



CALTECH/MIT VOTING TECHNOLOGY PROJECT

A multi-disciplinary, collaborative project of
the California Institute of Technology – Pasadena, California 91125 and
the Massachusetts Institute of Technology – Cambridge, Massachusetts 02139

MILITARY VOTING AND THE LAW: PROCEDURAL AND TECHNOLOGICAL SOLUTIONS TO THE BALLOT TRANSIT PROBLEM

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Key words: overseas voting, military voting, military voter participation, ballot transit

VTP WORKING PAPER #53
March 2007



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During the 2000 presidential election controversy in Florida, the ballots submitted by individuals living overseas—especially military voters—were seen as crucial to the election outcome as the margin of potential victory was so small that these ballots could turn the election from one candidate to the other. Headlines at the time noted that “Odds Against Gore Absentee Gains: Republican-Leaning Counties Appear to Have More Uncounted Overseas Ballots,”¹ “Bush Lead Swells with Overseas Votes,”² “Military Ballot Review is Urged,”³ And “How Bush Took Florida: Mining the Overseas Absentee Vote.”⁴ For many Americans, however, the controversy surrounding the votes of military personnel and overseas voters, despite its importance, may have seemed both bewildering and esoteric. The debate centered on minute details; whether or not certain overseas absentee ballots were valid and could therefore be counted if they lacked postmarks, were received within given time periods, had missing signature or were deficient in other statutorily required characteristics, that are beyond the interest of the typical individual. However, several key legal skirmishes were fought within the broader context of the recount battle concerning whether certain absentee ballots could be counted, the resolution of which could have swayed the outcome of the 2000 presidential election.⁵ Issues of equal protection,

¹ Keating, Dan and John Mintz. 2000. “Odds Against Gore Absentee Gains: Republican-Leaning Counties Appear to Have More Uncounted Overseas Ballots.” *The Washington Post*. November 16: A-26.

² Schmidt, Susan. 2000. “Bush Lead Swells with Overseas Votes.” *The Washington Post*. November 18: A-1

³ Schmidt, Susan. 2000. “Military Ballot Review is Urged.” *The Washington Post*. November 21: A-1.

⁴ Barstow, David and Van Natta, Jr., Don. “How Bush Took Florida: Mining the Overseas Absentee Vote, New York Times, Sunday, July 15, 2001, page 1. These data were also examined in a paper by Kosuke Imai and Gary King, “Did Illegally Counted Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?” *Perspectives on Politics*, volume 2, number 3, September 2004, page 537-549.

⁵ See *Harris v. Florida Elections Canvassing Comm’n*, 122 F.Supp.2d 1317, 1321 (N.D. Fla.), *aff’d* 235 F.3d 578 (11th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001) and *Bush v. Hillsborough County Canvassing Board*, 123 F.Supp.2d. 1305 (N.D.Fla. 200) discussed *infra* at pages 33-34.

federalism and statutory interpretation played large roles in this litigation. The tension between allowing overseas votes to be counted and ensuring a fair election that complied with state law was at the heart of the debate and related litigation.

This debate is not new and, as it relates to military voting, has centered for years on the laws and procedures that individuals are required to follow before they can vote. The statutory frameworks put in place to govern voting are of critical importance because they ultimately determine who can vote, in what manner they can vote and the requirements that such votes must meet in order to be counted. In the past, many states used procedural hurdles to systematically exclude minorities and the poor from voting.⁶ Procedures were implemented to make it more difficult, if not impossible, for such targeted populations to vote. More recently, however, the expansion of voting rights overall, and granting the right to vote to those 18-years-old and older in particular, has significantly broadened the pool of potential voters, particularly for those in the military.⁷

One difficulty that arises from the expansion of the pool of potential voters is the added burden of dealing with a voting population that is spread across the globe and is in highly

⁶ Key, V.O., 1949. *Southern Politics in State and Nation*. New York: A.A. Knopf; Kousser, J. Morgan, 1974. *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*. New Haven: Yale University Press.

⁷ While the Department of Defense does not provide specific information on how many of its active duty members are eligible voters between the ages of 18 and 20, demographic information for FY2004 indicates that 112,128 active duty enlisted members are aged 17-19 and 461,930 are between the ages of 20 and 24. *See* Population Representation in the Military, FY 2004, Appendix B, Table B-22, available at <http://www.dod.mil/prhome/poprep2004/>. In 2004, 69.7 percent of new recruits were between the ages of 17-20 with 122,670 joining the active duty military. *See id.* at Appendix B, Table B-1. There were an additional 89,323 members of the reserve military in 2004 aged 17-20. *Id.* at Appendix C, Table C-16. Previously disenfranchised minority voters also make up a significant percentage of the military with African-Americans comprising 20.56% of active duty enlisted personnel in 2004 with 243,486 members, plus an additional 18,286 officers. *See id.* at Appendix B, Tables B-24 & B-38.

inaccessible areas.⁸ Such challenges necessitated new rules that facilitate voting for those in the military living overseas. States responded by liberalizing the rules for military voting and, as a result, purely procedural issues have moved to the background, although as 2000 showed such procedural rules can still present salient problems for military voter participation. Instead, laws seeking pragmatic solutions to logistical military voting problems have moved to the forefront. The concomitant increase in the availability and use of technology has provided an opportunity to address such problems. In many ways, military voting has become part of the e-government revolution, with technology being used to address bureaucratic failures.⁹ However, such movements are not universal and have not solved all of the potential issues with military voting.

Estimates indicate that there are between 6 and 7 million Americans who are overseas, in the Armed Forces, or dependents of Armed Forces members residing abroad.¹⁰ These American citizens include soldiers stationed in places such as Iraq and Afghanistan currently fighting the war against terrorism; missionaries working in remote regions of the world; younger Americans studying abroad; and Americans who work overseas, building economic opportunities in the global economy. Each of these populations present their own challenges for voting officials, but military voters are often the most difficult to reach because of the logistical problems associated with sending ballots to mobile individuals operating in potentially inaccessible and hostile areas. The U.S. Congress has passed various statutes for decades in an attempt to facilitate the process

⁸ Not only does this include members of the armed forces who might be serving in remote regions of Iraq or Afghanistan it also includes those who are at sea (for example in submarines) or those whose precise whereabouts might be considered classified for security purposes.

⁹ Fountain, Jane E. 2001. *Building the Virtual State: Information Technology and Institutional Change*. Washington, DC: Brookings Institution Press.

¹⁰ Walker, David M. 2001. "Elections: Issues Affecting Military and Overseas Absentee Voters." Testimony before the Subcommittee on Military Personnel, Committee on Armed Services, U.S. House of Representatives. Washington, D.C.: United States General Accounting Office. May 9.

for overseas and military voting¹¹ including the Solider Voting Act of 1942,¹² the Federal Voting Assistance Act of 1955,¹³ the Overseas Citizens Voting Rights Act of 1975¹⁴ and the currently operating law that superseded them all, the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (“UOCAVA”).¹⁵ Such attempts have met with varying level of success in making it easier for overseas and military voters to vote in state-run elections.

Although a very small number of scholars have argued that military voters do not have a difficult time voting,¹⁶ data from numerous studies and analyses conducted since the 2000 election show that civilians living overseas and personnel in the uniformed services have a difficult time participating in the electoral process using the current paper-based absentee voting system. In an examination of absentee voting in California, researchers found that UOCAVA voters were roughly two times more likely to not return a requested absentee ballot and approximately three times more likely to have that ballot challenged when compared to non-UOCAVA voters.¹⁷

This problem is not new. In 1942, 137,686 applications for federal “war ballots” were received, but only 28,051 of these ballots were cast in the election.¹⁸ Contemporary accounts indicate that few military personnel voted using conventional state absentee voting procedures

¹¹ See Coleman, Kevin J. The Uniformed and Overseas Citizens Absentee Voting Act: Background and Issues. January 30, 2003. *Congressional Research Service*.

¹² Public Law 712-561

¹³ 42 U.S.C. § 1973cc, et seq.

¹⁴ 42 U.S.C. § 1973dd, et seq.

¹⁵ 42 U.S.C. §§ 1973 ff through ff-6.

¹⁶ Diane Mazur. 2005. “The Bullying Of America: A Cautionary Tale About Civil-Military Relations And Voting Reform.” <http://www.law.ufl.edu/faculty/publications/pdf/mazur3.pdf>

¹⁷ Alvarez, R. Michael, Thad E. Hall, and Betsy Sinclair. forthcoming. “Whose Absentee Votes Are Counted?” *Electoral Studies*.

¹⁸ Martin, Boyd A. 1945 at footnote 5.

during World War II when personnel were dispersed all over the world.¹⁹ The low response rate in 1942 was due to several factors that still present problems today. The main factor is simply the speed at which a paper ballot can be created, mailed to an overseas voter, filled out, and mailed back. Such time scales are not conducive to some states' regulations about when voting materials become available, as a result of administrative processes or simply the schedule between primaries and general election, or the date by which they must be returned to an election official to be considered valid.

For example, the deadline for registering as a UOCAVA voter ranges from 30 days prior to an election in 21 states to absolutely no registration requirement in 15 states. Similarly, ballots have to be received prior to Election Day in several states, but can be received even after Election Day in 15 states.²⁰ This variation can easily create confusion among overseas and military voting impact the very ability of these voters to receive their ballots in time to return them for tabulation. According to their most recent survey of military and overseas voters, almost one-third of all military personnel and 20 percent of non-federally employed overseas civilians that did not vote in the 2000 election reported that they did not cast ballots because they either did not receive the ballot they requested or they received the ballot too late for it to be returned in time.²¹ Recent news coverage noted that many ships deployed during the Iraq war received no mail deliveries until they were well-away from their deployed positions, delaying delivery for months.

In this article, we examine how the issue of military voting has changed over time from being a procedural one, focused on how states could change election laws to promote military

¹⁹ Martin, Boyd A. 1945. "The Service Vote in the Elections of 1944." *American Political Science Review*. 39, 4: 720-732.

²⁰ Walker, David M. 2001 at footnote 3.

²¹ See <http://www.fvap.gov/services/survey.html>

voting within a given set of parameters, to a technology one that focuses on how new technologies can facilitate military voting. We argue that major wars have spurred procedural changes in the election process and that, after universal suffrage was achieved, the federal role in military voting has allowed for technological efforts that facilitate military voting to move to the fore. However, these efforts to promote technological “fixes” to the problems with military voting still require the acquiescence of the state and local governments who run the elections. For much of American history, the idea of allowing military personnel to vote has been problematic due to domestic political concerns.²² Allowing more military personnel to vote and attempts at governing the mechanisms for doing so at the federal level have come into conflict with the right of states to determine how elections are conducted in the states. Technology may ultimately be the means of resolving this tension and ensuring that not only do military voters have the ability to exercise their constitutionally guaranteed right to vote but states can ensure fair elections that comply with their individualized election law.

Conflicting Principles: State Control Versus The Federal Role

Much of the conflict that arises concerning voting in the military results from the shared power that the federal and state governments have over federal elections, shared power with roots in the U.S. Constitution.²³ Congress has broad power to regulate federal elections under the Elections Clause:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

²² See, for example, *Soldiers and Civilians: The Civil-Military Gap and American National Security*. Peter Feaver and Richard Kohn, eds. 2001, Cambridge, MA: MIT Press.

²³ See Gamboa, Anthony H. 2001. *The Scope of Congressional Authority in Election Administration*. GAO Report to Congress 01-470, March 2001.

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.²⁴

As Daniel R. Ortiz and Pamela S. Karlan note that “the Election Clause has traditionally been interpreted [by the Supreme Court] to give Congress virtually plenary power over a wide range of aspects related to congressional elections.”²⁵ As early as 1879, the Supreme Court evaluated the power of Congress to enact legislation, in that case *The Enforcement Act of 1870*, which sought to ensure citizens the ability to vote in federal elections conducted by states “without molestation.”²⁶ An argument arose whether Congress could provide piecemeal changes to only some of the aspects of the state-run system or if, should Congress want to have any effect at all, it needed to completely preempt state law and assume full control over the entire election process for federal offices.²⁷ The Court rejected this argument and established, pursuant to the Elections Clause, that Congress

may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.²⁸

Thus, Congress is entitled to enact regulations and inject federal law into whatever limited aspects of state election procedures it deems necessary. Such power has continually been

²⁴ Article I, Section 4, Clause 1

²⁵ Karlan, Pamela S. and Ortiz, Daniel R.. “Congressional Authority to Regulate Elections.” in *To Assure Pride and Confidence in the Electoral Process: Task Force Reports to Accompany the Report of the National Commission on Election Reform*. August 2001: 15-16.

²⁶ *Ex Parte Siebold*, 100 U.S. 371, 382 (1879)

²⁷ *Id.*

²⁸ *Id.* at 383-84.

reiterated by the Supreme Court. In 1932, the Court again reviewed the Election Clause’s grant of power to Congress to regulate the time, place and manner of federal elections and stated that

[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of “times, places and manner of holding elections,”²⁹

Such power includes the authority to regulate congressional primary elections as they are a “necessary step” in choosing federal officeholders.³⁰ As recently as 1997, the Supreme Court has reaffirmed the supremacy of Congress in overriding state election procedures as they apply to federal elections.³¹ One key characteristic of all of these cases is that Congress has not yet exercised its plenary power to completely dictate how federal elections take place but has instead provided incremental and targeted regulation to address specific perceived problems with state-run elections.

One aspect of elections that Congress cannot regulate at all is who is eligible to vote in federal elections, as that right is granted to states under Article I, Section 2 and the Seventeenth Amendment;³² each states that “the electors in each state shall have the qualifications requisite

²⁹ *Smith v. Holm*, 285 U.S. 355, 366 (1932).

³⁰ *See United States v. Classic*, 313 U.S. 299, 320 (1941).

³¹ *See Foster v. Love*, 522 U.S. 67 (1997) (invalidating Louisiana’s “open primary” held in October as a violation of 2 U.S.C. §§ 1 & 7 setting a uniform day for electing Senators and Representatives). *See also* Gamboa at 5-7 (discussing recent cases upholding Congressional authority to determine registration procedures under the national Voter Registration Act of 1993).

³² Gamboa, Anthony H. 2001 at n.1; *see also Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966).

for electors of the most numerous branch of the state legislature.”³³ Thus under the Constitution, the states, not the federal government, set voter eligibility requirements for federal election, including the voting eligibility for military personnel. Only through constitutional amendment has state discrimination against black voters, female voters, poor voters, and individuals aged 18-20 been ended.³⁴ These four amendments³⁵ have, over time, made addressing the problems associated with voting by military personnel less problematic, as allowing military members to vote no longer set a bad precedent by enfranchising certain ‘unwanted’ classes of voters who happen to serve in the military. However, prior to universal suffrage in 1971, states and localities were reticent to allow military voters—especially military voters stationed overseas—to participate in elections because of the enfranchisement issues it raised.³⁶

Two examples illustrate this point. First, until the mid-1800s, several states only allowed property owners to vote, thus disenfranchising landless individuals serving in the military. Second, although African-Americans were able to serve in the military and often forced to serve through the compulsory draft, they were denied voting rights by states with Jim Crow laws and all-white primary elections.³⁷ In both cases, individuals served their nation, often by force, yet state laws governing elections prevented their participation in the electoral process.

³³ U.S. Constitution, Article 1, Section 2 & Seventeenth Amendment.

³⁴ Obviously, the passage of this amendment did not stop racial discrimination. It was not until the passage of the Voting Rights Act in 1965 that states were forced to end most forms of legal discrimination against African-Americans and other minority voters.

³⁵ U.S. Constitution, Fifteenth Amendment (race), Nineteenth Amendment (gender), Twenty-Fourth Amendment (abolition of poll tax) & Twenty-Sixth Amendment (age lowered to 18).

³⁶ As Robert Dahl noted in his book *On Democracy*, the United States only initiated universal suffrage with the passage of the 26th amendment, which lowered the voting age nationally from 21 to 18. Prior to the passage of this amendment, the United States had systematically disenfranchised various segments of the population who, although unable to vote, served in the armed forces.

³⁷ Throughout this analysis, we will rely on Keyssar, Alexander. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York: Basic Books.

The combination of Congress' incremental exercise of its regulatory authority over federal elections and the interplay between federal and state control over elections, often rooted in attempted disenfranchisement, resulted in very slow progress in the expansion of both the right and ability of military voters to cast ballots in federal elections. It was often wars or other major military mobilizations that drove the changes that ultimately occurred in both enfranchisement and procedural improvements in military voting.

Starting at the Beginning: The Revolutionary War

Before there was even a United States or a Constitution, there was a war and debate over whether individuals who had fought that war should be eligible to vote, despite legal barriers to their participation in the political process. Many have thought that the "horror of wartime experiences...amply earned a man the right to choose his leaders and participate in politics. [Thus,] principled reasons for enfranchising men who bore arms were to be heard repeatedly in the course of American history."³⁸ During the Revolutionary War state militia associations, which were typically comprised of working class individuals, agitated for the abolition of certain restrictions on suffrage such as property or landholding requirements. In many states, including Georgia, Maryland, New Jersey, New York, North Carolina, and Pennsylvania, the franchise was expanded to include many more working class individuals. However, many other states did not change their laws governing the franchise during the war, even though this created a situation where many of the men who served in the state's militia during the war were completely unable to participate in the political process within their state or benefit politically from the freedoms for which they were fighting.

³⁸ Keyssar, Alexander. 2000 at footnote 12.

The key issue related to voting in the Revolutionary War and its immediate aftermath was not *how* individuals voted—the methods or procedures used—but instead was *who* could vote. Over the next 80 years, the rights of military voters were a relatively low priority. Between the Revolutionary War and the Civil War, the United States was engaged in only two major conflicts—the War of 1812 and the Mexican American War—and many smaller military actions such as fighting the Barbary pirates.³⁹ Although the War of 1812 occurred during a presidential election year and the Mexican-American War occurred during a mid-term election, the War of 1812 involved troops fighting relatively close to home, and neither war involved large-scale mobilizations. With relatively few troops affected by an interaction between war-fighting and voting, there was little clamor at this time to make military absentee voting easier.⁴⁰ This would change with the Civil War, as the nation would undergo the largest military mobilization in its history. With more than 10 percent of the population serving in the military, pressures to improve voting rights for military personnel would come to the forefront.

The Civil War and the 1864 Presidential Election

Although it is now taken for granted, the election of 1864 was an amazing phenomenon. No nation had ever held a general election in the middle of a war, much less a Civil War. There had never been a similar situation where there was, in essence, a referendum on an ongoing war where all citizens, including those doing the fighting, could participate. Two critical questions arose in this first effort to enfranchise military personnel to vote in the election. First, by what

³⁹ A complete history of these smaller wars can be found in Boot, Max. 2002. *Savage Wars of Peace*. New York: Basic Books.

⁴⁰ Burcher, William M. 1944. “A History of Soldier Voting in the State of New York.” *New York History*. 25: 459-481.

procedures could Union soldiers participate in the 1864 election? Second, would the military vote have any direct impact on the outcome of the 1864 election?

Laws governing the participation of military voters varied from state to state, but in 18 Northern states, it was possible for military men to vote using absentee procedures. Because the Union military command was largely organized by state military units, it was relatively easy for states with absentee voting procedures to conduct elections for statewide offices in the field. Each of the states could set up polling sites in the encampments for its units to facilitate voting, creating one of the first instances of remote voting in America. However, several northern states, such as Indiana, did not allow for absentee voting. To accommodate these military voters, President Abraham Lincoln exercised his power as commander-in-chief and called for a cessation of military operations prior to the election to allow military personnel from affected states the time to go home and vote. In part, this was possible because other military voters from states that did provide for absentee voting could vote prior to Election Day and be available for military operations.⁴¹

The 1864 election centered around one issue: war and peace. Democrats, led by former Union General George B. McClellan, were seen as the party of peace (although the question of whether peace could come only if the South recognized the Union divided Democrats throughout the election campaign).⁴² By contrast, Lincoln's position was clear: the war would continue until the South capitulated. Because the 1864 election took place after a string of decisive military victories by Union forces, including the destruction of Atlanta, many in the military viewed the Democrat's position of seeking peace without conditions as being unfaithful to the troops. This

⁴¹ McPherson, James, M 1982 at footnote 16.

⁴² McPherson, James, M. 1982. *Ordeal by Fire: The Civil War and Reconstruction*. New York: McGraw-Hill Publishing Company. 440-442.

characterization was enhanced by Republican efforts to link northern Democrats with anti-war and anti-Union activities.⁴³ Letters from Union soldiers suggested that they thought a Democratic victory would bring shame and dishonor on soldiers who had sacrificed for the Union cause.⁴⁴

Lincoln recognized that the military vote could be critical to his re-election and maintaining a Republican majority in Congress. In the 12 states where civilian and military votes were counted separately, Lincoln won 78% of the military vote.⁴⁵ Although military voters were key members of the Lincoln electoral coalition, there is some controversy regarding their importance. Some scholars argue that the soldier vote provided the margin of victory in six states: Connecticut, Illinois, Indiana, New Jersey, New York, and Maryland, and without these votes, McClellan would have won the election.⁴⁶ However, the data in Table 1, taken from Winther⁴⁷ show that the soldier vote enhanced marginal victories that Lincoln would have achieved with only the civilian vote. However, the soldier vote was likely critical in congressional races; and solidified the Republican control of Congress. In the 1864 House elections, 31 seats were won with a margin smaller than 1,000 votes. Of these, 8 remained Democrat, 3 remained Republican, zero switched to Democrat, and 20 switched to Republican.⁴⁸

[Table 1 about here]

⁴³ McPherson, James, M 1982 at footnote 16.

⁴⁴ Catton, Bruce. 1957. *A Stillness at Appomattox*. Garden City, New York. Doubleday. p. 323. and McPherson, James, M.1982 at footnote 16.

⁴⁵ McPherson, James, M 1982 at footnote 16.

⁴⁶ Foote, Shelby. 1974 *The Civil War, A Narrative. Volume 3: Red River to Appomattox*. New York: Random House. 625.

⁴⁷ Winter, Oscar Osburn. 1944. "The Soldier Vote in the Election of 1864." *New York History*. 25: 440-458. See also McPherson, James, M. 1982 at footnote 16.

⁴⁸ These data are from *Congressional Quarterly's Guide to U.S. Elections, 3rd Edition*. Washington, D.C.: Congressional Quarterly, Inc, 1994: 1009-1012.

The 1864 election featured new legal mechanisms—remote and absentee voting—that allowed military personnel serving away from home to participate in the electoral process. For example, election officials from a state would travel to the units in the field, set up a polling place, and collect the ballots of the soldiers.⁴⁹ These procedures enfranchise hundreds of thousands of men serving their country and also had a direct impact in the outcome of a presidential election. This case illustrates how voting processes and procedures can improve the enfranchisement rate of military voters as well as affect who represents the people in government.

Military Voting: From a Civil War to a World War

After the Civil War, the election landscape in the states changed in several ways. First, to combat actual or perceived election fraud, many states adopted voter registration laws that were intentionally quite restrictive. Individuals had to register to vote before going to the polls on Election Day; in some cases, individuals had to re-register in person before each general election. Not surprisingly, these restrictions proved to be quite burdensome to soldiers, who were not at home and therefore unable to navigate the maze of election rules.⁵⁰ Second, the Civil War served as the impetus for more states to adopt absentee voting laws. Prior to 1861, only Oregon allowed men who were away from home on Election Day to cast their ballots from a remote location. As Keyssar notes, “the Civil War—and the desire to permit soldiers to vote during the war—severed the link between voting and physical presence in a community.”⁵¹ Still, many absentee voting laws benefited only citizens who were still within the state on Election Day. For example, in 1913, Missouri and North Dakota allowed “voters who are absent from their regular

⁴⁹ See Winter 1944 at footnote 42.

⁵⁰ Keyssar, Alexander. 2000 at footnote 12.

⁵¹ Keyssar, Alexander. 2000 at footnote 12.

election districts on the day of an election to send home their ballots by mail *from any point within their respective states.*"⁵² Only eight states extended absentee voting rights to primary elections, and Minnesota explicitly precluded absentee voting in primaries.⁵³ By 1918, 18 states had adopted laws designed explicitly to enfranchise soldiers whose military service prevented them from voting in their home precinct.⁵⁴ All total, 28 states had absentee voting laws that would cover military personnel, although this coverage was not always explicit.

These new absentee voting laws were not intended for soldiers stationed overseas. As burdensome as voting was for many men who fought in the Civil War, the difficulties faced in 1864 were simple compared to those encountered by the soldiers voting in the congressional elections of 1918, when approximately two million soldiers were stationed overseas. Not all of these men were eligible to vote, some were under the age of 21, but for those who did want to vote, the obstacles to be overcome were daunting.

Consider the impossibilities of the absentee voting law in Missouri. There, a military absentee voter was required to request an absentee ballot in person or by mail not less than five days or more than 15 days before the election.⁵⁵ Assuming that a request for such a ballot arrived at a registrar's office exactly 15 days before the election and was promptly processed, a soldier stationed in France would have but two weeks for the requested ballot to be mailed to him overseas, for him to mark the ballot, and for the ballot to be returned. Considering that the first trans-Atlantic airplane flight did not occur until 1919, the odds were long that a ballot could get from St. Louis to France and back in two weeks.

⁵² Ray, P. Orman. 1918b. "Absent-Voting Laws, 1917." *American Political Science Review*. 12, 2: 251-261.

⁵³ Ray, P. Orman. 1918b at footnote 24.

⁵⁴ Ray, P. Orman. 1918a. "Military Absent-Voting Laws." *American Political Science Review*. 13, 2: 264-274.

⁵⁵ Ray, P. Orman. 1918a at footnote 20.

In World War I, state election laws and federal governance issues disenfranchised military personnel serving overseas. The governance issues were highlighted by the War Department's decision that men stationed overseas would not be able to participate in the 1918 election.⁵⁶ Additionally, two pieces of federal legislation that would have facilitated military voting in 1918 were not acted upon. One bill would have created a Federal Election Commission to oversee voting by military personnel and a second would have made it easier for military voters to vote for federal offices. The Department of War initially refused to supervise voting in congressional elections by soldiers serving overseas but suggested that states would be able to conduct elections in order to enfranchise soldiers from their respective states. However, the Department of War later decided that "the soldier vote could not be taken in France or on other foreign soil in the theater of war without serious interference with military efficiency."⁵⁷ For those soldiers away from home but still on U.S. soil, the option of voting via absentee ballot existed but it is not known what percentage of these servicemen voted. However, the 4.7 million soldiers deployed in the European theatre in 1918 likely found it difficult, if not impossible, to vote. Importantly, military votes—or the lack thereof—may have affected control of Congress; 24 House seats in 1918 were decided by fewer than 1,000 votes and control of Congress switched from the Democrats to Republicans.⁵⁸

Voting in a True World War

In World War I, the country participated in a war in Europe that lasted less than three years and resulted in U.S. forces serving away from home during only one mid-term election. Between the two World Wars, the U.S. did not have sizable forces stationed overseas to be

⁵⁶ Martin, Boyd A. 1945 at footnote 5.

⁵⁷ Martin, Boyd A. 1945 at footnote 5.

⁵⁸ Martin, Boyd A. 1945 at footnote 5.

affected by the absentee voting procedures in the states. As a result, little action was taken by the states to improve absentee military voting laws. However, the United States' lengthy involvement in World War II created pressure for the military to facilitate the soldier vote and counter-pressure to ensure that military men did not get ballots. The conflict between those who wanted to facilitate the military vote and those who wanted to prevent it illustrate the problems that vexed military voting prior to the granting of universal suffrage in 1971.

The problem of facilitating military suffrage in World War II was daunting. By 1942, several million American soldiers were scattered over Europe, Africa, Asia and the Pacific, in addition to those stationed away from home in North America. Unlike in the Civil War, soldiers did not serve in units or battalions based on their place of origin. One battalion in Italy, for example, was comprised of men from 36 different states.⁵⁹ Additionally, most states retained the stringent voter registration requirements that were adopted during the progressive era. Military personnel were still expected to register to vote—often in person—and to maintain their registration—often through annual renewals—while serving overseas or otherwise away from home. Most states did not differentiate among those absentee voters serving overseas, those serving in the continental United States, and civilians on the home front serving the nation in other ways. Likewise, with the exception of Mississippi and South Carolina, all states that had poll taxes required military personnel to pay these taxes before voting.⁶⁰

The absentee ballot laws in the 48 states remained quite divergent. In total, 34 states had relatively liberal absentee voting laws and another 11 states had limited absentee voting laws. For instance, some states would not allow military voting in primary elections or voting for any office except the presidency. Other states had liberal absentee voting rules for soldiers casting a

⁵⁹ Martin, Boyd A. 1945 at footnote 5.

⁶⁰ Martin, Boyd A. 1945 at footnote 5.

ballot from within the confines of the state, but not from an aircraft carrier in the middle of the Pacific Ocean. Three states did not allow for absentee voting.⁶¹

The implementation of state absentee voting laws for military voters remained difficult primarily because of ballot transit issues. In most states, the statutory requirements for the time from when an absentee ballot would be issued to when it had to be returned was less than 30 days. Even in peacetime this would be a challenge for a soldier stationed outside the United States; the war made this challenge more daunting. Congress attempted to address the non-uniformity of state laws prior to the 1942 mid-term election via the Soldier Voting Act by requiring states to create a federal ballot that allowed soldiers to vote for the four major federal offices – a President, Vice-President, Senator, and Representative; states could also opt to add state or local races.⁶² The Department of War provided soldiers with a post card which, if sent to their state's Secretary of State, would result in them receiving the federal ballot. The Department of War would then facilitate getting the ballot back to the appropriate Secretary of State to be counted.

One interesting feature of the 1942 law is that it had a mechanism for each Secretary of State to submit to the Treasury Department an estimate of the costs associated with implementation of this Act. The Treasury would reimburse the State for the costs incurred, including “the expense of preparing and printing post cards, official war ballots, booklets, envelopes, instructions, and other supplies, and the cost of mailing and express charges.”⁶³ This

⁶¹ American Political Science Association. 1952. “Findings and Recommendations of the Special Committee on Service Voting.” *American Political Science Review*. 46, 2: 512-523. and Martin, Boyd A. 1945 at footnote 22.

⁶² Martin, Boyd A. 1945 at footnote 5 and United States Statutes at Large. 1943. “An act to provide for a method of voting, in time of war, by members of the land and naval forces absent from the place of their residence.” Washington, D.C.: Government Printing Office, 753-757.

⁶³ United States Statutes at Large. 1943 at footnote 33.

makes the 1942 law one of the first, if not the first, case where the federal government subsidized state and local election administration.

While this law sought to facilitate voting by improving ballot accessibility; it did not address voter registration and eligibility. Soldiers still had to follow the state's registration rules, although eligible voters could not be subject to poll taxes or similar taxes.⁶⁴ The Act does not seem to have facilitated many military votes; fewer than 140,000 federal ballots were requested, and only 28,051 were validly cast.⁶⁵ A subsequent analysis conducted by the Bureau of the Census found that the law was enacted too close to the election for states to implement effectively.⁶⁶ Because the law was passed on September 16th, its effect on the November election was deemed to be nearly worthless.⁶⁷

In 1943, Members of Congress pressed for more effective legislation to facilitate military voting in the upcoming 1944 election cycle. In part, this was a partisan decision. Polling done by George Gallup in 1943 found that the 1944 election was a toss-up among the general public. However, 61 percent of the military vote (over 6 million) was predicted to go to President Roosevelt and the Democrats.⁶⁸ As was the case in 1864, military voters were seen as able to affect the outcome of presidential and congressional races, and Democratic members wanted to make the military voting process as simple as possible. Facing pressure from the public and soldiers to ensure that military personnel could participate in the electoral process, Congress considered two approaches to facilitate military voting. One approach—sponsored Senators

⁶⁴ United States Statutes at Large. 1943 at footnote 33.

⁶⁵ Of course, soldiers could vote using their state's traditional absentee voting laws, but these provisions were almost always inadequate for addressing the needs of soldiers serving overseas.

⁶⁶ Martin, Boyd A. 1945 at footnote 5.

⁶⁷ Coleman, Kevin J. at CRS-2 (citing U.S. Department of Defense, *The Federal Voting Assistance Program*, 11th Report, (Washington: Dec. 1977), p. 2).

⁶⁸ Gallup, George. 1943. "Votes of Soldiers Could Decide '44 Election, Gallup Poll Finds." *New York Times*. December 5: 48.

Theodore F. Green (D-RI) and Scott W. Lucas (D-IL) and favored by the President and northern Democrats—would have created a war ballot that would be distributed to American troops by a War Ballot Commission. In order to vote, soldiers would only have to fill out the ballot and it would be returned to the appropriate secretary of state to be counted.⁶⁹

This approach was opposed by Republicans, who did not want to increase the size of the Democratic electorate, and by Southern Democrats, who did not want federal officials interfering with state suffrage, especially by potentially enfranchising African-Americans normally excluded from voting by Jim Crow restrictions. The bill supported by President Roosevelt and northern Democrats would have exempted military personnel from poll taxes, one of the most effective means of disenfranchising African-American and poor White voters in the South. Because the federal government cannot set state suffrage requirements, opponents of the Green-Lucas legislation argued that it was unconstitutional. After passage in the Senate, opponents of Green-Lucas gutted it in the House, replacing it as states-rights oriented bill. This new bill required states to use the federal ballot only if (1) a state failed to establish effective absentee voting procedures, (2) the federal ballot was certified by the state, and (3) if a military voter had not received a requested traditional absentee ballot. The 1944 law liberally uses the phrase “recommends to the states” as opposed to the word “shall,” which was used consistently through the 1942 law.⁷⁰

Even with the weaker federal law, the 1944 election saw military voting that far exceeded the projections of political analysts. Turnout among the general population was 60 percent while

⁶⁹ American Political Science Association. 1952 at footnote 32. and Martin, Boyd A. 1945 at footnote 5. The war ballot would only have federal races on it. States would have the option of adding state races to the ballot if they desired.

⁷⁰ See United States Statutes at Large 1943 at footnote 33 and United States Statutes at Large 1945, 136-148.

50 percent of military personnel requested ballots and 30 percent succeeded in casting ballots, even with the associated logistical problems.⁷¹ There are some discrepancies regarding how many military personnel voted, with *The New York Times* reporting that between 3.1 million and 4.4 million soldiers voted in the 1944 election,⁷² and the American Political Science Association reporting that 4,487,540 military personnel requested ballots and 2,691,160 submitted ballots that were counted in the totals.⁷³ With the two presidential candidates only separated by a total of 3.5 million votes in the final outcome, military votes were significant in the final result. In New Jersey the military vote tipped the state from Republican Thomas Dewey, who won the civilian vote, to President Roosevelt who dominated the military vote. The 1944 election also helped the Democratic Party rebound from its mid-term losses in the 1942 House races; the military vote may have played a key role in some of these races.⁷⁴

Uniform Voting Laws for Uniformed Voters

After World War II ended, there remained pressure to create a permanent uniform national voting procedure that would address the needs of all military personnel overseas. It was clear that the U.S. would remain a world military power with forces stationed around the globe for extended periods. President Harry S. Truman saw a need to study the military voting issue systematically, and in 1951 he asked the American Political Science Association to establish a commission for the purpose of making recommendations regarding how to improve voting

⁷¹ American Political Science Association. 1952 at footnote 51.

⁷² Egan, Leo. 1944. "Service Ballots Put at 4,400,000 in Last Election." *The New York Times*. December 10:1.

⁷³ American Political Science Association. 1952 at footnote 32.

⁷⁴ Egan 1944, at footnote 66.

among military service personnel.⁷⁵ In 1952, the APSA's *Special Committee on Service Voting* released its findings.⁷⁶ The report found that because of their voluntary nature and states rights framework, the 1942 and 1944 statutes had only limited success in increasing the military vote. The threat of a federal ballot had stimulated some states to improve their absentee ballot laws. However, military voting remained infrequent in many states, especially in the Democratic South, where voting in general elections at the time was not particularly meaningful.⁷⁷

The APSA report also found that voting by military personnel had become harder since 1944, even though Congress had again passed legislation in 1946 encouraging states to improve their military voting laws.⁷⁸ For example, six states continued to require registration in person, five states had special absentee ballot application procedures (a military voter literally had to apply to apply for a ballot!), and 20 states had very short windows for requesting and returning an absentee ballot. New Mexico and South Carolina no longer even had absentee voting procedures, and Texas did not allow members of the regular armed forces to vote.⁷⁹

APSA made a series of recommendations to make voting simple for military personnel. First, there were ten recommendations to improve the rights of military voters, including doing away with poll taxes, literacy tests, and difficult registration and residency requirements. Military personnel should be able to use a federal post card application for a ballot, receive ballots well before the election, and receive information about the election and voting procedures. Second, APSA recommended that all states change their election laws to conform to

⁷⁵ American Political Science Association. 1952 at footnote 32.

⁷⁶ American Political Science Association. 1952 at footnote 32.

⁷⁷ In the South, it was the primary election, rather than the general election, that was important for determining representation (Key 1949). In the 1944 presidential election, voting in either election was not particularly meaningful as Roosevelt won all of the states there handily.

⁷⁸ American Political Science Association. 1952 at footnote 32.

⁷⁹ American Political Science Association at 515.

these 10 principles, focusing most explicitly on the poll tax and registration requirements. Third, APSA recommended that the federal law be changed to ensure that military voting was always promoted, not just during national emergencies. Fourth, they called on the Secretary of Defense to collect data and publish reports on military voting and whether states were fulfilling their obligations to promote it. Fifth, they encouraged political parties and interest groups, such as the League of Women Voters, to promote military voting and to develop mechanisms to provide election information to military personnel. Finally, APSA encouraged the creation of a National Bipartisan Commission on Voting to promote election reform.⁸⁰

Southern Members of Congress blocked implementation of the APSA recommendations because they could have enfranchised African-American military personnel who resided in the South and were easily kept from voting under the existing system. Instead, Congress passed the 1955 Federal Voting Assistance Act,⁸¹ which took the APSA recommendations and made many of them into voluntary standards and recommendations for absentee voter registration and voting procedures for the states to follow in order to facilitate voting by military and civilian support personnel stationed overseas.⁸² The 1944 Act was only relevant in times of war, so the new law benefited the approximately 3 million military personnel serving during the Cold War in addition to civilian support personnel and dependents.⁸³ The states retained the right to determine who in the military services would and would not be enfranchised. While these limitations hampered the extension of full voting rights to military personnel, the 1955 Act did set the stage for future federal voting reforms by requiring the President to designate an executive department or agency

⁸⁰ *Id.* at 518-19.

⁸¹ 42 U.S.C. § 1973cc, et seq.

⁸² United States Code Congressional and Administrative News (USCCAN). 1955a.

⁸³ United States Code Congressional and Administrative News (USCCAN). 1955b. "The Federal Voting Assistance Act of 1955." St. Paul, Minnesota: West Publishing Company, 654-660.

to “coordinate and facilitate” federal military voting and to issue a report every odd-numbered year on the issues affecting these voters. The act also required states to furnish requested data to this designee, and required other federal agencies – especially the Attorney General and the General Services Administration – to cooperate with the designee in implementing the Act.⁸⁴

Although the APSA report came out before the 1952 general election, its findings would have been little changed if it had been released a year later. It was estimated that 40 percent of the 2.5 million military personnel were directly disenfranchised because of complex state absentee voting regulations in place at the time.⁸⁵ For example, there were approximately 260,000 soldiers stationed in Korea in 1952, and officers estimated that approximately 30 percent attempted to vote. However, trying to vote and actually voting were two different things as one civilian radio reporter amply demonstrated. Robert Alden received his absentee ballot from New York County on October 31, the same day that ballots were required to be received by election officials in New York.⁸⁶ Furthermore, some state absentee voting laws contradicted the state constitution. For example, New Jersey law only allowed military personnel to vote with an absentee ballot under certain situations because of a concern for fraud, even though New Jersey’s 1844 constitution explicitly enfranchised all voters to vote absentee.⁸⁷

By 1965, Congress had passed laws to end the systematic disenfranchisement of African-Americans.⁸⁸ With the franchise broadened, political parties began to engage in more organized efforts to turn out the military vote, and in the 1960s the issue of military voting took on a

⁸⁴ United States Code Congressional and Administrative News (USCCAN). 1955a at footnote 46.

⁸⁵ Alden, Robert. 1952a. “Stevenson Leads by 2-1 in Poll of 500 U.S. Army Men in Korea.” *New York Times*. November 1: 1.

⁸⁶ Alden, Robert. 1952b. “30% of Soldiers in Korea Voting.” *New York Times*. November 3: 1.

⁸⁷ Dales, Douglas. 1952. “Absentee Rulings to Curtail Voting.” *New York Times*. August 17: 1.

⁸⁸ *See Voting Rights Act of 1965*, 42 U.S.C. §§ 1973-1973aa-6.

decidedly partisan tone. In 1968, the Republican National Committee appointed absentee voting chairmen in 45 states and the District of Columbia to register and mobilize the estimated 3.5 million military voters.⁸⁹ The European Republican Committee encouraged the two million Americans in Europe to vote by having Shirley Temple Black tour European cities to encourage Republicans overseas to vote.⁹⁰ Democrats similarly attempted to mobilize overseas voters in 26 counties through “Americans Abroad for Humphrey-Muskie” committees that ran ads to mobilize Democratic voters.⁹¹

The military itself also sought to assist the voting process. The military set up temporary voter information stations in Laos, Thailand, and Vietnam in 1968 to inform military voters about each state’s absentee voting laws. It also encouraged soldiers to vote through various ads in *The Army Reporter*, armed forces radio, and the armed forces television networks. Additionally, voting assistance officers in the various military branches encouraged soldiers to vote and answered questions regarding the election rules in the states.⁹² These generic efforts to encourage voting were supported by both parties. However, not all efforts were as politically neutral. In some elections, senior military officials attempted to indoctrinate soldiers. For example, Major General Edwin A. Walker, who commanded troops in Germany during the 1960 election, recommended that his soldiers consult the conservative Americans for Constitutional Action voter guide before casting a ballot and gave his troops literature from the John Birch

⁸⁹ United Press International. 1968. “Absentee G.I. Votes Sought by Republicans.” *New York Times*. September 23:31.

⁹⁰ Associated Press. 1968b. “European Branch is Set Up by G.O.P.” *New York Times*. September 2:21.

⁹¹ Associated Press 1968a. “Both Parties Woo Absentee Voters, Especially the G.I.” *New York Times*. October 30: 28.

⁹² Robinson, Douglas. 1968. “Armed Forces Press Efforts to Spur Voting From Vietnam.” *The Houston Chronicle*. June 5: A-4.

Society.⁹³ It is clear that with the expansion in voting rights and capabilities, the military became an important constituency courted by both parties.

However, the logistics of voting had not become any easier, and the idiosyncrasies of state election law and ballot transit issues could still keep overseas citizens and servicemen from being able to vote. Consider the experience of one Peace Corps volunteer:

The Board of Elections of Suffolk County [New York] must truly live in an isolated, automated world if they think mail can travel 14,000 miles by plane from Singapore to Kuching; 150 miles from Kuching to Sibuy by plane; sixty miles by Chinese launch from Oya to Mukah and a half-mile by bicycle from the post office to me (the last 78 1/2 miles taking twice the time of the first 14,000) and be returned in 12 days...The Board of Elections should become more realistic about world mail systems and stop depriving concerned overseas Americans of their right to vote.⁹⁴

With almost all Americans eligible to vote, the issue of voting rights for military personnel and individuals living overseas became much less controversial and opposition in Congress declined accordingly. In 1968, Congress expanded voting rights for civilians living overseas by passing two laws amending the Federal Voting Assistance Act that encouraged states to allow U.S. residents living overseas to be able to register and vote.⁹⁵ As the legislative history to P.L. 90-343 notes, “Thousands of Americans temporarily residing abroad and engaging in business, the professions, teaching, the arts, and other walks of life, are denied the right to vote because their States of residence do not provide for absentee registration or absentee

⁹³ Bamford, James. *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency*. New York: Doubleday.

⁹⁴ Miranda, Stephanie. 1968. “Absentee Ballots.” *New York Times*. November 10.

⁹⁵ United States Code Congressional and Administrative News (USCCAN). 1968b. “Absentee Voting—Procedures.” St. Paul, Minnesota: West Publishing Company, 218-220. and United States Code Congressional and Administrative News (USCCAN). 1968d. “Absentee Registration and Voting—Citizens Residing Outside U.S.” St. Paul Minnesota: West Publishing Company, 218.

voting, or both.”⁹⁶ Due to corporate globalization and the increase in Americans volunteering to serve their country overseas in civilian capacities, the issue of disenfranchisement was becoming more real for more people. Even individuals serving the government had problems voting. The head of the Peace Corps told Congress that “One of the major difficulties faced by Peace Corps trainees and volunteers in voting while away from their residences is in complying with State laws requiring oaths when applying for an absentee ballot as well as when marking the ballot.”⁹⁷ However, once again, the voluntary nature of the 1968 law left overseas voters at the mercy of their own state’s absentee voting laws.⁹⁸

In 1975, Congress passed Public Law 94-203, The Overseas Citizens Voting Rights Act, which enfranchised the “1.6 million Americans, not counting military personnel, living abroad.”⁹⁹ An overseas citizen now had the right to vote in the last state in which “he was last domiciled immediately prior to his departure from the United States and in which he could have met all qualifications to vote in Federal elections under any present law.”¹⁰⁰ Congress found little reason to be concerned about fraud in such situations and that enfranchising such voters was within its constitutional capacity. This legislation enfranchised an array of overseas civilians including dependents of military personnel stationed overseas, students and scholars studying abroad, business people and their families, and expatriates. According to the

⁹⁶ United States Code Congressional and Administrative News (USCCAN). 1968a. “Absentee Voting—Procedures, Legislative History.” St. Paul, Minnesota: West Publishing Company, 2065.

⁹⁷ United States Code Congressional and Administrative News (USCCAN). 1968c. “Absentee Registration and Voting—Citizens Residing Outside U.S.” St. Paul, Minnesota: West Publishing Company, 218.

⁹⁸ *See Id.*

⁹⁹ House Report No. 94-649. 1975; “Legislative History, Public Law 99-410: Uniformed and Overseas Citizens Absentee Voting Act.” *United States Code Congressional and Administrative News*. 2358-2375.

¹⁰⁰ United States Code Congressional and Administrative News (USCCAN). 1975. “Overseas Citizens Voting Rights Act of 1975.” St. Paul, MN: West Publishing Company, 1142-1144.

Association of Americans Resident Overseas, less than 10 percent of overseas Americans were retired; most were business people and their families.¹⁰¹ They were now allowed to vote in federal elections. The Act also clarified the varying and confusing state registration and voting requirements that an individual had to meet to vote absentee while overseas. The law had finally moved past the issues of enfranchisement and now sought to resolve the procedural issues and hurdles facing those overseas, both military and non-military, in an effort to facilitate voting via absentee ballot. However, the 1975 Act was unfortunately not the end of such problems, many of which continue to this day.

Current Problems

The current federal policy regime for overseas voting was established in 1986, when Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) which superseded both the 1955 Federal Voting Assistance Act and the Overseas Citizens Rights Act of 1975.¹⁰² This law further eased absentee voting for both military personnel and American citizens residing overseas. It required states to provide for absentee registration and voting by uniformed services and overseas voters and established a federal voting assistance program to facilitate absentee registration and voting by eligible voters. It provided for a standard Federal Post Card Application (“FPCA”) form that it recommends states allow for registration and application purposes, and provides for postage-free mailing of FPCAs and other balloting materials.¹⁰³ Additionally, it stipulated that U.S. citizens overseas may continue to vote for federal office even if they have no current address in the United States. Properly registered military and overseas voters are also allowed to submit a federal write-in absentee ballot for

¹⁰¹ House Report No. 94-649. 1975at footnote 60.

¹⁰² See 42 U.S.C. §§ 1973ff to ff-6

¹⁰³ *Id.*

federal offices in a general election if they did not receive the state absentee ballot they requested in a timely manner.¹⁰⁴ According to the General Accounting Office (GAO), this act covers approximately 6.1 million American citizens, including 2.7 million members of the military and their dependents.¹⁰⁵

As with previous military voting laws, some discretion is still left to the states under UOCAVA, and variations in registration requirements, deadlines for submitting ballots, and tight time frames between when ballots are sent to military voters and when they are due to be returned still cause problems.¹⁰⁶ These problems were made clear by the 2000 election, as we discussed earlier in this article. In Florida, issues such as ballot transit times continued to disenfranchise voters. *The New York Times* conducted an independent examination of late overseas absentee ballots received in the 2000 Florida election received after November 7, 2000, and examined by canvassing boards between November 17 and November 26.¹⁰⁷ Researchers examined 3,739 overseas ballots, of which 2,490 were accepted and counted by canvassing boards. Thus, 33% of these overseas ballots received after November 7, 2000 were invalidated for various reasons. The researchers then examined the 2,490 overseas absentee ballots that were received after November 7, 2000 and were accepted by canvassing boards and included in county tabulations. Based on the Florida regulations for what constitutes an acceptable overseas absentee ballot, 680 (27 percent) of the accepted late ballots were flawed. If these 680 ballots

¹⁰⁴ Coleman, Kevin J. 2001 at 2-3; United States Code Congressional and Administrative News (USCCAN). 1986. "Uniformed and Overseas Citizens Absentee Voting Act." St. Paul, MN: West Publishing Company, 924-930.

¹⁰⁵ Walker, David M. 2001. at footnote 3

¹⁰⁶ Coleman, Kevin J. 2001 at 3; Walker, David M.2001 at footnote 3.

¹⁰⁷ Barstow, David and Van Natta, Jr., Don. 2001, footnote 4; Imai and King, 2004, footnote 4.

had not been accepted and counted, then 52 percent of the late overseas absentee ballots would have been rejected in the 2000 Florida election.¹⁰⁸

The passage of the Help America Vote Act of 2002¹⁰⁹ and the National Defense Authorization Act for FY 2002¹¹⁰ made six major changes to the UOCAVA process in an effort to improve the ability of these voters to vote. First, states are required to designate a single state office to serve UOCAVA voters in the registration and ballot application process. Second, states must collect and publish statistics on UOCAVA registration and balloting. Third, a single absentee ballot request is now valid for two federal elections. Fourth, there is a standard oath for all voting documents promulgated by the FVAP. Fifth, states must accept all absentee ballot requests, even if they are received before the state typically accepts them. Finally, states must notify UOCAVA voters if their registration application is rejected.

However, even with these recent changes, it is clear that military UOCAVA voters still suffer from serious problems in voting because of logistical difficulties. In separate reports, the United States General Accounting Office (GAO) and the Department of Defense (DoD) Inspector General found that the current UOCAVA voting process is very cumbersome, resulting in many voters being disenfranchised. The paper-based process is also a source of many problems. As the GAO noted,

[M]ilitary and overseas voters do not always complete absentee voting requirements or use federal forms correctly. The basic steps that absentee voters must take to register and request an absentee ballot are similar for all states. Nevertheless, absentee voting schedules and requirements vary from state to state.... County officials said that problems in processing absentee voting applications arise primarily because voters do not fill in

¹⁰⁸ *Id.*

¹⁰⁹ Public Law 107-252

¹¹⁰ Public Law 107-107

the forms correctly or do not begin the voting process early enough to complete the multiple steps they must take.¹¹¹

Ballot transit times are another important potential problem. In their study of UOCAVA voting, the GAO found that transit times for first class mail can range from as little as five days to as much as a month. A survey by the GAO found that almost two-thirds of all disqualified absentee ballots were rejected because election officials received them after the official deadline. The DoD Inspector General also noted that there are special types of mail transit, such as transit to naval vessels underway that are difficult to service. For example, mail transit averages 7 days for 80 percent of mail. However, remote areas and forward deployed locations, such as Bosnia or Kosovo, may take an average of 9 days. In the legislative history for the UOCAVA law, Congress documents these and other problems.¹¹²

More recently, a 2004 GAO study found that ballot transit times to Iraq fell within the Army standard of 12 to 18 days for prograde mail (i.e. mail sent from the United States into Iraq) for every month between February, 2003 and September 2003, but that this “standard” hid the fact that 25 percent of test letters were delivered more than 18 days after the date mailed.¹¹³ Moreover, the delivery time for retrograde mail (i.e. mail from Iraq to the U.S.) was outside the 12 to 18 day delivery standard for two of the six months of the evaluation.¹¹⁴ Thus, under most circumstances it was incredibly difficult, if not impossible in many cases, for mail to be sent and returned from Iraq in less than 30 days, a typical deadline lead-time for absentee ballots to be

¹¹¹ General Accounting Office. 2001. Elections: Voting Assistance to Military and Overseas Citizens Should Be Improved. GAO-01-1026. pages 40-41

¹¹² House Report No. 99-765. 1986. “Legislative History, Public Law 99-410: Uniformed and Overseas Citizens Absentee Voting Act.” *United States Code Congressional and Administrative News*. 2009-2027.

¹¹³ GAO. 2004. “Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved.” GAO-04-484, page 13.

¹¹⁴ *Id.*

sent to prospective voters. At best, it provided only a very short window for personnel to individually receive their mail, properly fill out the documentation and then be in a position to place it in return mail. Congress, in its examination of the issue during the UOCAVA debates, indicated that to overcome such problem ballots should be mailed out at least 45 days prior to the election to ensure enough time for their return.¹¹⁵

Such problems not only affect the ballot itself but the registration and request for ballots that must be sent in order to receive a ballot in the first place. As stated above, UOCAVA authorizes military and overseas voters to use the post card application (“FPCA”) for registration and absentee ballot requests.¹¹⁶ However, a severe logistical problem faces military UOCAVA voters as election officials often find that the FPCAs submitted by voters either have inadequate voting residence address information or contain inadequate or illegible mailing address information. Mail transit time makes rectifying these problems before an election takes place extremely difficult.

These difficulties caused by mail transit time are exacerbated by the local election laws and schedules established by states, often by statute, that dictate when primary elections occur, when ballots can be produced, deadlines for mailing ballots out to voters and cut-off dates for the receipt and counting of absentee ballots. Indeed, many of these restrictions come into direct conflict with federal statutes intended to protect military and overseas voters and result in the Justice Department bringing litigation against states and localities seeking remedies that will help overcome the ballot transit problem. From 1988 through 2004, the U.S. Department of Justice

¹¹⁵ von Spakovsky, Hans A. 2005. “Voting by Military Personnel and Overseas Citizens: the Uniformed and Overseas Citizens Absentee Voting Act.” The Federalist Society for Law and Public Policy Studies, p. 5; *see also* H.R. Rep. No. 765, 99th Cong., 2d Sess. 10-11 (1986).

¹¹⁶ 42 U.S.C. § 1973ff(b)(2)

brought more than 20 enforcement actions under UOCAVA.¹¹⁷ A discussion of a few of these cases will highlight the difficulties that are continually at issue between state election officials and federal officials seeking to guarantee military and overseas voters the ability to receive ballots in a timely fashion.

The most famous instance of this type of litigation occurred even before the current UOCAVA statutory framework was in place. In 1980, the United States sued the State of Florida alleging that the late scheduling of primary election, resulting in the sending out of ballots at the earliest 20 days before the general election and in some cases only a few days before, violated the Overseas Citizens Voting Rights Act because it made it impossible for such voters to return them before the statutory deadline of 7 p.m. on election day.¹¹⁸ The judge in the case provided injunctive relief for the 1980 election mandating that ballots received within ten days of election day should be counted.¹¹⁹ As the 1982 election approached, Florida and the United States entered into a consent decree that allowed ballots to again be accepted for ten days after the election and also requiring that absentee ballots be sent out 35 days prior to the election.¹²⁰ The Court also required the state to submit a plan of compliance showing that it had enacted sufficient measures to ensure that overseas voters had a reasonable opportunity to receive and return their ballots. In 1984, when the Florida Legislature had failed to act to provide such measures to the satisfaction of the Court, it entered an order mandating that the state to implement an administrative rule, ultimately delineated as Florida Administrative Code § 1S-

¹¹⁷ von Spakovsky, Hans A. 2005. p.5; *see also* USDOJ, Civil Rights Division, Voting Section Home Page, The Uniformed and Overseas Citizens Absentee Voting Act, http://www.usdoj.gov/crt/voting/misc/activ_uoc.htm.

¹¹⁸ *Harris v. Florida Elections Canvassing Comm'n*, 122 F.Supp.2d 1317, 1321 (N.D. Fla.), *aff'd* 235 F.3d 578 (11th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001).

¹¹⁹ *Id.* at 1321-22.

¹²⁰ *Id.* at 1322; *see also* von Spakovsky, p. 7.

2.013, containing the 35-day advance mailing requirement and the 10-day extension for receipt of ballots after election day.¹²¹ Florida operated under this situation, in which an administrative rule directly contradicted a state statute, for 16 years without much fanfare.

Then, in 2000, Florida received 2,411 overseas ballots after the statutorily mandated 7 p.m. election day deadline which, if counted, gave Bush/Cheney a 537 vote edge in the state and, if rejected, gave Gore/Lieberman a 202 vote edge.¹²² The U.S. District Court for the Northern District of Florida was therefore faced with determining whether a statute or administrative rule was the applicable standard for the counting of absentee ballots. In contrast to nearly every other circumstance, the Court ruled that the administrative rule superseded the directly contradictory statute because the rule was mandated by a federal court as part of the enforcement of federal overseas and military voting statutes.¹²³ Thus, a resolution of a logistical problem with the timely mailing of overseas ballots nearly twenty years prior had a dramatic and decisive effect on the election of a president.¹²⁴

This same Florida administrative rule providing for an extension for the return of UOCAVA ballots was again attacked following the 2004 Presidential election, this time by the ACLU seeking to expand its protections to all absentee voters.¹²⁵ The ACLU claimed that not providing the 10-day extension for receipt of absentee ballots to all absentee voters violated the

¹²¹ *Id.* at 1322-23.

¹²² *Id.* at 1320.

¹²³ *Id.* at 1323-24.

¹²⁴ *See also Bush v. Hillsborough County Canvassing Board*, 123 F.Supp.2d. 1305 (N.D.Fla. 200) (ruling that overseas and military ballots that did not have APO, FPO or foreign postmarks and for which no application was on record must be counted pursuant to UOCAVA and other federal protections).

¹²⁵ *See Complaint, Friedman v. Snipes*, Case No. 04-22787 (S.D. Fla. 2004), available at <http://www.aclu.org/FilesPDFs/fl%20absentee%20final%20complaint.pdf>

Civil Rights Act of 1957 and the Equal Protection Clause of the 14th Amendment.¹²⁶ The U.S. Department of Justice was successful in arguing that overseas and military voters, because of the logistical issues involved with mailing such ballots that Congress recognized by passing the federal statutes, were legitimately distinguished from other absentee voters.¹²⁷ The court therefore dismissed the ACLU claim.¹²⁸

One would think with such a high-profile and consequential incident as the 2000 election controversy that states would take notice of the logistical problems and legal ramifications of the issue of military and overseas ballots and endeavor to avoid such situations. However, this was not the case and in 2004 the Department of Justice filed two enforcement actions, one in Georgia and the other in Pennsylvania pertaining to the late mailing of absentee ballots by local election officials.¹²⁹ As discussed in a GAO report,

Georgia state law requires counties to have absentee ballots on hand 45 days before a general election. Georgia missed the September 20, 2002, deadline for the November 5, 2002, general election because of the compressed election schedule in 2002. The 45-day deadline was set to comply with federal mandates to make it easier for U. S. military personnel stationed outside the United States to vote. Georgia had compressed its 2002 primary and runoff election schedules such that the runoff was held only 49 days before the November 5 general election. This precluded the printing of the general election ballot in time for the mailing deadline required under state law. Georgia election officials had contacted FVAP during the first week of October regarding the state's compliance with the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA). Catoosa County ballots omitted the names of the Republican candidate for the U. S. Senate and the Republican gubernatorial candidate from the ballot. An

¹²⁶ *Id.*

¹²⁷ See Letter to Judge Alan S. Gold dated November 9, 2004 in re: *Friedman v. Snipes*, available at http://www.usdoj.gov/crt/voting/misc/gold_ltr.htm; see also *Ingartua De La Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), *cert. denied* 514 U.S. 1049 (1995) (ruling that distinction between those living abroad and those who do not is not a suspect class and was supportable on a reasonable basis); *Romeu v. Cohen*, 121 F.Supp.2d 264 (S.D.N.Y. 2000), *aff'd* 265 F.3d 118 (2nd Cir. 2001) (same); *Howard v. State Administrative Board of Election Laws*, 976 F.Supp. 350 (D.Md. 1996); von Spakovsky, Hans A. 2005. p.6.

¹²⁸ von Spakovsky, Hans A. 2005. p.7.

¹²⁹ von Spakovsky, Hans A. 2005. p.7-8.

allegation was made that this, among other absentee ballot irregularities, violated UOCAVA because the correct ballots, even if sent at the time this concern was raised on October 16, 2002, would not be received in time. Georgia's Secretary of State asked DOJ to bring suit against the state to extend the deadline for receipt of military and other absentee ballots.¹³⁰

Despite this prior instance, Georgia again had a problem with the mailing of absentee ballots in 2004 and the U.S. Department of Justice again brought suit to force an extension in the deadline for receipt of overseas and military ballots on the 2004 election.¹³¹ The court granted a three day extension in the deadline as well as “accelerated means for the transmission and return of [UOCAVA] voter’s absentee ballots, including facsimile, e-mail, and express mail at public expense.”¹³² The case was ultimately resolved in 2005 by a Memorandum of Understanding that recognized that the Georgia General Assembly had taken sufficient steps to ensure long-term compliance with UOCAVA.¹³³

In Pennsylvania, similar litigation was required when multiple county election boards failed to send out absentee ballots early enough to comply with UOCAVA requirements.¹³⁴ The court provided injunctive relief extending the deadline for receipt of ballots in the primary election, statutorily set at 5:00 p.m. on the Friday before election day, for 21 days and provided for overnight delivery of ballots at state expense.¹³⁵ The judge specifically denied the DOJ’s request for relief to use technological means such as facsimile and E-mail even though it

¹³⁰ GAO. 2004. 'Department of Justice's Activities to Address Past Election-Related Voting Irregularities.' October 14, available at <http://www.gao.gov/htext/d041041r.html>

¹³¹ See Stipulation and Order of Dismissal, *United States v. Georgia*, Case No. 1:04-CV-2040 (N.D. Ga. July 25, 2005) available at http://www.usdoj.gov/crt/voting/misc/ga_uocava2.htm.

¹³² *Id.*

¹³³ See Memorandum of Understanding Between the State of Georgia and Secretary of State of Georgia and the United States, *United States v. Georgia*, Case No. 1:04-CV-2040 (N.D. Ga. July 25, 2005) available at http://www.usdoj.gov/crt/voting/misc/ga_uocava2.htm.

¹³⁴ See Order, *United States v. Pennsylvania*, CA No. 1:CV-04-830 (M.D. Penn. April 16, 2004) (available at http://www.dos.state.pa.us/dos/lib/dos/20/voting_case_tro.pdf).

¹³⁵ *Id.* at 5-6.

conceded that such procedures “‘make sense’ in this electronic age” because it “would involve this Court devising and superimposing it’s own election scheme on a complex legislatively sanctioned system spread across sixty seven diverse counties.”¹³⁶ This statement encapsulates much of the tension between the Federal Government’s desire for ensuring military and overseas voters a chance to vote and the localized control over the mechanisms of voting.

Later in the election year, the same case was revitalized with respect to the General Election under circumstances that show that it is not always the local control and scheduling of elections that can cause problems for military voters. Beginning on August 24, 2004, Pennsylvania began issuing absentee ballots to overseas and military voters with a total of 26,739 ultimately being sent out.¹³⁷ The problem arose when the eligibility of Ralph Nader to appear on the Pennsylvania was challenged and Nader was ordered removed from the ballot, was then allowed back on only to be removed again as the case wound its way up the appeals process.¹³⁸ As a result, thousands of overseas and military voters ended up with ballots that were different than the one officially certified as correct. The Federal Government again intervened and sought relief in the form of resending the ballots, through electronic means or express mailing, and extension of the deadline for processing the ballots.¹³⁹ The District Court denied such relief on the grounds that doing so would “harm the Pennsylvania election system and the public at large by undermining the integrity and efficiency of Pennsylvania elections”¹⁴⁰ and that

¹³⁶ *Id.* at 4-5.

¹³⁷ See Memorandum and Order, *United States v. Pennsylvania*, CA No. 1:CV-04-830 (M.D. Penn. October 20, 2004), 2004 WL 2384999 (available at <http://www.pamd.uscourts.gov/opinions/kane/04v0830.pdf>).

¹³⁸ *Id.* at 1.

¹³⁹ *Id.* at 8.

¹⁴⁰ *Id.* at 8-9.

“the ‘remedies’ proposed by the Government invite unpredictability to an otherwise orderly and time tested elections process.”¹⁴¹

Such battles have not ended and the U.S. Government has filed several more lawsuits during the most recent election over the mailing of overseas ballots and deadlines for receipt from military voters. In 2006, the DOJ brought actions and obtained either injunctive relief or stipulated agreements from the states of Alabama,¹⁴² South Carolina,¹⁴³ Connecticut,¹⁴⁴ and North Carolina.¹⁴⁵ Thus, despite years of efforts and multiple litigations, states continue to give short shrift to overseas and military voters in how they handle election deadlines, ballot transmission and absentee deadlines. These cases illustrate the continued tension and interaction between the state and federal governments concerning military and overseas ballots. The federal government is waging a continuing struggle to ensure that such voters are provided enough time to receive their ballots in the mail and return them for inclusion in the official tally within the context of state-mandated deadlines and primary schedules. Technology may ultimately provide the solutions to such problems although it is not a panacea and despite advances has yet to provide a complete resolution to the continued difficulties faced by military and absentee voters.

¹⁴¹ *Id.* at 10.

¹⁴² See Press DOJ Release 03-354, “Justice Department Announces Resolutions to Protect Rights of Military and Overseas Citizens to Vote in Federal Primary Elections in Alabama and South Carolina,” June 8, 2006, available at http://www.usdoj.gov/opa/pr/2006/June/06_crt_354.html

¹⁴³ *Id.*

¹⁴⁴ See Stipulated Agreement, *United States v. Connecticut*, Civil Action No. 3:06-cv-1192 (D. CT. August 2, 2006) available at http://www.usdoj.gov/crt/voting/misc/ct_cd.htm.

¹⁴⁵ See Consent Decree, *United States v. North Carolina*, Civil Action No. 5:06-cv-00118-H (E.D.N.C. March, 20, 2006) available at http://www.usdoj.gov/crt/voting/misc/nc_uocava_cd.htm.

From Procedures to Technology

The six legal changes to UOCAVA voting accomplished by HAVA are procedurally focused, attempting to make the existing by-mail process work more efficiently. However, as shown above, the primary problem with UOCAVA voting is ballot transit time, something that can only be improved by improving the mail and that is clearly outside the providence of election reforms. So, in 2001, Congress passed the National Defense Authorization Act (“NDAA”) of 2002, which was an attempt to use technology to improve UOCAVA voting by moving the ballot transit issue away from the mail and into cyberspace. Specifically, Section 1604(a)(1) of the 2002 NDAA states that

the Secretary of Defense shall carry out a demonstration project under which absent uniformed services voters are permitted to cast ballots in the regularly scheduled general election for Federal office for November 2002 through an electronic voting system. The project shall be carried out with participation of sufficient numbers of absent uniformed services voters so that the results are statistically relevant.¹⁴⁶

This requirement was designed to experiment using technology, as opposed to merely procedural improvements, as a means to solve the problems UOCAVA voters face in receiving and returning absentee ballots within the time restraints of state-run federal elections. The desire to find technological solutions to the UOCAVA problem recognizes that the continued reliance on state and local actors, variations in state election laws, and limitations on addressing ballot transit, hinder UOCAVA voting. Technology can allow the local election official and the voter to transmit information immediately, thereby solving one of the critical roadblocks in UOCAVA voting.

¹⁴⁶ Public law 107-107.

In recent years, it has become clear that there is an important role to be played by technology in addressing the issues associated with UOCAVA voting. The Federal Voting Assistance Program (“FVAP”), which oversees UOCAVA voting, is uniquely situated in the federal government to promote the use of technology to facilitate voting. The voters with which they are primarily identified, military voters, are a popular population in political circles to serve leading to little controversy in efforts to improve their ability to vote. Additionally, by being housed in the Department of Defense, the FVAP is able to leverage the budget and technological inclination of the Department to its advantage.

However, FVAP does not have the power to coerce local election officials to adopt new technologies, nor can it bypass local election officials to facilitate UOCAVA voting.¹⁴⁷ Instead, FVAP can support and promote technological innovation by the local governments that serve UOCAVA voters. This process of identifying and supporting “champions” is common in voluntary technology adoptions; the United Kingdom is using this strategy to test electronic voting in local elections.¹⁴⁸ Champions tend to be leaders in their field who want to use new technologies and have the capacity—including personnel, experience, and resources—to make pilot adoptions work.¹⁴⁹ Without the power to coerce involvement, champions are often the only ones who are likely to want to participate; the FVAP, therefore, often works with only champions who adopt their own innovations.

One problem with this use of champions is that it makes it difficult to know how well the program will work in other jurisdictions. Innovation helps voters in the most progressive

¹⁴⁷ United States Code Congressional and Administrative News (USCCAN). 1955a at footnote 46.

¹⁴⁸ Pratchett, Lawrence. 2002. *The Implementation of Electronic Voting in the U.K.* London: Local Government Association.

¹⁴⁹ For examples of this from the private sector, see Foster 1986; Kanter 1983.

communities cast ballots while others are left behind. The history of the adoption of innovative solutions to serve UOCAVA voters, therefore, looks in many ways similar to the historical issues surrounding procedural reforms as it is both piecemeal and, to date, ineffective in addressing all of the problems faced by voters overseas. Nonetheless, over the last 14 years, FVAP has worked to promote the use of new technologies that address the transit time and voter error problems using three technological platforms: fax machines, and Internet and email voting.

Fax Balloting

The Gulf War and the military buildup that preceded the war, Operation Desert Shield, were the first large-scale military operations undertaken since the Vietnam War. This new war footing allowed FVAP to initiate an innovative use of fax technology to facilitate voting.¹⁵⁰ Specifically, FVAP hired a private firm to create a centralized data collection and transmission center (Center) for faxed ballots. The Center served as a broker between the local election official (LEO) and the voter. LEOs would fax voting information – ballots and other election information – to the Center and the Center would then transmit that information to the voter. With cast ballots, the process was reversed. Having a process centralized through the Center created several important benefits. First, the Center was a one-stop shop. Voters and LEOs only needed to know one fax number to transmit election materials. Second, the Center could operate 24 hours a day, receiving ballots securely and then retransmitting them to the voter or LEO at specific times. This kept LEOs from receiving ballots in an unsecured manner as secrecy is obviously one of the key victims of voting by facsimile.

¹⁵⁰ Keikkila, Ralph C. 1995. “The Electronic Transmission of Election Materials.” Washington, D.C.: National Clearinghouse on Election Administration, Federal Election Commission.

In the two months the system operated in 1990, 1,675 voters took advantage of the fax system. In 2002, when many fewer troops were deployed in combat situations abroad, 669 ballots were cast in 49 states using the fax system.¹⁵¹ The limited number of users of the fax system point out two sets of limitations to this system. First, from the voter perspective, the system is not private; their vote is being cast in the open and can be seen by the person receiving the ballot in the LEO office. The voter is making a trade-off of having a public ballot cast versus not casting a ballot and has to determine if this trade-off is acceptable. Second, and more critical, is the issue of local adoption and utilization of the system. LEOs vary widely in their ability to adopt and utilize new technologies. In the case of fax voting, not all LEOs have fax machines. Even if they do, the LEO may not have the staff to operate the system, or a secure location to place the machine and the cast ballots so that ballots are not received or stored in an inappropriate environment.

The lack of secrecy is one of the main problems with the use of ballots transmitted by facsimile as it is both difficult to separate the identity of the voter from the ballot and the information is being transmitted through a third party. One example of how such issues play out is California's attempt to deal the secrecy issue. California requiring those overseas voters allowed to vote by facsimile¹⁵² to also sign a waiver of secrecy that states as follows:

I, _____, acknowledge that by returning my voted ballot by facsimile transmission I have waived my right to have my ballot kept secret. Nevertheless, I understand that, as with any absent voter, my signature, whether on this oath of voter form or my identification envelope, will be permanently separated from my voted ballot to maintain its secrecy at the outset of the tabulation process and thereafter.¹⁵³

¹⁵¹ Ibid.

¹⁵² Cal.Elec.Code § 3103.5 provided that "A special absentee voter who is temporarily living outside of the territorial limits of the United States or the District of Columbia may return his or her ballot by facsimile transmission."

¹⁵³ Cal.Elec.Code § 3103.5.

This waiver was initially deemed to violate the California Constitution's provision that all voting should be in secret.¹⁵⁴ Subsequently, a California Court of Appeal reversed and made the highly salient observation that "In our view, given a choice between fax voting and not voting at all, citizens should be able to choose to vote by fax and to waive their right to a secret ballot. In such circumstances, voting by fax is a 'reasonable measure[] to facilitate and increase exercise of the right to vote....'"¹⁵⁵ This view seems to be prevailing in more and more states as, according to the FVAP, 18 states now allow for the return of ballots by facsimile.¹⁵⁶ The military voter does so by sending ballots through the centralized FVAP program and signing a waiver similar to California's that states "I understand that by faxing my voted ballot I am voluntarily waiving my right to a secret ballot."¹⁵⁷

Federal courts have had limited review of voting by facsimile but those that have addressed the issue have expressed contradictory views. In the two recent cases brought by the DOJ to enforce UOCAVA protections in Georgia and Pennsylvania, the courts each took a different tack. The court in Pennsylvania highlighted many of the concerns concerning such voting and described fax and electronic mail voting as "problematic" as they "are not

¹⁵⁴ See *Bridgeman v. McPherson*, 141 Cal.App.4th 277, 280, 45 Cal.Rptr.3d 813, 06 Cal. Daily Op. Serv. 6284, 2006 Daily Journal D.A.R. 9094 (Cal.App. 3 Dist. Jul 11, 2006).

¹⁵⁵ *Id.* at 186 (quoting *Peterson v. City of San Diego* (1983) 34 Cal.3d 225, 193 Cal.Rptr. 533, 666 P.2d 975).

¹⁵⁶ See FVAP 2006-07 Voting Assistance Guide, State Absentee Registration and Voting Procedures, <http://www.fvap.gov/pubs/vag/vagchapter3.html>.

¹⁵⁷ FVAP 2006-07 Voting Assistance Guide, Appendix B: Electronic Transmission of Election Materials, http://www.fvap.gov/pubs/vag/textvag/appendix_b.html.

legislatively sanctioned, are incapable of implementation by all counties, and they deprive voters of the right of secrecy.”¹⁵⁸

In contrast, the Georgia District Court specifically ordered that ballots be accepted by facsimile and prescribed a specific procedure for doing so:

The Georgia Secretary of State and the registrars of Georgia's 159 counties are given the authority to send requested ballots to voters by facsimile transmission or email and to accept the returned of voter oaths and voted ballots to a single secure facsimile machine that is under the supervision of the Secretary of State. The Secretary shall promptly place each ballot received via facsimile in a sealed unmarked envelope and place that envelope within a second envelope containing the voter's oath. The Secretary shall then immediately transmit the ballots by overnight or personal delivery to the election superintendent in the appropriate county for verification and counting with all other absentee ballots. Transmission of returned voted ballots under this order may be made directly from the voter via facsimile, or may originate as image files sent via electronic mail to the Federal Voting Assistance Program's read-only computer facilities and then relayed to the Secretary via facsimile. In duplicating the received facsimiles of the ballots for purposes of permitting those ballots to be read by the appropriate counting equipment, the county election officials shall use the duplication of ballot procedures and the vote review panel as described in state law in order to assure the integrity of the ballot duplication process.¹⁵⁹

These cases highlight that facsimile voting is gaining acceptance as a means of resolving ballot transmission time problems for overseas voters but still faces some reservations or outright opposition because of its lack of secrecy.

Internet Voting

In contrast, Internet voting, both directly over the Internet and through transmission of ballots through E-mail, offers at least the hope of instantaneous electronic transmission, security

¹⁵⁸ Memorandum and Order, *United States v. Pennsylvania*, CA No. 1:CV-04-830 (M.D. Penn. October 20, 2004), 2004 WL 2384999 (available at <http://www.pamd.uscourts.gov/opinions/kane/04v0830.pdf>).

¹⁵⁹ Order, *United States v. Georgia*, Case No. 1:04-CV-2040 (N.D. Ga. July 15, 2004) available at http://www.usdoj.gov/crt/voting/litigation/ga_uocava.htm.

and secrecy. In practice, however, it has not proven to fulfill this potential. In keeping with their role as an innovator, FVAP has promoted projects to test the effectiveness of both E-mail and Internet voting for the UOCAVA population. The first Internet voting project that the FVAP promoted was the Voting Over the Internet (VOI) pilot project which sought to test the feasibility of remote registration and voting over the Internet.¹⁶⁰ VOI was a proof of concept design to ascertain whether secure and accessible Internet voting could be deployed for FVAP clients.¹⁶¹ The project was a cooperative effort between Federal, state and local governments with the FVAP acting as the Program Manager.¹⁶² Four states (Florida, South Carolina, Texas, and Utah) as well four specific counties (Okaloosa and Orange Counties of Florida, Dallas County in Texas, and Weber County in Utah¹⁶³) agreed to participate in the program for the November 2000 presidential election.¹⁶⁴ The pilot project identified 127 potential participants, of which 91 registered and 84 voted over the system.¹⁶⁵ The system worked by issuing digital

¹⁶⁰ See R. Michael Alvarez and Thad E. Hall, *Point, Click and Vote: The Future of Internet Voting*, Washington D.C.: Brookings Institution Press. There Alvarez and Hall discuss the problems associated with UOCAVA voting in detail, as well as the VOI project.

¹⁶¹ FVAP clients include all U.S. citizens covered under UOCAVA: U.S. citizens who are members of the uniformed services and their family members, as well as all other U.S. citizens who reside outside the United States.

¹⁶² Department of Defense, Washington Headquarters Services, Federal Voting Assistance Program, *Voting Over the Internet Pilot Project Assessment Report*, June 2001, page ES-1.

¹⁶³ The importance to some state governments of UOCAVA procedures that are technology-focused can be seen in the case of Utah. There, legislation was enacted stating:

Notwithstanding any other provisions of this title, any county may, if selected by the Department of Defense, participate in the Federal Voting Assistance Program pilot project to allow military and voters overseas as defined by Section 20A-3-403 to register to vote and cast their votes electronically (Utah Code § 20A-6-103).

Without such legislative permission, counties and LEOs cannot engage in experiments of this type.

¹⁶⁴ See Footnote 149.

¹⁶⁵ *Id.* at 2-2.

certificates and passwords to potential voters who could then log onto the FVAP server. The voter then

selects the voting residence from the drop-down menu, and requests to vote (i.e., requests a blank E-Ballot). The VOI System logs the date and time the E-Ballot request is made. The citizen receives the E-Ballot, votes it, and submits the encrypted, voted E-Ballot after signing it using the digital certificate and password. The FVAP server “postmarks” the E-Ballot and forwards it to the appropriate LEO server. The LEO server issues an immediate message to the citizen acknowledging that the E-Ballot has been received. If the citizen has any questions about the status of the voted E-Ballot at any time, he/she can access the Check Status feature. The LEOs set their individually determined parameters to specify when to stop providing blank E-Ballots. That date and time are based on the deadline mandated by state election law.¹⁶⁶

From the LEO side, processing is done in a similar manner:

To process E-Ballots, the LEO logs on to the LEO server and views the Ballot Reconciliation Table, reconciles the E-Ballots and validates them using the same criteria as the by-mail process. If any ballots are invalidated, the LEO can enter a reason. A handwritten signature comparison does not need to be performed because the citizen has already been authenticated by the FVAP server. The encrypted E-Ballots remain stored in the LEO server database.¹⁶⁷

The stated goal of the VOI project was to mirror the process used for paper, mail-in absentee ballots to the greatest degree possible while still maintaining proper security.¹⁶⁸

VOI was also designed to address each of the problems associated with the UOCAVA voting process. It had a voter registration component to facilitate voters completing the first step in the voting process successfully. Voters requested a ballot online and could check the status of their registration and ballot request thus making any voter error in the process known quickly. The Internet also removed the problems associated with ballot transit as all communication occurs almost instantaneously. Also, because voters are using an electronic voting platform, it is possible to design a voting system that is more accurate and effective than the existing absentee

¹⁶⁶ *Voting Over the Internet Pilot Project Assessment Report*, June 2001, page 3-5.

¹⁶⁷ *Id.* at 3-6.

¹⁶⁸ *Id.*

voting technologies. Problems associated with ballot rejection could also be minimized because the LEOs designed the ballots and the voting processes to meet the requirements of their individual jurisdictions.

The VOI pilot project's assessment report reached three basic conclusions. First, the technology worked; there were no major problems with the VOI system. Second, within the scope of the pilot project, the risks introduced into the remote registration and voting process by technology can be mitigated and the integrity of the electoral process can be maintained. The report also noted that the Internet voting system has the potential to enhance the accessibility of the electoral process for UOCAVA citizens.¹⁶⁹ Third, the VOI pilot showed that FVAP could collaborate successfully with state and local election officials in the development and implementation of an Internet voting system. Because FVAP relies on these state and local officials to carry out the provisions of UOCAVA, the success of this collaboration was a critical element and a harbinger of the possibility of successful collaborations in the future. Ultimately, however, the assessment concluded that the system was not sufficiently "mature" and that further development was needed for "Internet remote registration and voting [to] be provided effectively, reliably, and securely on a large scale."¹⁷⁰

Another step towards such further development was planned in a scaled up Internet voting experiment for 2004. The *Secure Electronic Registration and Voting Experiment* ("SERVE") would have been implemented in 50 counties in seven states across the country to serve the UOCAVA population including up to an expected 100,000 votes in the 2004 primary

¹⁶⁹ *Id.* at ES-2. For further discussion of the debate about Internet voting and accessibility, see R. Michael Alvarez and Jonathan Nagler, "The Likely Consequences of Internet Voting for Political Representation", *Loyola Law Review*, April 2001, pages 1115-1153.

¹⁷⁰ *Id.*

and general election cycle.¹⁷¹ However, a report by four computer scientists asked by the FVAP to evaluate the system raised concerns about the security of Internet voting and its vulnerability to cyber-attack led the Department of Defense to cancel the experiment. It is therefore unclear whether the Internet will be a tool in the continuing effort to facilitate the franchise of military and overseas voters.

Email Voting

Finally, the FVAP has also encouraged localities to use E-mail to facilitate the transfer of voting information and ballots under the NDAA mandate. For example, in the 2002 elections, 22 jurisdictions in Virginia engaged in pilot E-mail absentee voting efforts for UOCAVA citizens.¹⁷² Because of the events of September 11, 2001, Cameron Quinn, the Secretary of the State Board of Elections, declared an election emergency for all active-duty military voters deployed outside the United States.¹⁷³ According to the statute,

The provisions of this section shall apply in the case of an emergency that will not allow sufficient time for the distribution and handling of absentee ballot applications and absentee ballots, in accordance with the procedures of this title, for qualified voters who are unable to vote in person because of the emergency. The Secretary of the State Board of Elections shall have the authority to designate alternative methods and procedures to handle such applications and ballots.¹⁷⁴

Under her emergency order, election boards were directed to E-mail an absentee ballot—as the alternate method and procedure—to the E-mail address that an eligible absentee voter had

¹⁷¹ Jefferson, David, et. al., A Security Analysis of the Secure Electronic Registration and Voting Experiment (SERVE), Security Peer Review Group, available at <http://www.servesecurityreport.org/paper.pdf>.

¹⁷² The discussion of the pilot comes from “Report: Emergency E-Mail Absentee Voting & Pilot Programs,” which is an internal report prepared by the Virginia Board of Elections.

¹⁷³ Virginia Code § 24.2-713.

¹⁷⁴ *Id.*

provided on their absentee ballot request. The packet sent to the vote included the ballot, cover letter, and instructions, all of which was prepared by the State Board of Elections.¹⁷⁵

How successful was this pilot? Well, participants –15 who requested ballots, 7 of which were returned and counted – found the program to be exciting. The primary problem that voters encountered technical problems downloading the ballot file, which was about 800 KB, while election administrators had to combat problems associated with illegible or incorrect email addresses. The problem, of course, was low participation, which Virginia officials contributed largely to a lack of competitive races on the ballot – incumbent Senator John Warner (R) ran unopposed – and voters not being aware of this pilot initiative. So while E-mail ballot delivery is potentially promising, it has yet to be tested on a large scale and its potential therefore remains uncertain. Some states used email balloting in the 2006 election cycle, as we were conducting the research for this article.¹⁷⁶ Furthermore, while some methods of email ballot delivery suffer from many of the problems associated with fax ballot delivery (especially privacy and security), technologies for securing email and documents delivered via email are rapidly advancing (certainly for members of the Armed Forces).

The Evolution of Military Absentee Voting – Lessons from History

There has been a steady evolution in the concept of enfranchising military personnel. It started with expanding military voting via absentee and remote polling places while soldiers

¹⁷⁵ The exception was Loudoun County, which prepared its own documents.

¹⁷⁶ As of May 2006, ten states (North Dakota, South Carolina, Montana, Mississippi, Florida, Virginia, Wisconsin, Washington, Illinois, and Missouri) allowed some form of email balloting, according to information provided by the FVAP (<http://www.fvap.gov/pubs/vin/html06vins/may06vin.html>). In August 2006, Iowa announced that it was also allowing email ballot delivery and return (<http://electionupdates.caltech.edu/2006/08/iowas-overseas-military-to-use-email.html>). At the time we write this article, there is little information available about how these email initiatives fared in the 2006 elections.

were still on American soil, progressed to fully enfranchising military personnel who are overseas and now seeks to facilitate voting to the highest degree possible within the constraints of state election regulations. Congress has the constitutional authority to regulate nearly all aspects of the mechanisms of voting in federal elections and has exercised that power in an effort to ensure military personnel, and other overseas voters, the greatest possible opportunity to receive and return absentee ballots. Through statutory action, Congress has created a central entity—the Federal Voting Assistance Program—that advocates for and facilitates voting by UOCAVA citizens. FVAP has worked with the states to lower the procedural barriers to UOCAVA voting by encouraging states to create uniform laws that provide for easier ballot request and a longer time during which they can cast ballots. However, these purely legal remedies are often not enough to ensure those living and fighting abroad the ability to receive a ballot and vote because of continuing difficulties related to ballot transit time. The advance towards fully realized enfranchisement is therefore incomplete, and there is still room for additional procedural innovations.

But the focus is rapidly shifting from procedural improvements to technological innovations, when it comes to enfranchising military voters. Clearly, technology provides a theoretical solution to the ballot transit time problem, by minimizing the time that it can take for a military voter to request a ballot, receive a blank ballot, and even to return a voted ballot. Furthermore, with advances in technology, electronic balloting for military voters might make for a more accurate, accessible, private and secure voting experience than military voters now face when they use paper ballot request forms or ballots, often sent through postal services that may not be highly secure or that insure privacy. But there simply have been too few serious attempts to develop, implement, and test new technologies for ballot delivery to military voters,

and thus new technologies remain poorly tested and poorly developed, and may thus fall short of the requirements for full implementation for all military and overseas voters.

The key problem with technological innovation has not necessarily been with the technology itself but with issues raised by interest groups to aspects of trials of these technologies. Concerns over security and secrecy have even hampered scaling up successful pilot initiatives into large-scale tests, let alone into operational programs. Some of these concerns are based in real issues associated with the use of new technologies for ballot delivery and receipt; some are no doubt arise from the political uncertainty about the potential impact of thousands of new ballots received from heretofore disenfranchised military voters. Nonetheless, if the past is any indication, the ongoing deployment of a sizeable population of troops abroad will spur innovation and changes in the law to help facilitate military voting. Supporting military voters is both politically popular and normatively laudable, so there is room for procedural and technological progress aimed at enfranchising military and overseas voters. If Congress provides the statutory guidance and funding, and state and local election officials work constructively with Federal officials, it is likely that a fully realized technological answer to the ongoing troubles in absentee voting could eventually be developed that alleviates, if not all, then at least most of the difficulties faced by overseas and military voters. Congress has taken steps in the right direction with UOCAVA, HAVA and the NDAA of 2002, but there is still work to do to adequately serve those who serve the country.

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Table 1: Vote Margins for the 1864 Presidential Election, by State

| State | Total Vote | | | Military Vote | | |
|----------------------------|------------|-----------|--------------|---------------|-----------|--------------|
| | Lincoln | McClellan | Differential | Lincoln | McClellan | Differential |
| California | 62,053 | 43,837 | 18,216 | 2,600 | 237 | 2,363 |
| Connecticut | 44,673 | 42,285 | 2,388 | | | |
| Delaware | 8,155 | 8,767 | (612) | | | |
| Illinois | 189,512 | 158,724 | 30,788 | | | |
| Indiana | 149,887 | 130,230 | 19,657 | | | |
| Iowa | 83,858 | 49,089 | 34,769 | 15,178 | 1,364 | 13,814 |
| Kansas | 17,089 | 3,836 | 13,253 | 2,867 | 543 | 2,324 |
| Kentucky | 27,787 | 64,301 | (36,514) | 1,194 | 2,823 | (1,629) |
| Maine | 67,805 | 46,992 | 20,813 | 4,174 | 741 | 3,433 |
| Maryland | 40,153 | 32,739 | 7,414 | 2,800 | 321 | 2,479 |
| Massachusetts | 126,742 | 48,745 | 77,997 | | | |
| Michigan | 91,133 | 74,146 | 16,987 | 9,402 | 2,959 | 6,443 |
| Minnesota | 25,031 | 17,376 | 7,655 | | | |
| Missouri | 72,750 | 31,596 | 41,154 | | | |
| Nevada | 9,826 | 6,594 | 3,232 | | | |
| New Hampshire | 36,596 | 33,034 | 3,562 | 2,066 | 690 | 1,376 |
| New Jersey | 60,724 | 68,020 | (7,296) | | | |
| New York [‡] | 368,735 | 361,986 | 6,749 | 209 | 96 | 113 |
| Ohio | 265,674 | 205,609 | 60,065 | 41,146 | 9,757 | 31,389 |
| Oregon | 9,888 | 8,457 | 1,431 | | | 0 |
| Pennsylvania | 296,292 | 277,443 | 18,849 | 26,712 | 12,349 | 14,363 |
| Rhode Island [‡] | 14,349 | 8,718 | 5,631 | 162 | 28 | 134 |
| Vermont | 42,419 | 13,321 | 29,098 | 243 | 49 | 194 |
| West Virginia [‡] | 23,799 | 11,078 | 12,721 | 76 | 6 | 70 |
| Wisconsin | 83,458 | 65,884 | 17,574 | 11,372 | 2,458 | 8,914 |

[‡] = Vote totals are for the Army of the Potomac only.