

MEMORANDUM

Date: February 4, 2010

To: Harvey Tettlebaum

From: Lowell Pearson 

Re: Uniform Military Services and Overseas Civilian Absentee Voters Act

This Memorandum analyzes the October 2009 Interim Draft of the Uniform Military Services and Overseas Civilian Absentee Voters Act ("UMSOCAVA"), under consideration by the Uniform Law Commission (sometimes referred to as the National Conference of Commissioners on Uniform State Laws). A copy of the October 2009 Interim Draft is attached.

1. **Background.**

In 2008, the Uniform Law Commission created a study committee to consider the advisability of state legislation to address voting by military personnel and other Americans residing overseas. That study committee recommended that legislation be drafted, and was transformed into a drafting committee that prepared three drafts of UMSOCAVA in 2009. The current version is the October 2009 Interim Draft. The current schedule is that the drafting committee will meet on March 12-14, 2010. It is expected that a final version of UMSOCAVA will be presented to the Uniform Commission for adoption at its July 2010 Annual Meeting. UMSOCAVA would then be available for state adoption.

As you recall, I commented in February 2009 on the then-existing draft of UMSOCAVA. In addition to a section-by-section analysis, I made four general points:

First, it was clear to me that state legislation is warranted. As of February 2009, it was estimated that six million military and overseas voters have the legal right to cast

ballots.¹ It is clear that these overseas voters face challenges that domestic voters do not. Here is some anecdotal evidence:

- In the 2006 election, voter turnout was 39.8% for the general population, but only 20.4% for military voters.
- The registration rate for military voters is 64.86%, as compared to 83.8% for the general population.
- Military voters report registration problems at 1.7 times the rate – nearly twice as often – as non-military voters.
- In 2008, nearly a quarter – 23.7% -- of experienced overseas voters had problems or questions with registration.
- In 2006, less than 16.5% of eligible military and overseas voters requested absentee ballots, and only about a third of the absentee ballots requested were ever counted.
- In 2006, 85.8% of absentee ballots requested by the general population were cast; only 26.5% of absentee ballots requested by military personnel were cast.²

Second, the 2009 draft treated all overseas voters the same, and I noted that such uniformity may not be the best approach. It has the benefit of simplicity and, on its face, appears to be fair to all overseas voters. In practice, however, that approach may impose unfair burdens on military voters. The main issue is the mandatory use by military personnel of the Military Postal Service Agency to transport mail.

Military mail, at best, is slow. The military's standard for mail delivery is 12 to 18 days.³ The Department of Defense asserts that delivery is 11 to 13 days, but the General

¹ The Pew Center on the States, NO TIME TO VOTE: CHALLENGES FACING AMERICA'S OVERSEAS MILITARY VOTERS (January 2009) at 1 (hereinafter "NO TIME TO VOTE").

² Adam Skaggs, Brennan Center for Justice, REGISTERING MILITARY AND OVERSEAS CITIZENS TO VOTE 2009, at 1 (collecting data from other sources).

³ NO TIME TO VOTE, at 41 n. 12.

Accounting disputes the methodology used to make that assertion, stating the 11 to 13 days “significantly understate[s] actual transit time.”⁴ Civilian international mail appears to be faster. The United States Postal Service’s data says mail from the U.S. to any international destination takes 6 to 10 days.⁵ It is my understanding that most active duty personnel are limited to using the slower Military Postal Service Agency.

Third, I noted that technology may not be the entire solution for overseas voters, especially military voters. In addition to slower mail delivery, military voters may suffer (compared to civilian overseas voters) from a lack of access to technology. A 2006 survey revealed that in the 45 days before election day 2006, 25% of active-duty personnel never had access to a fax machine, and only 47% had daily access.⁶ E-mail access was somewhat better, in that 17% reported no access to e-mail, and 53% had daily access. I have found no comparable data for civilian overseas voters. Even where technology is available, security issues are pressing. Electronic transmission of blank ballots is generally viewed as a good idea,⁷ though there are concerns about what happens to such ballots. Electronic voting, by contrast, presents “significant challenges to the integrity of the election.”⁸ Electronic voting also threatens the secrecy of the ballot. Finally, any number of threats can compromise an electronic system, including natural disasters, equipment or power failures, and hacking.⁹

Fourth, I noted that in many cases in the 2009 detail was lacking, which was to be expected of a first draft. The October 2009 Interim Draft appears to have solved this issue.

Since those comments, the drafting of UMSOCAVA has evolved, and this Memorandum will address the October 2009 Interim Draft as a new draft.

⁴ *Id.*, at n. 13 and 14.

⁵ *Id.*, at 13.

⁶ *Id.*, at p. 41, n. 11, citing Defense Manpower Data Center, 2006 SURVEY RESULTS ON VOTING ASSISTANCE AMONG MILITARY MEMBERS AND DoD CIVILIAN EMPLOYEES, (2007), Note No. 2007-010, pp. 14 and 20.

⁷ See NO TIME TO VOTE, at 4; see also Andrew Regenschneid and Nelson Hastings, A THREAT ANALYSIS ON UOCAVA VOTING SYSTEMS (2008) published by U.S. Dep’t of Commerce, National Institute of Standards and Technology, at 2 (hereinafter, “THREAT ANALYSIS”).

⁸ THREAT ANALYSIS, at 2.

⁹ See THREAT ANALYSIS for a comprehensive study of electronic voting security issues.

Before turning to my section-by-section comments, it is worth briefly noting the major development in overseas voting in 2009, the adoption by Congress and signature by the President of the Federal Military and Overseas Vote Empowerment Act (“MOVE Act”). I will not summarize that here in full detail, but by way of a general summary of its impact on states, it requires the following state activities in advance of the November 2010 General Election:

- Implementation of mail and electronic transmission of voter registration applications, absentee ballot applications, and blank absentee ballots from and to absent uniformed services and overseas voters.
- Designation by states of “not less than” one means of electronic communication to absent uniformed services and overseas voters.
- Assurance of security and integrity in the electronic communication system.
- Transmission of absentee ballots to absent uniformed services and overseas voters not later than 45 days before the general election (September 18 this year).
- Creation of a free ballot tracking mechanism so absent uniformed services and overseas voters can determine if their ballots have been received.
- Acceptance of documents regardless of type of paper or envelope and regardless of notarization requirements.

Obviously, the enactment of the MOVE Act presents challenges for the states to conform their laws and rules in time for the November 2010 election. UMSOCAVA’s time frame is such that one would not expect any state legislative consideration of it until 2011 in most states. By then, many states may well have enacted legislation to bring their statutes into compliance with the MOVE Act.

2. **Section-by-Section Comments.**

Section 1 (Short Title):

I have no comments.

Section 2 (Definitions):

The definitions of “absent uniformed services voter” and “overseas voter” are different from the definition in the federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. §§ 1973ff-6(1) (the MOVE Act amends UOCAVA).¹⁰ The UMSOCAVA definition is broader by (1) including those who serve in the state militia or national guard; (2) including military personnel and spouses who are overseas even if the reason they are overseas is not military service; and (3) including U.S. citizens who are overseas for any reason (say, short-term travel) but do not reside outside the United States.

It seems clear to me that on the first point the UMSOCAVA definition is appropriate. There is no rational reason to treat military personnel who serve in a state militia or national guard unit differently from those who serve in the active or reserve components of the federal services.

On the second and third points, I am far from convinced that the UMSOCAVA is correct in extending its definition to all American citizens who are out of the country for any reason and do not reside there. Existing state laws on absentee balloting address this issue. It is not obvious to me that these laws are in any way inadequate or that a uniform approach is warranted.

Moreover, since UMSOCAVA mandates electronic communication to and from voters, it places voters who travel of their own volition outside the country in a better position than those who do so in the United States, since there is no mandate that domestic travelers have access to ballots and voting by electronic means. As an example,

¹⁰ Just to clarify, UMSOCAVA is the Uniform Act being developed by the Uniform Law Commission for presentation to the states. The similarly-named UOCAVA is the existing federal law regarding military and overseas voting. The acronyms are unwieldy and confusingly similar, but appear to be the commonly used terms so I use them here.

why should a person on a voluntary two-month tour of Europe have superior access to voting than that enjoyed by a businessperson on a trip mandated by his or her employer within the United States? I would restrict the application of UMSOCAVA to military personnel, spouses, and dependents who are out of the United States due to service and to voters who reside in a foreign country. The language to accomplish this could be taken from 42 U.S.C. §§ 1973ff-6(1).

Section 3 (Elections Covered):

This section applies UMSOCAVA to all elections including those for local office. This is much broader than the federal MOVE Act, which applies to elections only for federal office. Extending UMSOCAVA to all elections raises issues of cost that each state will have to address. But having said that, it is hard to develop a principled argument (other than cost) that absent military voters and overseas voters have a lesser right to participate in elections for non-federal office elections than do other voters.

Section 4 (Role of State's Chief Election Authority):

My comments are on subsection (d). First, it assigns to the state's chief election authority the task of developing "standardized absentee voting materials" for absentee voting by absent uniformed services and overseas voters. I see no reason why a uniform act should assign this task to the chief election authority. Existing state law on this topic could take many forms: statutes could establish such forms (*see, e.g.*, § 115.279 and 115.283, RSMo, designating language for absentee ballot documents); statutes could authorize the state election authority to establish such documents, but only through specified procedures such as notice-and-comment rulemaking; statutes could authorize the state election authority to establish such documents without constraint (as this draft of UMSOCAVA does); or the tasks could be left to local election authorities. I see no reason why UMSOCAVA should override state existing law on this topic. Further, I think an unconstrained delegation to the chief election authority is the wrong choice because, at a minimum, such forms should be promulgated as rules subject to the states' general rulemaking provisions.

I also disagree with the directive that such forms shall "to the extent reasonably practical" shall be developed "in coordination with other states." This is an unenforceable aspiration that sets no standard, and I see no reason to include it in a statute. More fundamentally, there is no good reason of which I am aware that state

materials should have consistency. The consumers of such materials – voters – can only vote in one state at a time. An Oklahoma voter obtains no benefit from completing an absentee ballot that is similar to Maine’s. For these reasons, I would omit subsection (d) from Section 4.

Section 5 (Overseas Voters’ Eligibility to Vote):

I have multiple issues with section 5.

First, as discussed above with regard to section 2, section 5 permits voting by citizens who are not overseas by virtue of military service or residency, but, rather, are there for any reason at all. The concerns I voiced in the discussion of section 2 apply equally here.

Second, subsection (a) is ambiguous as to where voters may vote. The text focuses on where the voter was or would have been “eligible to vote.” This term connotes that the voter was registered to vote because in the vast majority of states registration is a pre-requisite to eligibility. I doubt, however, that the drafters meant the term “eligible to vote” to be read in that manner. If read that way, the text would preclude a person who resided in a state but never registered from voting. I do not think that was the intent. Because of this problem, I think subsection (a) requires further drafting to clarify its intent.

Third, subsection (b) assigns a voter who was born outside the United States and has never been in the United States to the place where a parent or guardian was eligible to vote. This approach raises numerous concerns. First, the draft is silent on what happens if the voter’s parents were last domiciled in different locations. It appears, but is far from clear, that the voter can make an election between the multiple jurisdictions. Second, the draft does not account for step relationships, nor does it define “parent” to account for adoptive versus birth parents. Third, the draft may well be assigning voters to a jurisdiction to which they have no voting interest. This is especially important because the draft permits these “never-domiciled” voters to vote in congressional, not just presidential, elections. My view is that the draft should permit such voters to vote only for president, which would eliminate some of these concerns. I believe that to be the majority view of states currently, though I have not fully researched that issue.

Section 6 (Form of Registration and Application for Military-Overseas Ballot):

This section promotes use of the Federal Post-Card Application for requesting an absentee ballot, while still preserving the existing state application process. I have no comments on this section.

Section 7 (Electronic Transmission of Registration and Application for Military-Overseas Ballot):

This section requires the state election authority to establish an “electronic transmission method” by which an absent uniformed services voter can submit an absentee ballot application to the election authority.

The decision of what form of electronic transmission will be used is an important policy decision. If this decision is to be delegated to the state’s chief election authority, the delegation should be accompanied by a requirement that the decision be made using the state’s existing rulemaking procedures.

Section 8 (Timeliness and Scope of Application for Military-Overseas Ballot):

This section provides that an application for a military-overseas ballot is timely if received by the later of (1) the fifteen days before the election or (2) the state’s last day for other absentee voters to apply for a ballot. This seems appropriate to me.

Section 9 (Transmission of Unvoted Ballots):

Subsection (a) provides that blank ballots must be sent to military-overseas voters who have applied for one no later than 45 days before the election. This confirms to the MOVE Act, and consistency between state and federal law on this point is desirable. As a practical matter, the MOVE Act is going to establish this as the norm, so UMSOCAVA might as well adopt the same standard.

Subsection (b) permits voters to select from facsimile transmission or e-mail, or “Internet delivery if offered by the voter’s jurisdiction.” As I read subsection (b)’s choice provision, the state would be required to provide both facsimile and e-mail for transmission of blank ballots, and could, but would not have to, provide “Internet

delivery.” This is a departure from the MOVE Act, which requires at least one electronic means of transmission.

Subsection (c) requires the local election authority to transmit a blank absentee ballot to a voter within two working days (this applies to those who apply for a ballot less than 45 days before the election). I have no disagreement with that provision, and a quick turnaround time is essential.

Section 10 (Timely Casting of Ballot):

This section requires the voter to submit the ballot for transmission by 12:01 a.m. on the date of the election (measured in the place where the voter completes the ballot). The comment asserts that this will prevent any voter from voting with knowledge of “early returns” of the jurisdiction whose ballot the voter is voting. While I am not certain that the comment is accurate (New Hampshire voters routinely know the “early returns” from Dixville Notch), I do endorse a bright-line measured at the place of voting, and this seems as good a line as any. Proof of timeliness is discussed in section 12.

Section 11 (Acceptance of Federal Write-In Ballot):

Subsection (a) requires the state to accept the Federal Write-In Absentee Ballot (FWAB) as provided for in 42 U.S.C. § 1973ff. I have no disagreement with subsection (a).

Subsection (b) provides that the FWAB’s voter declaration on the envelope be deemed a request for registration and is timely if received by the election authority by the deadline for requesting a blank absentee ballot. The FWAB includes a question where the voter can check “I ALSO REQUEST VOTER REGISTRATION (where permitted by state law).” As I understand the law, some states now permit the FWAB to serve as an application to register to vote and some do not. I am not convinced that UMSOCAVA should state the FWAB serve this purpose in all states, because some state laws are now more rigorous regarding registration than is the FWAB. For example, in Missouri, the applicant to register to vote must include the last four numbers of his or her social security number. § 115.155, RSMo 2009 Supp. This information is used to help uniquely identify the individual and to cross-reference voter lists between jurisdictions. The Missouri form includes a very strong, capitalized notice that a false registration is a class one election offense and a statement of what the penalties are. The FWAB has a

much weaker statement that “a material misstatement of fact in completion of this document may constitute grounds for conviction of perjury.” Given the differences between existing state registration forms and requirements and the FWAB, I do not favor using UMSOCAVA as a vehicle for converting the FWAB into a registration application in all states.

Section 12 (Receipt of Voted Ballot):

Subsection (a) provides that a military-overseas ballot must be counted if delivered by the local election authority by the end of business on the day before the date the local authority must complete its tabulation. The need for a later deadline for receipt of military-overseas absentee ballots than for domestic absentee ballots is clear because of slower delivery times. This provision will slow final canvassing because it effectively makes the last day for tabulations by local election authorities the only day for completing such tabulations, since the local election authority could not possibly complete tabulations until receiving the prior day’s mail. This is somewhat problematic in a state like Missouri with over a hundred local election authorities, since now the state election authority will likely receive all local tabulations at the same time. I do not necessarily disagree with the approach in subsection (a), since the longer deadline is probably necessary. But, it will have the effect of slowing tabulations.

Subsection (b) provides that if the military-overseas voter declares under penalty of perjury that the ballot was timely, the ballot may not be rejected because of no postmark or a late one. This is appropriate because international mail and military mail frequently has no postmark or an inaccurate postmark.

There appears to me to be an omission from section 12 in that it does not address timeliness of electronic transmissions. There will undoubtedly be situations where the military-overseas voter affirms that the ballot was timely filed, but the facsimile or e-mail transmission indicates that it was not. UMSOCAVA should address that situation.

Section 13 (Declaration Requirements):

I have no disagreement with this section. The noteworthy feature is that it permits a ballot to be made by declaration under penalty of perjury rather than a notarized signature. While notarization is preferred and is the current requirement in many states, access to notaries in foreign countries is a legitimate problem.

Section 14 (Confirmation of Receipt of Application and Voted Ballot):

This section is similar to a provision in the MOVE Act. I have no major disagreement with it.

Section 15 (Collection of Voters' Electronic Mail Addresses):

Subsection (a) requires the local election authority to request that the military-overseas voter provide an e-mail address when registering to vote. It provides that such addresses are not open records or available for any other purpose than voting.

This is an idea that I have not seen before. The goal of improving communication with voters by e-mail is laudable and necessary. I do have concerns about security of e-mail addresses in the offices of thousands of local election authorities, but given the amount of data these entities already have, the marginal security risk of e-mail addresses is probably not significant.

The subsection (b) and (c) provisions seem appropriate.

Section 16 (Publication of Election Notice):

Subsection (a) provides that an election notice must be published 100 days before each election. This will be a departure from existing law in most states, and will require two different notice deadlines unless the existing election notice statutes are conformed. It is not clear to me that this extra notice for overseas-military voters is necessary or that the existing election notice deadlines are an impediment to voting by overseas and military voters.

I have no comments on subsections (b), (c), and (d).

Subsection (17 (Nonessential Requirements):

I have no comments on section 17.

Section 18 (Exigent Circumstances):

I have no comments on section 18.

Section 19 (Issuance of Injunction or Other Equitable Relief):

This section permits a court to issue an injunction or other equitable relief to enforce UMSOCAVA. In my judgment, this is unnecessary and should be omitted. The states' existing laws on injunctions, equitable relief and other remedies such as a declaratory judgment should govern this issue. One example from Missouri is instructive. In 2000, a circuit judge in St. Louis entered an election-day order directing that polls remain open beyond the statutory closing time. *State ex rel. Bush-Cheney 2000 v. Baker*, 34 S.W.3d 410 (Mo. App. 2000). The court of appeals held that there was no authority for such an order. *Id.* In 2006, the Missouri General Assembly enacted legislation providing that "no state court shall have jurisdiction to extend the polling hours established by law. . ." § 115.430(14), RSMo. My reason for mentioning this is not to debate the merits of keeping-the-polls-open issue, but to show that existing state law may well have consciously considered court jurisdictional issues, and that section 19's approach may well not fit into that existing law in many states.

Section 20 (Supersession of State Law):

I have no comments on Section 20.

Section 21 (Application and Construction):

I would omit subsection (b) of Section 21 which provides that UMSOCAVA is designed to facilitate and shall be read in harmony with the federal UOCAVA. I believe this encourages too much deference to federal law.

Section 22 (Relation to Electronic Signatures in Global and National Commerce Act).

I have no comments on Section 22.

Sections 23-25 (Various Housekeeping Provisions):

I have no comments on these sections.

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Thank you for the opportunity to comment. Please advise if I can be of further help.

LDP:cst