

To: Committee on Scope and Program, Uniform Law Commission

From: Steve Wilborn, *Chair*, Steve Huefner, *Reporter*, Study Committee on a Military Services and Overseas Civilian Absentee Voters Act

Date: Dec. 12, 2008

Re: Report and Recommendation for Drafting Committee

In response to a request from the Pew Center on the States that the ULC consider drafting an act to address the voting difficulties facing overseas and military voters, the ULC Committee on Scope and Program recommended in July 2008 that a study committee be formed. Subsequently, at its meeting of July 22, 2008, the ULC Executive Committee approved the following resolution:

RESOLVED, that a Study Committee be formed to make a recommendation as to the feasibility of drafting a Military Services and Overseas Civilian Absentee Voters Act, that this study committee be formed promptly, that a reporter be provided to assist the study committee, and that a report as to the viability and potential scope of the project be given to the Committee on Scope and Program at its January 2009 Midyear Meeting.

In September 2008 ULC President Martha Lee Walters appointed a Study Committee on a Military Services and Overseas Civilian Absentee Voters Act. The Study Committee was asked to complete its work on a fast-track so that it could present its report by mid-December 2008. Aiding the Study Committee's effort during this compressed period was the fact that the Pew Center had already collected and was able to share a substantial amount of background information concerning the issues before the Study Committee. In addition, many potential stakeholders were already well-organized.

In October and November 2008, the Study Committee held two conference calls. Then on December 8th and 9th, the Study Committee met in-person in Washington, D.C., for two full days of discussion. A number of observers also attended and contributed to the Study Committee's deliberations over these two days, including representatives of the Overseas Voting Foundation, the National Defense Committee, the Pew Center on the States, the JEHT Foundation, the National Association of Secretaries of State, the National Conference of State Legislatures, the U.S. Election Assistance Commission, the Federation of American Women's Clubs Overseas, American Citizens Abroad, Iraq and Afghanistan Veterans of America, and both the military and United States postal services. As a result of these deliberations, those members of the Study Committee present at the December meeting unanimously concluded that the Committee should recommend that a drafting committee be formed to take up the work of preparing a Military Services and Overseas Civilian Absentee Voters Act, and that such an act meets the criteria for proposed acts that

the ULC established in its statement of January 13, 2001. The Committee has authorized the Chair to prepare this memorandum to describe the basis for this recommendation and to report on the Committee's work.

Underlying Problem

The Study Committee found widespread agreement that military personnel and overseas civilians face a variety of unique challenges in participating in American elections, notwithstanding repeated congressional efforts – most prominently the enactment of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA) – as well as various state efforts to facilitate these voters' ability to vote. In important part, the difficulties that these voters face reflect the fact that American elections are conducted at the state and local levels under procedures that vary dramatically by jurisdiction. This lack of uniformity complicates any effort, such as the UOCAVA, to assist these voters as a group to surmount the other primary obstacles that they face. These other obstacles include: difficulties registering to vote from abroad; ballots or ballot applications that never arrive; frequent changes of address; incredibly slow mail delivery times to and from overseas citizens, especially military personnel; and failures to complete absentee voting materials properly, including noncompliance with notarization or verification requirements.

One dramatic representation of the problem that these voters face are figures from 2006 (the most recent federal election for which full data were available) indicating that: (1) while in 2006 military personnel were slightly more likely to have registered to vote than the general U.S. population (87% vs. 83%), the voter participation rate among the military was about half that of the general population (roughly 20% vs. roughly 40%), meaning that more than one million service members did not vote; (2) only 25% of military voters who requested an absentee ballot completed and returned one (compared to 85% of voters generally); (3) more than 20% of military personnel who did return a ballot had their ballot rejected. A similar pattern has occurred in other elections, although the Study Committee did not undertake to quantify it more specifically. Rather, because the nature of the problem was generally accepted, the Committee focused instead on identifying the causes of and the potential solutions to the particular obstacles already known to disenfranchise military and overseas civilian voters.

Information Considered

The Study Committee considered a variety of materials relevant to the voting experiences of military and overseas civilians. A partial bibliography of the range of materials that the Study Committee and its Reporter consulted is attached as an Appendix to this report, although a few of the most helpful sources also deserve note here. Several government agencies or offices, including primarily the U.S. Election Assistance Commission, the Department of Defense (and its Federal Voter Assistance Program), and the Government Accountability Office (GAO), have collected data about or have otherwise

studied the problem. The GAO in particular has studied the challenges of implementing electronic voting for overseas and military voters, while the EAC, as part of its more general collection and analysis of data about voter participation after each federal election, now annually publishes a report on overseas and military voting.

In addition, a number of private organizations have been actively collecting and analyzing data about overseas and military voting. These organizations include the National Defense Committee, the Overseas Vote Foundation, the Federation of American Women's Clubs Overseas, and the Pew Center on the States. The Overseas Vote Foundation has conducted its own surveys of military and overseas voters, as well as voting officials, concerning both the 2006 and 2008 federal elections. The information from these organizations, in conjunction with the government reports, provided the committee with very specific knowledge about the shortcomings in the voting processes pertaining to military and overseas voters.

At the same time, the Study Committee found very little systematic academic study of these issues. Professor Thad Hall, a political scientist known for his research concerning matters of election administration, confirmed this in a literature review earlier this fall. Despite the dearth of scholarly attention in this area, however, it was nonetheless apparent to the Study Committee both that military and overseas voters face undue burdens in many states, and that the lack of uniformity across states is itself a factor contributing to the disenfranchisement of these voters.

The Study Committee specifically considered some of the varying state laws that govern voting by military and overseas citizens. For instance, while some states permit overseas absentee ballots to arrive up to ten days after election day and still be counted, other states require that all absentee ballots, including those from overseas, be received by election day. Meanwhile, some states permit overseas and military voters to request, and in a smaller number of cases also to cast, an absentee ballot electronically, but other states require transmission by regular mail. A minority of states requires a notary or other witness to vouch for the absentee voter's execution of the absentee ballot affirmation. These and other variations across states have both complicated the procedures developed under the UOCAVA to help overseas and military voters, and have made it difficult for voting assistance groups and the U.S. military to give standard advice to these voters.

In addition, the Study Committee found strong popular support for the idea that voting should be much easier and more reliable than it is for these voters. In a survey conducted earlier this year for the Pew Center, the public opinion company Lake Research Partners found "strong universal support . . . across age, regional, and party lines" for the idea that military and overseas voters should be able to participate in elections "back home." The stakeholders who shared their views with the Committee were overwhelmingly of a similar disposition.

Issues

The Study Committee considered four major categories of issues that a uniform law in this area likely should address. Two threshold categories were: (1) which voters should such a law cover, and (2) which elections should such a law cover. With respect to the first issue, the Committee reached consensus that as a starting position, a ULC act should be drafted to include at least the same population covered by the UOCAVA. This population encompasses three kinds of voters: (1) U.S. military personnel who, because of their active military duty, are unable to vote in-person in the jurisdiction in which they are eligible to vote; (2) dependents of U.S. military personnel who, because of the active military duty of such personnel, are unable to vote in-person in the jurisdiction in which they are eligible to vote; and (3) persons residing outside the United States who therefore are unable to vote in-person, but who otherwise would be qualified to vote in the last place in which they were domiciled before leaving the United States. The Committee also considered a fourth kind of voter not covered under the UOCAVA, namely U.S. citizens residing outside the United States who have never had a domicile in the United States. The Study Committee concluded that a drafting committee should work to include these voters as well, and also specify which elections such voters might be eligible to vote in, but left for further discussion just how completely to do this.

With respect to which elections to cover, the Study Committee reached consensus that a ULC act should at least apply to all federal elections, both primary and general (and presumably also special elections), as well as to all statewide elections. The Committee also had a more extended discussion of the advisability of including purely local elections within the act's coverage, but decided only that whether to include these elections required further consideration.

In addition to these two threshold questions of the scope of a potential ULC act, most of the remaining issues that the Committee addressed fell into two broad but interrelated categories: (1) what voting processes and mechanisms (such as what technologies, what authentication requirements, etc.) should be used for these voters and elections; and (2) what timetables should be associated with these processes. The Committee did not reach the same degree of consensus on the issues in these two categories, but did conclude that the key issues in these areas likely would be amenable to successful resolution at the drafting stage.

The issue that may require the most extended consideration is the extent to which overseas and military voters should be able to cast or at least transmit their *voted* absentee ballot electronically, whether by facsimile, email, internet voting, or otherwise. The Study Committee recognized that electronic options would dramatically reduce the time periods required to permit these voters to vote successfully, but also understands that many state election officials and others may have strong reservations about electronic voting, because of both privacy and security concerns. Whether these concerns can be addressed remains

an open question. However, the Study Committee did conclude that at least for those steps in the absentee voting process prior to casting the ballot (such as registering to vote, requesting an absentee ballot, and receiving a blank ballot), electronic transmission options should be made available.

The Study Committee also agreed that a ULC act would increase the number of overseas and military voters who vote successfully if the act eliminated the requirements of some “non-essential” steps in the voting process (for example, specific paper types or paper sizes for printed ballots) so as not to disenfranchise these voters. Similarly, at least as a tentative judgment, the Committee felt that a notarization or witness requirement when casting an absentee ballot was unduly burdensome, provided the voter was affirming under penalties of perjury to be legitimately casting the ballot.

As for the timetable that a ULC act might establish for military and overseas voting, the Committee agreed to proceed by recommending an initial framework that would require states to transmit absentee ballots at least sixty days before an election, allow overseas and military voters to cast ballots until the day before the election, and require states to count these ballots as long as they were received by the tenth day after the election. Not all Committee members believed it advisable to permit absentee ballots to be returned after election day, but all agreed that in the drafting stage the discussion could begin from that framework. Similarly, requiring ballots to be ready to transmit sixty days before an election is an aggressive timetable that may need to be scaled back in the drafting stage to accommodate the realities of ballot preparation. The Committee engaged in repeated discussion of the possibility that an act could permit states to use a shorter timetable in exchange for employing more extensive use of electronic options to transmit voting materials.

The Study Committee also was able to discuss a number of other smaller issues concerning a potential ULC act in this area, as a result of which the Reporter received more specific direction about what a first draft of such an act might cover, if a drafting committee is asked to prepare such an act.

Recommendation

The Study Committee concluded that the voting challenges facing military and overseas civilian voters are appropriate for resolution through state legislation, and therefore recommends the appointment of a drafting committee to prepare a ULC act on this subject. Federal legislation has already been attempted, and itself has been dramatically complicated by the huge variation in how states structure the voting processes for these voters. Although additional federal legislation also might be helpful, particularly to update the UOCAVA in light of a ULC act were such a measure to become law in many states, at this point additional federal legislation does not appear necessary. Rather, the critical need is for a state measure. In particular, the ULC is in a position to develop a state

act that specifically addresses the challenges facing military and overseas voters, challenges that presently arise out of the fact that state law provides the primary legal structure for the nation's election processes. Widespread adoption of a ULC act in this area would foster a more streamlined voting process for military and overseas voters, thereby making it substantially easier for more of these voters to have a meaningful opportunity to participate in American democracy.

The Study Committee also concluded that there is a reasonable probability that an act in this area, if the ULC approved it, would be accepted and enacted into law by a substantial number of jurisdictions. Support for enfranchising military service personnel in particular is widespread, and a number of stakeholders would be able (and are clearly eager) to provide considerable assistance in educating state legislators about the reasons for the act. These stakeholders also are in a position to assist in the development of a ULC act.

The Study Committee identified several caveats that a drafting committee should keep in mind: an act for overseas and military voters will be easier for states to adopt to the extent that it does not require substantial modification of other aspects of a state's election processes and timeline; those states that feel that they have already enacted comparable legislation in the area will be more likely to consider a ULC act if it in fact would obviously lead to meaningful uniformity across states; and the views of state and local election officials, who would have responsibility for implementing the act, should be considered at every step.

The study committee requests that a drafting committee be appointed immediately, that it meet twice in the first half of 2009, that it have its first reading at the ULC Annual Meeting in July 2009, and that it have its final reading at the ULC Annual Meeting in July 2010. This way a uniform act can be ready for states' consideration in 2011.

Attachment.