

## Testimony of Mr. Eric Eversole

Hearing on “The 2008 Election: A look back on what went right and wrong”

Before the Subcommittee on Elections of the  
Committee on House Administration

March 26, 2009

Madame Chair and members of the Subcommittee, thank you for allowing me to testify regarding the “2008 Election: What went right and wrong.” It is my pleasure to discuss the voting experiences of our men and women in uniform and their voting age family members (collectively, “military voters”).

For many Americans, the 2008 election was historic, both in its outcome and the number of citizens who were able to vote for the first time. Local election officials in many states witnessed historic turnout and participation. The same, however, cannot be said for military voters. Once again, many of America’s military voters were left out of the process and unable to participate in the 2008 election.

While nationwide data is still being collected by the Election Assistance Commission, the data that is available paints a bleak picture for military voters. Take for example, data from the following states:

- **Minnesota:** in a state where 78 percent of the general population was able to vote in the 2008 election, only 15.7 percent of military voters were able to cast an absentee ballot that counted in the 2008 election. Military absentee voters were nearly four times more likely to have their absentee ballot rejected by local election officials compared to non-military absentee voters. Of the rejected ballots, nearly seventy percent were rejected because they arrived after the election.

- **Missouri:** of the approximately 43,000 military voters in Missouri, only 8,101 attempted 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 an 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) returned an absentee ballot to be counted in the 2008 election. Sixty-six percent of military and overseas ballots were rejected for being late.
- **Alabama:** only 6.3 percent of Alabama’s estimated 92,000 military voters and overseas citizens were able to cast a valid absentee ballot in the 2008.

In short, the 2008 election was historic for military voters too, but only because they continued to be disenfranchised at historic levels.

Many members on this Subcommittee saw this train wreck coming. The Committee on House Administration held a hearing on April 18, 2008, to discuss the difficulties faced by military voters in the 2006 election. Every witness that testified that day—except for the one from the Department of Defense and Federal Voting Assistance Program (FVAP)—expressed their concern regarding the treatment of military voters in the 2006 election and the need for immediate legislative action. In an attempt to address these concerns, Representative McCarthy, and separately Representatives Maloney and Honda, proposed legislation that would assist military and overseas voters. While neither of these pieces of legislation passed the House, Senator Cornyn succeeded in passing legislation similar to Representative McCarthy’s Military Voter Protection Act out of the Senate. As noted below, I hope the House will take up similar legislation this Congress.

Ultimately, military voters should not suffer another federal election where only 10, 15 or 20 percent are able to cast a vote that is counted. Congress must find a legislative solution and must do so in a timely manner to ensure its implementation before the 2010 federal election. To that end, please consider the following recommendations for legislative action:

**1. Make 45 Days Mandatory.** Every federal agency and non-profit group examining the issue of ballot delivery times to military voters in war zones has concluded that ballots should 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; and (2) military exigencies (*i.e.*, fighting the war) further delay the delivery of the ballot to the military voter. In other words, it takes at least 36 days of mail time (18 days each way) for a ballot to be sent to and from a war zone and some additional amount of time to account for military exigencies.

Unfortunately, nearly half of the states refuse to follow the 45-day recommendation. 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. A 35-day time period does not account for mail transit times (which may take 18 or more days each way), let alone account for military exigencies or the time needed to review and cast the ballot. These states include Arizona, California, Colorado, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, Oklahoma and Vermont. Eight additional states (Alabama, Alaska, Iowa, 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 appear more likely to be disenfranchised, especially if the state does not permit the electronic transmission of absentee ballots (e.g., facsimile or email). The military voters in these states receive their ballots so close to the election that the voter does not bother to return it or, even when the ballot is returned, it arrives after the election deadline causing the ballot to be rejected. Take for example, the treatment of military voters in Minnesota, where military voters were nearly four times more likely to have their absentee ballot rejected in the election as compared to non-military absentee ballots. Other states, like Missouri, Arkansas and Nebraska, had a significant number of military absentee ballots that were received after the election deadline.

Given this data, this Subcommittee should considering an amendment to the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff-1, which would require each state to provide military and overseas citizens with at least 45 days to cast, receive and return their absentee ballot prior to the state deadline for receiving absentee ballots. Such an amendment will immediately ensure that tens of thousands of absentee ballots from military voters will be counted in future elections.

**2. Reintroduce the Military Voter Protection Act.** Representative McCarthy should reintroduce the Military Voter Protection Act (MVP Act) and this Subcommittee should work toward its speedy passage. Even if Congress passes the 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 and military exigencies that delay the delivery of mail to war zones. While mail delivery to a war zone 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. The MVP Act helps to resolve the uncertainty regarding these mail times and provides a guarantee that an overseas military voter's ballot will be delivered in time so long as the ballot is sent at least four days before the election.

Nor should the MVP Act be delayed because it provides express mail delivery only for overseas military voters. Unlike a vast majority of overseas citizens, overseas military voters face far greater risks and challenges in receiving the delivery of their absentee ballot. These voters are constantly on the move, their location is secret, and the delivery of mail is sporadic at best. This especially seems true for forward deployed military voters in Iraq and Afghanistan where their only option for returning a ballot is the weekly or bi-weekly mail drop. Given their daily sacrifices, it seems only appropriate that their country provide them with a guaranteed mail delivery method to ensure their participation in the democratic process, regardless of their remote location in the world.

### **3. Designate Military Pay and Personnel Offices as Voter Registration**

**Agencies.** As many members of this Subcommittee are aware, the FVAP has long failed to provide military voters with the necessary assistance and materials to ensure their participation in federal elections. That point was recently made by Representatives Maloney and Honda in a bipartisan letter to the Secretary of Defense, where they noted that the efforts of FVAP have been "wholly inadequate, and the status quo is simply unacceptable." The data from the 2008 election provides the exclamation point to that statement.

Yet, despite FVAP's longstanding failure, there is no provision of federal law that can be enforced against FVAP or the Department of Defense to ensure that military voters are provided with the necessary information and materials to participate in federal elections. This fact was made clear in August 2008, when over 20 congressional

members, including Representatives Ehlers and McCarthy, asked the Department of Justice (DOJ) to investigate whether FVAP was complying with its obligations to provide military voters with the necessary information and assistance to vote in federal elections, as required by section 701 of the Help America Vote Act (HAVA). In a letter dated September 23, 2008, DOJ declined to investigate saying that the “Attorney General’s authority does not extend to enforcing the duties assigned to the Defense Department [FVAP] under that provision.” In other words, while FVAP may have been directed to provide voter information and assistance to military voters under HAVA, those provisions are not enforceable against FVAP.

In light of this deficiency, the Subcommittee should consider an amendment to section 7 of the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg-5, which would designate military personnel and pay offices as Voter Registration Agencies under the act. Not only would such an amendment help to ensure that military voters receive the necessary voting information and material when they need it most (i.e., when they visit a pay or personnel office to update their personal information or change their permanent duty station), it will create a legally enforceable right for military voters to receive that information and assistance. It will ensure that FVAP provides military voters with the necessary assistance to participate in federal elections and will go a long way toward remedying low military voter participation rates.

#### **4. Conduct a Hearing Regarding DOJ’s Lack of Enforcement.**

Notwithstanding the substantial data that has been generated regarding the disenfranchisement of military voters in the 2006 general election, the primary entity responsible for enforcing their rights under UOCAVA—i.e., DOJ’s Civil Rights Division, Voting Section (Voting Section)—has only initiated one case since August 2006 to protect a military voter’s right to receive a ballot. Given the findings of the 2007 EAC report, which showed that only 5.5 percent of military and overseas citizens were able

to cast a valid ballot, and the widespread reports of military voter disenfranchisement, it is shocking that the Voting Section has not been more aggressive in investigating and prosecuting these claims.

The Voting Section also refuses to bring UOCAVA cases when states provide military and overseas voters less than 45 days to receive and return their absentee ballots. 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 the absentee ballot. There is simply no study that supports a 30-day standard under UOCAVA, as such a timeframe does not even account for military mail delivery times (estimated to be at least 12-18 days each way). Rather, according to a recent study by the Pew Center on the States, “No Time to Vote: Challenges Facing America’s Overseas Military Voters,” 25 states and the District of Columbia must improve their absentee voting process and provide overseas military voters with more time to vote.

At the very least, the Voting Section’s lack of enforcement raises serious questions regarding its investigative and decision-making process for bringing UOCAVA cases. If there is a legal basis for this refusal, then the Subcommittee and Committee as a whole should have an explanation so that it can explore legislative remedies to resolve this deficiency. Otherwise, the Voting Section should explain its monitoring efforts for the 2008 general election and its ongoing efforts to ensure that military voters are provided with a reasonable opportunity to vote.