Testimony of Mr. Eric Eversole

Hearing on "Voting Wrongs: Oversight of the Justice Department's Voting Rights Enforcement"

Before the Committee on the Judiciary Subcommittee on the Constitution

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Mr. Chairman and members of the Subcommittee, thank you for providing me, as the Executive Director of the Military Voter Protection Project (MVP Project)[1], an opportunity to testify regarding the enforcement of military voting rights by the Department of Justice. We greatly appreciate the Subcommittee's longstanding support of our men and women in uniform and its efforts to protect their voting rights.

In 2009, Congress passed the most significant military voting reform in 20 years. The new law, the Military and Overseas Voter Empowerment Act ("MOVE Act")[2], required significant changes at both the federal and state level. In particular, the MOVE Act required states and local election officials to send absentee ballots to military voters at least 45 days before the election. It also required states to adopt at least one form of electronic delivery for blank absentee ballots (e.g., internet download, fax, or email). Finally, the MOVE Act required the Department of Defense (DOD) to provide greater military voter assistance by creating offices that would operate under the National Voter Registration Act (NVRA). All of these changes had to be implemented by the November 2010 election.

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[1] The MVP Project is a program of The Legacy Foundation, a 501(c)(3) non-profit organization. More information about our program can be found at www.mvpproject.org or www.legacyfoundation.us.

[2] Pub. L. No. 111-84 §§ 577 to 582, 583(a), 584 to 587, 123 Stat. 2190 (2009). Much of the MOVE Act was codified under the Uniformed and Overseas Citizen Absentee Voting Act, 42 U.S.C. § 1973ff et seq. ("UOCAVA").

A law, however, is only as good as the agency that enforces it and, in this context, the Voting Section of the Department of Justice has failed to uphold its obligations under the law.[3] Time and again, the Voting Section has demonstrated an unwillingness to aggressively enforce military voting rights, take timely action, or negotiate settlements that provide meaningful relief for military voters. These failures were well documented in 2010 and, unfortunately, continue to occur. Without corrective action, thousands of military voters will have their voices silenced on Election Day.

November 2010 Election

From day one, the Voting Section appeared to drag its feet when implementing the MOVE Act and lacked a clear strategy to enforce it. For nearly a year, the Voting Section and DOD promised to provide states with detailed implementation guidance on the MOVE Act, but that guidance never came, and the states were forced to guess how the Voting Section would enforce the new law. This failure not only caused a rash of last-minute litigation on the eve of the election, it created a significant amount of uncertainty for military voters.[4]

Overall, there were at least 14 states with one or more counties that failed to mail absentee ballots at least 45 days before the election in 2010.[5] While a vast majority of the violations were inadvertent errors, 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

[3] Only the Attorney General is authorized to bring a civil action under UOCAVA. 42 U.S.C. § 1973ff-4. That authority, in turn, has been delegated to the Voting Section.

[4] *See* M. Eric Eversole, *Military Voting in 2010: A Step Forward, But A Long Way to Go*, Military Voter Protection Project & AMVETS Clinic at the Chapman University School of Law (2011) (*available at* http://mvpproject.org/wp-content/uploads/2012/01/MVPProject_study_download.pdf).

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

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. In total, more than 45,000 military and overseas ballots were mailed less than 25 days before the November 2010 election.

Unfortunately, many of the settlement agreements negotiated by the Voting Section failed to fully protect military voters. Take, for example, the cases against New York and Illinois. Even though standard mail delivery to a warzone can take 30 or more days for the one-way delivery of a ballot,[6] the Voting Section negotiated a settlement with both states that allowed counties to mail absentee ballots using standard mail delivery. In other words, many of the ballots sent under these agreements to warzones would not have arrived before the election.

The flawed nature of these agreements became evident after the election. In New York, for example, local election officials rejected 1,609 of the 5,090 absentee military ballots (or 32 percent) that were returned in 2010.[7] Many of the ballots appeared to have been rejected because they arrived after the deadline negotiated between the Voting Section and New York. Clearly, the Voting Section's settlement agreement did not adequately protect military voters in New York.

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[6] The challenges associated with mail delivery to a war zone were documented in 2004 by the Government Accountability Office, which found that 25 percent of military mail took more than 18 days to make the one-way trip to Iraq. U.S. Gov't Accountability Office, GAO 04-484, Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved, pp. 9–13 (2004), *available at* http://www.gao.gov/new.items/d04484.pdf. The Military Postal Service Agency recommends that absentee ballots be sent at least 30 days before the election. *See Federal Voting Information*, Military Postal Service Agency, http://hqdainet.army.mil/mpsa/vote.htm (last visited April 16, 2012).

[7] Eversole, *supra* note 3, at 8.

More problematic was the Voting Section's attempt to avoid enforcement actions by advising jurisdictions to send federal-only ballots to military voters, especially in cases where the state could not certify state races.[8] This federal-only ballot presumably would allow the state to meet the strict requirements of UOCAVA (which applies only to federal elections), but would affect the military voter's right to vote in state and local races and could lead to other violations of the law. In Maryland, for example, a federal judge found a violation of a military member's fundamental right to vote in state and local elections when Maryland sent federal-only ballots, based on ill-advised guidance from the Voting Section, during the 2010 election.[9]

Another problem that plagued the Voting Section was its failure to discover and pursue cases in a timely manner. Of the 14 cases where a state or local jurisdiction failed to meet the 45-day deadline, the Voting Section pursued cases against only eight of those jurisdictions.[10] Many of those cases were discovered by third parties including by the MVP Project.[11] The delay in discovering these cases caused most of them to be

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[8] There is evidence that at least three jurisdictions received this advice, including Maryland, the District of Columbia, and the Virgin Islands (V.I.). *See* Letter from Linda H. Lamone, State Administrator, Maryland State Board of Elections, to Robert Carey, Director of the Federal Voting Assistance Program (Aug. 25, 2010), *available at* http://www.fvap.gov/resources/media/md_waiver_withdrawal.pdf; *see also* Letter from Carol Thomas-Jacobs, Chief, Civil Division, Virgin Islands, U.S. Department of Justice, to Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice (Sept. 2, 2010), *available at* http://www.justice.gov/crt/about/vot/misc/vi_uocava_letter.pdf; *see also* http://www.youtube.com/overseasvote#p/c/3A63B59A550D845D/13/x5VALB712o8 (Webcast of Rokey Suleman, the Elections Director for the District of Columbia, saying that the Voting Section offered the District a federal-only solution).

[9] *Doe v. Walker*, No. 10cv2646, at 13–25 (D. Md. Oct. 29, 2010).

[10] The eight states include Illinois, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Wisconsin.

[11] Of the 14 cases mentioned above, eight cases were discovered by third parties including violations in Alabama, Arkansas, California, Illinois, Indiana, Nevada, New Mexico, and Virginia. Six of those cases were identified in a September 27, 2010, letter from the MVP Project. *See* Letter from Eric Eversole, Executive Director of the MVP Project, to Hon. Eric Holder, U.S. Attorney General (Sept. 27, 2010), *available at* http://mvpproject.org/wp-content/uploads/2012/01/2010.09.27HolderLetter.pdf.

settled only two or three weeks before the election. Such last-minute litigation creates significant uncertainty for military voters and limited options for a remedy.

As for the remaining six cases, it appears that the Voting Section may have ignored these violations based, in part, on a faulty interpretation of the MOVE Act. As noted above, the MOVE Act requires a state to mail absentee ballots "not later than 45 days before the election."[12] While the language is clear, the Voting Section interpreted this provision to mean that military voters were only entitled to 45 days of total time to receive and return their ballot, disregarding whether those 45 days accrued before the election as required by the law. In other words, so long as a state provided a total of 45 days to receive and return absentee ballots, then the Voting Section refused to pursue a case or a remedy.

Consider, for example, Illinois, where state law provides military voters with an additional 14 days after the election to return their absentee ballot. Thus, as part of the Voting Section's settlement with Illinois, even though more than 35 counties violated the law, the Voting Section pursed remedies only against the six counties that sent their absentee ballots more than 14 days after the deadline.[13]

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

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The Voting Section sent a single e-mail in response to the letter, but provided no further information regarding the results of its investigations or how the violations were resolved.

[12] 42 U.S.C. §1973ff-1(8)(A).

[13] Consent Decree, United States v. The State of Illinois, No. 10-cv-06800 (D. Ill., Oct. 22, 2010) (*available at* http://www.justice.gov/crt/about/vot/misc/il_uocava_cd.pdf).

the election plus 14 days after the election). In the 35 counties that violated the law, however, the Voting Section permitted the state and counties to treat the military voters much differently based solely on their counties' failure to comply with the law. Such disparate treatment creates a potential violation of these voters' right to equal protection.[14]

Finally, notwithstanding the Voting Section's claim that it would "vigorously" and "fully" enforce the MOVE Act, that claim must not apply to the Department of Defense and its obligations under the MOVE Act. As noted above, DOD had an obligation to create installation voting assistance offices that would be covered by the NVRA.[15] These offices were supposed to provide the same type of voting assistance received by civilians at their local driver's license branch or public assistance office. Unfortunately, DOD did not comply with this requirement before the 2010 election and the Voting Section took no action apparent action.[16]

2012 Primary Elections

In some respects, the Voting Section appears to have learned from its errors in 2010. The Voting Section has been more proactive in calling states to see whether they will be monitoring local election officials and whether they will be in compliance for the 2012 elections. Of particular importance, the Voting Section initiated litigation against

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

[15] 10 U.S.C. § 1566a(a). While the MOVE Act did not require the Secretary of Defense to make the NVRA designation, that designation occurred on November 15, 2010. *See* http://www.dtic.mil/whs/directives/corres/pdf/DTM-10-021.pdf.

[16] *See* M. Eric Eversole and Hans A. von Spakovsky, *A President's Opportunity: Making Military Voters a Priority*, Heritage Foundation Legal Memorandum No. 45 (2011) (*available at* http://www.heritage.org/research/reports/2011/07/a-presidents-opportunity-making-military-voters-a-priority#_ftn35).

New York because its presidential primary date made it impossible for the state to mail absentee ballots at least 45-days before the election. A federal judge agreed ordering the state to move its primary to June 2012 and, thus, ensuring that military voters will be able to participate in the November election.[17]

Unfortunately, many of the problems that occurred in 2010 are reoccurring in 2012. Thus far, at least three states—Alabama, Ohio, and Wisconsin—have had local election officials that failed to mail absentee military ballots at least 45 days before their respective primaries. In Wisconsin, for example, at least 65 municipalities did not mail absentee ballots to military voters as required by federal law and, like New York in 2010, had municipalities that mailed their absentee ballots less than 30 days before the election.[18] Alabama, in turn, had violations in 47 counties and many of those ballots were sent less than 30 days before the election.[19]

Like many of the cases in 2010, the Voting Section is discovering the violations and taking action with little or no time to remedy the violation. For example, the Alabama complaint was filed only 18 days before the election and the Wisconsin complaint, as well as a consent decree, was filed 11 days before the primary election. Such late-filed actions provide little time to notify affected military voters and, more importantly, they limit a judge's ability to remedy the violation. This is particularly true

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[17] Dan Wiessner, "Judge faults N.Y. lawmakers, adopts new primary calendar," Feb. 9, 2012 (*available at* http://newsandinsight.thomsonreuters.com/Legal/News/2012/02_-_February/Judge_faults_N_Y__lawmakers,_adopts_new_primary_calendar/).

[18] Consent Decree, *United States v. Wisconsin*, No. 12-cv-197 (D. Wis., Mar. 23, 2012) (*available at* http://www.justice.gov/crt/about/vot/misc/wi_uocava_cd12.pdf.)

[19] Order on Preliminary Injunction, *United States v. Alabama*, No. 12-cv-179 (D. Ala., Mar. 12, 2012) (*available at* http://www.justice.gov/crt/about/vot/misc/al_uocava_pi_opinion.pdf).

in cases like Alabama where there is no consent decree and the case has to be litigated. A judge in such a case has few available remedies.

Worse yet, the Voting Section once again allowed the local jurisdictions in Wisconsin and Alabama to mail overseas military ballots using first class mail, even though they were being sent less than 30 days before the election. In both states, the Voting Section should have required the use of express mail delivery, especially if the ballots were being sent overseas. No one should be surprised when military voters are disenfranchised again in both states.

Most shocking, however, was the Voting Section's willingness to settle the Wisconsin case without knowing whether 350 municipalities—that is, nearly 20 percent of all municipalities—had mailed their absentee military ballots at all or on time. While the settlement agreement required the Government Accountability Board to order a report from the non-responding local jurisdictions, there was no remedy or consequence if the municipality refused to provide that information. In fact, on the day before the election, one local reporter indicated that 56 clerks still had not provided the requested information.[20] The military voters in these municipalities were left unprotected by the Voting Section.

Finally, it still is not clear whether the DOD has fully implemented the provisions requiring NVRA assistance on military installations. However, given the low participation rates in several state primaries, it is unlikely that these voting assistance offices have been fully created or in compliance with the NVRA. For example, South Carolina reported that it sent out 191 absentee ballots to military and overseas voters and New Hampshire sent out for its primary, while New Hampshire mailed out 163

[20] Kirsten Adshead, "Call to Duty: Military members at risk of missing WI," April 2, 2012, (http://www.wisconsinreporter.com/call-to-duty-military-members-at-risk-of-missing-wi-vote).

absentee ballots.[21] Both figures represent a small percentage of the military and overseas voters in these states. The same can be said about the 22,657 military and overseas voters who requested an absentee ballot in Florida. Had DOD fully implemented the voter assistance offices on each installation, as required by the MOVE Act, the participation rates among military voters should be much higher.

Conclusion

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, DOJ must ensure that its sister agency DOD fully complies with its obligations under the MOVE Act. Our men and women in uniform deserve to have their rights protected in the same way they protect our rights.

[21] Pew Election Dispatches, "New Hampshire Dispatch: Ballots Already Cast in Presidential Primary," Dec. 6, 2011; Pew Election Dispatches, "Primaries Dispatch: Thousands of Military and Overseas Ballots Already Cast in Upcoming Elections," Jan. 17, 2012 (available at http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=85899362969).