

Testimony of Mr. Eric Eversole
**Hearing on “Military and Overseas Voting:
Effectiveness of the MOVE Act in the 2010 Election”**
Before the Committee on House Administration
February 15, 2011

Mr. Chairman and members of the Committee, thank you for providing me, as the Executive Director of the Military Voter Protection Project (MVP Project), an opportunity to testify regarding the effectiveness of the Military and Overseas Voter Empowerment Act (MOVE Act)¹ in the 2010 election. We greatly appreciate the Committee’s longstanding support for the voting rights of our men and women in uniform and look forward to working with the Committee to defend those rights.

There is no doubt that the MOVE Act was the most significant military voting reform in 25 years. It requires the states, as well as the federal government, to undertake significant efforts to provide our men and women in uniform with a better opportunity to vote. Among other things, the MOVE Act requires states to send absentee ballots to military voters at least 45 days before the election, except in limited circumstances where the state suffers an undue hardship and applies for a waiver from the Federal Voting Assistance Program (FVAP).² The MOVE Act also requires states to adopt at least one electronic delivery mechanism (e.g., internet download, fax or email) for election materials, including blank ballots. Finally, it requires FVAP to expand its outreach efforts and to use expedited mail delivery service to return absentee military

¹ Pub. L. No. 111-84 §§ 577 to 582, 583(a), 584 to 587, 123 Stat. 2190 (2009).

² The MOVE Act allows a state to apply for a waiver of the 45-day standard in limited circumstances where the state can show an undue hardship and can otherwise demonstrate that it will provide military voters with sufficient time. See 42 U.S.C. § 1973ff-1(g).

ballots from overseas locations. All of these changes had to be implemented by the November 2010 election—that is, approximately 13 months after the Act was passed.

States worked aggressively and expended significant resources to implement these changes. In a relatively short period, many states introduced and passed a host of legislative changes to comply with the MOVE Act. A few states, including Vermont and Minnesota, undertook the immense burden of moving their primary date to meet the 45-day mailing 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. West Virginia and the District of Columbia created pilot programs to explore the use of internet-based voting for military service members. All of the states had to provide extensive training to local election officials to ensure compliance with the MOVE Act.

While the overall effect of these changes has not yet been analyzed,³ some of the data indicates that the extended timelines for receiving and returning absentee ballots had a significant impact on a military voter's ability to return his or her ballot in time to be counted. For instance, data from California, Colorado, and Florida, show a significant reduction in the number of rejected military absentee ballots as compared to the mid-term election in 2006. Much of this reduction appears to result from the fact that few absentee military ballots were rejected for arriving after the election deadline.

The implementation of the MOVE Act, however, was far from flawless. There were at least 12 states that had one or more counties that failed to send absentee

³ Currently, the MVP Project is working with states to collect data regarding military voter participation rates, rejection rates, MOVE Act compliance, and existing barriers to military voter participation. We hope to issue our findings in June 2011.

ballots at least 45 days before the November 2010 election.⁴ While a vast majority of these violations were inadvertent, there were at least two states, New York and Illinois, where the violations were much more egregious. In New York, for example, after receiving a two-week waiver that allowed the state to begin mailing absentee ballots on October 1, 2010, 13 counties (including 3 in New York City) failed to meet this deadline and waited until October 5, 2010, or later, to mail absentee military ballots. Similarly, in Illinois, at least 35 counties failed to meet the 45-day deadline and, like New York, several counties waited until October 5, or later, to mail absentee ballots.⁵ In total, more than 45,000 military and overseas ballots were mailed less than 25 days before the November 2010 election.⁶

While the Voting Section of the Department of Justice negotiated settlements with both states, neither agreement failed to address the simple fact that mail delivery to overseas locations, especially war zones, may take as much as 30 days before the ballot is delivered.⁷ In other words, even though the Voting Section may have been able

⁴ The states include: Arkansas, Alabama, California, Indiana, Illinois, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Virginia.

⁵ One local election official in St. Claire County, Illinois (home to Scott Air Force Base and affecting nearly 1,300 ballots), openly flouted the MOVE Act. He told one reporter, "This is not just like sending out your grocery list. . . . I really don't care what the Department of Justice thinks." See Kurt Erickson, "Regulators examine Illinois' military ballots," October 13, 2010, *available at* http://www.stltoday.com/news/local/govt-and-politics/article_08eefef6-d732-11df-89a0-00127992bc8b.html.

⁶ A vast majority of these ballots were from the three counties in New York City.

⁷ The challenges associated with mail delivery to a war zone were documented by the Government Accountability in 2004, which found that 25 percent of military mail took more than 18 days to make the one way trip to Iraq. Neal P. Curtin, OPERATION IRAQI FREEDOM: Long-standing Problems Hampering Mail Delivery Need to Be Resolved, GAO Report 04-484 (Washington, D.C.: Government Accountability Office, Defense Capabilities and Management, April 14, 2004), p. 9-13, *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 <http://hqdainet.army.mil/mpsa/vote.htm>.

to add a few days after the election for the ballots to be returned, some military voters—especially those serving at the front lines—would not receive their ballots prior to the election and, thus, would not be able to vote. At the very least, the Voting Section should have required New York and Illinois to use express mail delivery to ensure pre-election delivery.⁸

The Illinois settlement agreement also suffered from a more serious defect—it purposefully treated some military voters in Illinois disparately from other military voters in the state. For military voters in 65 counties where their county followed both federal and state law, they received 59 days to receive and return their absentee ballots—their ballots had to be sent 45 days before the election (MOVE Act) and they had a 14-day grace period after the election to return their ballots (Illinois state law). However, for those counties that violated the MOVE Act, the Voting Section treated the 14-day grace period as an offset for any violation and, thus, refused to provide the military voters in these counties with additional time to vote. Not only does this decision send the wrong message to those counties that violated the law (i.e., don't worry about following the 45-day deadline because of the 14-day grace period), it treats military voters disparately based solely on whether their county follows the law. This is a clear violation of their right to equal protection.⁹

⁸ Ironically, the Voting Section had negotiated at least two agreements—one with Hawaii and one with Nevada—that required use expedited mail delivery services. See, e.g., Hawaii Memorandum of Agreement (available at http://www.justice.gov/crt/about/vot/misc/hi_uocava_moa.pdf); Nevada Letter Agreement (available at http://www.justice.gov/crt/about/vot/misc/nv_uocava_ltr.pdf).

⁹ As the Supreme Court emphasized in *Bush v. Gore*, 531 U.S. 98, 104 (2000), “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.”

Illinois, however, was not the only state that ran afoul of the Constitution with the assistance of the Voting Section. The Voting Section advised Maryland, as well as other states,¹⁰ that it could avoid a potential violation of the MOVE Act by mailing, at least 45 days before the election, a ballot that only contained federal races.¹¹ When Maryland implemented this plan, the MVP Project and a deployed member of the Maryland National Guard filed a lawsuit, arguing that the plan would not provide military voters in Maryland with sufficient time to vote in state races and, thus, would deprive them of their fundamental right to vote. The federal judge agreed and required the state to provide additional time for the ballot to be returned.¹² This lawsuit helped more than 600 military and overseas voters who otherwise would have been disenfranchised.

Another area of significant concern involves the Voting Section's overall effort to enforce the MOVE Act in 2010. The MVP Project, along with members of this Committee and many other members of Congress, repeatedly raised questions about the Voting Section's efforts to ensure full compliance with the MOVE Act prior to the election. The Department of Justice—from the Assistant Attorney General down—emphasized that the Voting Section would “vigorously” and “fully” enforce the law. Yet, in a recent report entitled “Moving Forward, 2010 OVF Post Election UOCAVA Survey Report and Analysis,”¹³ the Overseas Vote Foundation indicates several provisions of

¹⁰ In a recent panel discussion at the Overseas Vote Foundation's Fifth Annual UOCAVA Summit 2011 in Washington, D.C., Rokey Suleman, the Elections Director for the District of Columbia, indicated that the Voting Section provided him with similar guidance after the District of Columbia's waiver application was denied. It is unclear how many other states were provided this advice.

¹¹ Maryland's letter summarizing its understanding of the Voting Section's and FVAP's view of the MOVE Act can be found at: http://www.fvap.gov/resources/media/md_waiver_withdrawal.pdf.

¹² Doe v. Walker, No. 10cv2646, at 13-25 (D.Md. Oct. 29, 2010).

¹³ See www.overseasvotefoundation.org/files/OVF_2010_Post_Election_Survey_Report.pdf.

the MOVE Act may not have been implemented in some states, including the provision that required a ballot tracking system and the provision that prohibited states from rejecting ballots without a notary's signature.¹⁴

In addition, the MVP Project and others have raised concerns about the manner in which the Voting Section investigates whether a state or county has complied with the MOVE Act, especially the requirement to send absentee ballots at least 45-days before the election. While the Voting Section repeatedly mentions the fact that it reached agreements with 14 states prior to the election, it fails to discuss the equally important issue of whether the cases were discovered and resolved in a timely manner. Nor does it discuss the fact that many of the 14 cases were discovered by third parties, including the MVP Project and other concerned citizens. While the Voting Section emphasizes how "rapidly" it acted, its rapid action has to be put in the appropriate context. In Illinois, for example, the Voting Section filed a complaint and settled the case less than two weeks after it discovered the violation, but it took more than three weeks to discover the violation. Three weeks is an eternity for a military voter that only has 45 days to receive and return his or her ballot.

Part of the Voting Section's problem arises from its superficial investigation of MOVE Act violations. Once again, the Illinois case is illustrative. Rather than calling local election officials in Illinois (i.e., the ones who actually know whether the ballots were mailed), a Voting Section simply sent an email to the Illinois State Board of Elections to see if the state complied with the 45-day standard.¹⁵ The State Board

¹⁴ *Id.* at 7-8.

¹⁵ The email, as well as story about the Voting Section's investigation, can be found at: <http://biggovernment.com/capitolconfidential/2010/10/15/exclusive-illinois-elections-officials-caught-lying-about-military-ballots/#more-182057>.

responded that the ballots were sent out on September 18, 2010 in compliance with MOVE Act. The truth, however, was that 35 counties failed to mail out their ballots and, in most of the cases, they were not sent out until October 5, 2008. Had the Voting Section called the individual counties, which is how the violation was ultimately discovered by a third party, then the violation would have been discovered and resolved much sooner.¹⁶

Ultimately, in order to ensure full compliance with the MOVE Act for the 2012 elections, the Voting Section has to ensure violations are discovered and addressed in a timely manner. It needs to investigate violations at the county or local level and, if more expedient, address those issues at the local level. And, to the extent it provides guidance to the states or settles a case, it must ensure that such advice or settlement complies with the Constitution and does not disenfranchise voters in state races. Finally, the MVP Project requests that the Committee consider a minor modification that allows military voters a private right of action under the MOVE Act and the Uniformed and Overseas Citizens Absentee Voting Act. That will ensure that military voters will be protected even if the Voting Section fails to fully defend their rights.

¹⁶ Ironically, the Voting Section had a nearly identical situation in Virginia in 2008 and, as a result, missed widespread failures prior to the election. These failures are well documented in J. Christian Adams' story, "Disgrace: DOJ Fails to Protect Military Voting Rights," July 26, 2010, *available at* <http://pajamasmedia.com/blog/disgrace-doj-fails-to-protect-military-voting-rights/?singlepage=true>.