Oklahoma) had a rejection rate that exceeded 10 percent.<sup>31</sup> The percentage of returned ballots that were counted for each of the 24 states is listed in Appendix A.

New York's military voters represented the single largest group of disenfranchised voters in the survey data. Overall, 1,609 of New York's military voters had their ballots rejected by local election officials. To put this number in context, New York accounted for nearly 30 percent of the total number of absentee ballots rejected in the survey data. But for New York, the overall acceptance rate would have been 95.5 percent.

Despite New York's failures, the 2010 survey data shows an improvement in the number of ballots that were counted—and not rejected—by state and local election officials as compared to the 2006 election. In that election, state and local election officials rejected 7.5 percent of military and overseas absentee ballots. In our view, the MOVE Act and the changes implemented by the states played a critical role in this improvement.

## V. CONCLUSION

The data in this report indicates that while the MOVE Act improved certain aspects of military voting, more must be done to enfranchise military voters in 2012. In particular, the 2010 survey data shows that military voters, if they were able to return an absentee ballot, enjoyed a very high likelihood of having that ballot counted. The data further indicates that absentee ballot return rates will continue to increase as states clean-up their absentee ballot request lists by sending ballots for one election cycle.

Much of the improvement in 2010 can be attributed to the MOVE Act. There should be no doubt that the requirement to mail absentee ballots at least 45-days before an election, as well the requirement to send election materials electronically, helped to ensure that absentee ballots were sent, received, and returned in a timely manner and, thus, reduced the likelihood that a ballot would be rejected.

However, the survey data also raises serious questions about the effectiveness of the MOVE Act, the manner in which it was implemented, and the need for further military voting reform. At the very least, Congress and interested parties should examine:

1. *Low Absentee Ballot Request Rates and Participation Rates.* When only 6.2 percent of eligible military voters request absentee ballots for the 2010 election, as was the case in Nevada and Minnesota, serious questions must be raised and addressed regarding the ability of our men and women in uniform to request and receive an absentee ballot. While the MOVE Act intended

to resolve low participation rates by requiring DOD to create voter registration offices on every military base, there is evidence indicating that the provision was not implemented (or fully implemented) prior to the 2010 election.<sup>32</sup> 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.<sup>33</sup>

2. *Need for a 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 to their election code—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 act and, thus, the need for such a provision has been significantly diminished.

3. *DOJ's Handling of Military Voting Cases.* Between the botched waiver process, including the bad advice to Maryland, as well as the fundamentally flawed nature of the New York settlement agreement, questions must be asked and answered regarding DOJ's enforcement of military voting rights in 2010. Military voters should not suffer through another election where DOJ fails to act in a timely manner or fails to fully protect military voters when there has been a clear and egregious violation of federal law.

4. *Use of Fax Machines as the Only Means of Electronic Delivery.* Congress should consider whether fax machines are a viable form of technology to meet the electronic delivery requirements under the MOVE Act. Given the

outdated nature of this technology, as well as its limited use by overseas military voters, it may be time to require states to adopt either an online or email delivery mechanism to meet the electronic delivery requirements.

## APPENDIX A

State	Total Military Voters	All Military Ballots Transmitted	% of Ballots Transmitted v. Total Voters	All Military Ballots Returned	% of Ballots Returned v. Transmitted	% of Ballots Returned v. Total Voters	All Military Ballots Counted	% of Ballots Counted v. Returned	% of Ballots Returned v. Total Voters
Texas	337,673	49,789	14.74%	13,218	26.55%	3.91%	12,773	96.63%	3.78%
Florida	250,941	53,426	21.29%	21,762	40.73%	8.67%	20,677	95.01%	8.24%
California	240,151	41,401	17.24%	6,385	15.42%	2.66%	5,977	93.61%	2.49%
Virginia	138,405	6,979	5.04%	1,785	25.58%	1.29%	1,766	98.94%	1.28%
North Carolina	111,550	8,323	7.46%	1,617	19.43%	1.45%	1,463	88.80%	1.31%
Washington	98,692	37,480	37.98%	15,737	41.99%	15.95%	15,501	98.50%	15.71%
Georgia	94,424	12,611	13.36%	2,238	17.75%	2.37%	2,230	99.64%	2.36%
New York	82,535	15,275	18.51%	5,090	33.32%	6.17%	3,481	68.39%	4.22%
Illinois	69,049	8,212	11.89%	2,845	34.64%	4.12%	2,728	95.89%	3.95%
Pennsylvania	61,112	12,186	19.94%	4,319	35.44%	7.07%	4,230	97.94%	6.92%
Ohio	54,039	5,643	10.44%	2,068	36.65%	3.83%	1,989	96.18%	3.68%
Alaska	52,972	8,133	15.35%	4,294	52.80%	8.11%	4,121	95.97%	7.78%
Colorado	45,569	3,263	7.16%	1,221	37.42%	2.68%	1,067	87.39%	2.34%
Maryland	43,985	3,354	7.63%	683	20.36%	1.55%	649	95.02%	1.48%
Missouri	39,840	5,488	13.78%	2,159	39.34%	5.42%	2,042	94.58%	5.13%
Alabama	36,517	3,982	10.90%	1,058	26.57%	2.90%	858	81.10%	2.35%
Oklahoma	34,476	3,021	8.76%	856	28.33%	2.48%	770	89.95%	2.23%
Louisiana	32,664	11,325	34.67%	1,524	13.46%	4.67%	1,364	89.50%	4.18%
New Jersey	30,145	3,783	12.55%	730	19.30%	2.42%	692	94.79%	2.30%
Nevada	26,491	1,541	5.82%	1,134	73.59%	4.28%	1,116	98.41%	4.21%
Indiana	24,237	4,751	19.60%	1,041	21.91%	4.30%	784	75.31%	3.23%
Oregon	21,992	6,941	31.56%	2,247	32.37%	10.22%	2,184	97.20%	9.93%
Wisconsin	19,121	2,603	13.61%	793	30.46%	4.15%	734	92.56%	3.84%
Minnesota	16,181	1,115	6.89%	731	65.56%	4.52%	691	98.29%	4.27%
<b>Totals</b>	<b>1,962,761</b>	<b>310,625</b>	<b>15.83%</b>	<b>95,535</b>	<b>30.76%</b>	<b>4.87%</b>	<b>89,887</b>	<b>94.10%</b>	<b>4.58%</b>

## ENDNOTES

- 1 Eric Eversole is the founder and the Executive Director of the MVP Project and serves as an Adjunct Professor at the AMVETS Legal Clinic at Chapman University School of Law. Eric has a long history of promoting and protecting military voting rights. Prior to his current positions, he served as a litigation attorney in the Voting Section of the United States Department of Justice, Civil Rights Division, where he investigated and filed numerous cases on behalf of military voters. He is a recognized expert on military voting issues, publishing numerous articles on the subject and frequently appearing on national television. Eric also serves as a Judge Advocate in the United States Navy Reserve and holds the rank of Commander.
- 2 Pub. L. No. 111-84 §§ 577 to 582, 583(a), 584 to 587, 123 Stat. 2190 (2009).
- 3 Under UOCAVA, active duty military members and their voting age dependents are commonly known as “absent uniformed services voters.” See 42 U.S.C. § 1973ff-4. As used in this report, the term “military voter” has the same meaning as “absent uniformed services voters.”
- 4 Hans A. Von Spakovsky and M. Eric Eversole, “America’s Military Voters: Re-enfranchising the Disenfranchised,” Heritage Foundation (July 28, 2009) (“Heritage 2009 Legal Memo”), available at [http://s3.amazonaws.com/thf\\_media/2009/pdf/lm0045.pdf](http://s3.amazonaws.com/thf_media/2009/pdf/lm0045.pdf).
- 5 There were several predecessor statutes to UOCAVA including the Overseas Citizens Voting Rights Act, 42 U.S.C. § 1973dd, and the Federal Voting Assistance Act, 42 U.S.C. § 1973cc.
- 6 U.S. Election Assistance Commission, *Uniformed and Overseas Citizens Absentee Voting Act Survey Report Findings, September 2007*, at 1 (“2006 EAC UOCAVA Survey”), available at [www.eac.gov](http://www.eac.gov).
- 7 This 30 percent participation rate is based on an estimated in-person voting rate of 18 percent for the 2008 election, as well as an absentee voting participation rate of 12 percent. See U.S. Election Assistance Commission, *Uniformed and Overseas Citizens Absentee Voting Act Survey Report Findings, September 2009*, Table 15 (“2008 EAC UOCAVA Survey”) (finding that 309,629 of approximately 2.5 million military voters cast an absentee ballot that counted in 2008); Federal Voting Assistance Program, *Eighteenth Report: 2008 Post-Election Survey Report*, March 2011, at 10 available at [www.fvap.gov/resources/media/18threport.pdf](http://www.fvap.gov/resources/media/18threport.pdf) (stating that 18 percent of military voters voted in person).
- 8 *Schumer Releases Survey Suggesting Ballots of One in Four Overseas Military Voters Went Uncounted in '08 Election*, May 13, 2009 (“Senator Schumer May 13, 2009 Statement”), available at [http://schumer.senate.gov/new\\_website/record.cfm?id=312970](http://schumer.senate.gov/new_website/record.cfm?id=312970).
- 9 *Id.*
- 10 42 U.S.C. § 1973ff-1(c).
- 11 The EAC survey questionnaire is available at [http://www.eac.gov/research/uocava\\_studies.aspx](http://www.eac.gov/research/uocava_studies.aspx).
- 12 See Senator Schumer May 13, 2009 Statement.
- 13 The data regarding the total number of military voters in each state was provided by the Federal Voting Assistance Program in a letter to each state on November 6, 2009. The letters are available at: <http://web.archive.org/web/20100914205226/http://www.fvap.gov/reference/laws/state-initiatives.html>.
- 14 2006 EAC UOCAVA Survey at 1.
- 15 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).
- 16 Washington and Oregon have implemented vote by mail statutes, which requires all voters to vote by absentee ballot. Thus, the absentee voting data for military voters in Washington and Oregon reflects the total number of military voters from those states that voted in the 2010 election.
- 17 By way of comparison, the participation rate for the general public in those states was 53.5 percent in Oregon to 54.3 percent in Washington. See [http://elections.gmu.edu/Turnout\\_2010G.html](http://elections.gmu.edu/Turnout_2010G.html).
- 18 *Id.*
- 19 Data collected by the U.S. Census Bureau indicates that military members are 2.5 times more likely to move as compared to the overall population over the age of 16. In 2009, 30.6 percent of military members moved as compared to 12.0 percent of the overall population. See U.S. Census Bureau, *General Mobility of Persons 16 Years and Over, by Sex, Age, Race and Hispanic Origin, Region, and Labor Force Status: 2009 to 2010*, available at <http://www.census.gov/hhes/migration/data/cps/cps2010.html>.



- 20 While Nevada did not officially implement this change until 2011, Nevada counties employed a procedure that effectively required military voters to re-request an absentee ballot in 2010. Specifically, the counties mailed a notice to all military voters who requested an absentee ballot in 2008 and required them to return the notice if they wanted a ballot in the 2010 election. If the military voter failed to return the notice, the voter would be moved to the inactive list and would not receive an absentee ballot in 2010. As noted above, this is tantamount to requiring the military voter to re-request an absentee ballot.
- 21 While many states could be referenced here, states like Vermont and Minnesota undertook the immense burden of moving their primary date to meet the 45-day deadline. Other states, like Alabama, California, Florida, and Indiana, undertook a comprehensive review of their military voting law and made significant changes to improve those laws.
- 22 See 42 U.S.C. § 1973ff-1(g).
- 23 Those ten states include Alaska, Colorado, Delaware, Hawaii, Maryland, Massachusetts, New York, Rhode Island, Washington, and Wisconsin.
- 24 Maryland's letter withdrawing its waiver application, as well as discussing its conversations with DOJ and DOD, can be found at: [http://www.fvap.gov/resources/media/md\\_waiver\\_withdrawal.pdf](http://www.fvap.gov/resources/media/md_waiver_withdrawal.pdf).
- 25 See *Doe v. Walker*, --- F.2d ---, 2010 WL 4269605 (D. Md. 2010).
- 26 See Assistant Attorney General Thomas E. Perez Speaks at the MOVE Act Pen-and-Pad Briefing, Oct. 27, 2010 ("Perez Oct. 10 Statement"), available at <http://www.justice.gov/crt/opa/pr/speeches/2010/crt-speech-101027.html>. The states that had violations included Arkansas, Alabama, California, Indiana, Illinois, Kansas, Maryland, Mississippi, Nevada, New Mexico, New York, North Dakota, Virginia, and Wisconsin.
- 27 *Id.*
- 28 Interestingly, this data is nearly identical to a recent finding by the Overseas Vote Foundation (OVF), which reported that 23 percent of overseas voters used electronic delivery methods to receive their blank absentee ballot. See Overseas Vote Foundation, *2010 Post Election Survey of Military and Overseas Voters*, at 1, 6 (Feb. 2011), available at [https://www.overseasvotefoundation.org/files/OVF\\_2010\\_Post\\_Election\\_Survey\\_Report.pdf](https://www.overseasvotefoundation.org/files/OVF_2010_Post_Election_Survey_Report.pdf).
- 29 According to OVF's survey, more than 12 percent of overseas voters did not return their absentee ballots even though they received it. See *id.* at 15. Many of those voters claimed that they received it too late for the ballot to be returned by the election deadline to be counted. *Id.*
- 30 At least 21 states plan to implement a one-election cycle or similar requirement in 2012. These states include: Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Utah, and Virginia.
- 31 While our study simply reports the rejection rates provided by the 24 states, it appears that some states may have over-reported the number of rejected ballots based on an administrative error by the counties. In Indiana, for example, several counties reported that they did not count any military ballots, but they also reported that they did not reject any ballots. This apparent error accounted for most of the rejected military ballots in Indiana and, thus, we believe that Indiana's actual rejection rate is much lower.
- 32 DOD designated Installation Voting Assistance Offices as voter registration agencies under the National Voter Registration Act on November 15, 2010—that is, two weeks after the November 2010 election. See Directive-Type Memorandum DTM-10-021 (Nov. 15, 2010), available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-10-021.pdf>.
- 33 See Heritage 2009 Legal Memo at 4-5, 8-9.



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