

# SAVING SOLDIERS' SUFFRAGE

## THE CHALLENGES OF OVERSEAS VOTING REFORM

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### **Introduction**

To most people, absentee ballot fraud is not an interesting subject. While many people say they do not have confidence in “the system” when it comes to elections, few are worried about their own ballots not being counted.

But for the thousands of military voters overseas, a case of uncounted absentee ballots strikes a little closer to home. A breathtaking percentage of overseas voters never receive their ballots, or never get them counted when they try to vote.

To make matters worse, there is constant pressure to make voting faster, easier, and more accessible. And most changes that make it easier to vote also make it easier for a vote not to be counted.

So where does this leave an overseas voter? How can officials make sure his ballot gets counted—without allowing somebody else to steal his vote?

## The Story Thus Far

Prior to the 2008 election, the Pew Center on the States released a report entitled “No Time to Vote.” According to Pew, over half the states mailed ballots to their overseas voters too late for the ballots to be returned in time to be counted.<sup>1</sup>

But just in case scholarly research did not make the point, the subsequent election did. In 2008, one in four overseas voters did not have his vote counted. This is even worse than it sounds, as the number four represents U.S. citizens overseas who actually received and voted their ballots. If we took into account those who did not, the number would be even worse. As it is, out of every four citizens overseas who actually submitted a ballot did not have it counted. Sen. Charles Schumer (D-NY) released a report substantiating Pew’s numbers and calling for comprehensive national action to remedy the situation.<sup>2</sup>

At this point, several states had already begun to take steps to remedy the situation internally. One such pioneer was Minnesota. At the advice of various election reform organizations, the state overhauled its procedures from the ground up. Between 2006 and 2008, Minnesota saw a 282% increase in overseas ballots voted; out of the 10,000 ballots mailed to overseas voters, a remarkable 8,000 were submitted.<sup>3</sup>

The reasons for the increase? One was the effective use of the internet. Everything, from regulations and procedures to registration documents to emergency ballots, was available online. (The internet was also used to advertise these new resources.)

Another reason was the creation of new institutions and procedures to specifically handle overseas ballots. An ID number match system was implemented to protect the security of the ballots, and every county had an overseas ballot board to handle ballots coming in from abroad. An army officer in Afghanistan could cast his ballot and feel some certainty it would not be lost in the shuffle—a feeling that was also helped by the Minnesota voters themselves, who responded enthusiastically to a state campaign to (as they put it) protect the votes of their military voters.

The result of all this was that, of the 8,000 ballots cast, only 463 were rejected (a substantial decrease from the percentage rejected in 2006).<sup>4</sup>

Yet in 2008, Minnesota was the exception, not the norm. Thus, in 2009, Congress passed the MOVE Act to require the rest of the states to implement similar procedures; a move applauded by activist groups on both sides of the aisle.<sup>5</sup> Among other things, the MOVE Act required states to mail overseas ballots 45 days before an election; it required states to make emergency ballots available online; and it removed an old requirement that overseas ballots be notarized.

“It is the least we can do for our troops to make sure their votes get counted when they are serving overseas,” said Schumer, the initial proponent of the bill. “This bill will remove the barriers that too often conspire to disenfranchise our military men and women. Thanks to this quick passage by the Senate, it will take effect in time for next year’s federal elections.”<sup>6</sup>

Broadly speaking, the MOVE Act mandated that all 50 states meet several benchmarks Minnesota had already met. For voters, in the best-case scenario, this would mean a lot fewer headaches, and a much higher probability of their votes getting counted.

While the MOVE Act set goals, it did not, in most cases, require specific methods of achieving them. On one level, this was arguably sensible, since 50 states meant 50 different existing systems, and no bill could have been passed that synthesized them all. Each state would need to do different things to meet the requirements, and some would need to do more work than others.

But on another level, this approach created a lot of challenges for the future. While federal legislators can now pat each other on the back for passing the law, the burden of actually implementing the law falls on the states.

### **The Big Picture**

While this might sound unfair, it is the way our constitutional system works—Colorado lawmakers and election officials get to determine what methods work best for Coloradans, rather than being forced to do everything the way Californians do it. But from another perspective, Congress has given state legislators, and state and county election officials, a mammoth task that has a great deal more complexity to it than Senator Schumer has cared to admit.

The MOVE Act comes as the latest in a seemingly irreversible wave of efforts to make voting easier. Politicians, research institutions, and election reform organizations come out with statements and proposals calling loudly for reform. The last 10 years—to some extent the last 20—have seen a number of efforts to “modernize” voting (trade speak for making it easier).

But identifying what is really a problem is easier said than done. Many election reform organizations have institutional memories going back no further than the 1990s. Citing recent statistics of low voter turnout and of problems voting, activists and politicians claim a clear need to abandon existing procedures that make it hard to vote. Yet those very procedures were put in place a century ago; during the Progressive era; because of rampant voter fraud, intimidation, and election-buying. (Anyone who has seen *Mr. Smith Goes to Washington* has seen a glimpse of what American politics looked like before election reform.)

Put another way, the American federal voting system has been structured and restructured over the years to foster an environment of legitimacy and accuracy. The same systems that occasionally make it hard for an unprepared voter to cast a ballot also protect that voter from having his vote stolen. And well-intentioned reformers, willing to tear down a fence before they even know why it was put there, risk undoing good things along with bad.

An example: many voters complain about the inconvenient hours of polling places. Yet fixed, daytime hours were mandated during the Progressive era after numerous ballot stuffing scandals delegitimized election results (along with ballot-marking parties in which employees or union members were forced to mark their ballots the “right” way). Such issues are not a relic of a bygone time—Afghanistan, which took great pains to make its voting “safe and accessible,” had serious problems along these lines in its 2009 election.<sup>7</sup> While polling place hours are not an unfixable problem, reform-minded lawmakers would need to think very carefully about *how* to fix it so as to avoid recreating problems the country has already (mostly) solved.

So as states deal with sweeping federal legislation demanding they make it easier to vote, historical experience challenges them to do it carefully—without unwittingly destroying the safeguards that have allowed American elections to end with cordial concession phone calls instead of revolutions.

### **State Implementation: Hurdles Ahead**

This challenge means a steep learning curve for some states.

For one thing, the systems in place vary dramatically, both in initial quality and in their ability to make significant changes. Already, Sen. Schumer’s own state, New York, has made headlines for failing to meet the 45-day deadline to mail ballots. As the deadline came and went, New York City hadn’t mailed any at all. A disgusted Mayor Michael Bloomberg called the Board of Elections’ work “reprehensible,” but said it was par for the course.<sup>8</sup>

As the state voting systems vary, so will the experiences had by overseas voters. And it remains to be seen whether the Department of Justice is serious about enforcing the MOVE Act. When it became clear New York would not meet its obligations, the department first granted the state a 15-day waiver, then declined to pursue legal action after that second deadline was not met. A department spokeswoman said the department was in “urgent discussions” with state election officials, but at that point planned no more drastic action.<sup>9</sup> If the MOVE Act is not enforced, its value to overseas voters may prove limited.

But what of states that are committed to improving the experience of overseas voters? They too have hurdles to clear.

For one, since the MOVE Act eliminated notarization requirements, states must scramble to create new security systems. While the notarization requirement was often onerous, it did make it easier to know that the ballot had indeed been submitted by its intended recipient. Some states have mail-ballot systems in place that can fairly easily be adapted to overseas voters. Others do not, and risk recreating the kind of corruption that gave voters a century ago such a cynical view of their political system. Those states have to establish which alternative voter verification approach works best for voters in foreign countries, and this is not accomplished in one election cycle.<sup>10</sup>

Another problem: the rush to improve election technology creates its own challenges. The Federal Write-In Absentee Ballot, the emergency ballot available online, can create a headache for county election offices (particularly in rural areas) that are not ready for it. Election websites, as has also been documented by Pew, range from superb to atrocious; and many are simply not equipped to handle the amount of information necessary to do what Minnesota did.<sup>11</sup> And submitting ballots electronically, while not as risky as actual online voting, does carry greater risks of identity theft and vote-stealing than a notarized, physical ballot.<sup>12</sup>

But perhaps one of the toughest issues in the short term is states’ existing calendars. A 45-day window for the ballot’s round trip forces state political parties to have their primaries far earlier than before—often as early as mid-summer. There is a certain irony to moving the apparatus of whole election systems, shifting the dynamic of an entire election, because of (often) a few hundred people. (Fun fact: the direct primary was also a product of the Progressive era’s election

reform, created so that a few hundred people could not change the outcome of an election.) And easy or hard, it takes time.

While no single issue makes compliance with the MOVE Act impossible, these examples demonstrate the challenges states face if they choose to try to comply—and the uncertainties they face if they do not. The MOVE Act was merely the beginning, not the end of a reform process.

### Conclusion

While reform bills from Congress usually sound as though they fix a problem, they more often have one of two effects. If they try to micromanage, they create new problems (regardless of whether they solve the original one). If, like the MOVE Act, they are more federal in nature and rely on the states for implementation, they are more like a punt disguised as a touchdown. Congress has told the states, “Fix the problem—or else,” then turned to the public and proclaimed, “Look—we fixed it!”

State officials working thanklessly to make Senator Schumer’s dream a reality would do well to consider the past as they try to reshape the future. Overseas voters do not need to trade one problem (votes not being counted) for another (votes being stolen). Smart reform is needed; changes that take into account the institutional memory of our election system. “The least we can do” is, in this case, a lot. But the states that can pull it off will have done a great service to the future of American government.

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<sup>1</sup> Pew Center for the States, “No Time to Vote,” January 2009

[http://www.pewcenteronthestates.org/uploadedFiles/NTTV\\_Report\\_Web.pdf](http://www.pewcenteronthestates.org/uploadedFiles/NTTV_Report_Web.pdf), p. 3

<sup>2</sup> Office of Sen. Charles Schumer (D-NY), Press Release, May 2009

[http://schumer.senate.gov/new\\_website/record.cfm?id=312970](http://schumer.senate.gov/new_website/record.cfm?id=312970)

<sup>3</sup> Overseas Vote Foundation, “Minnesota Takes the Lead: Web Services and Outreach for Overseas and Military Absentee Voters Helped Determine Election Results,” May 2009 <https://www.overseasvotefoundation.org/files/OVF-CS-MN09.pdf>, p. 4

<sup>4</sup> Overseas Vote Foundation, “Minnesota,” p. 2

<sup>5</sup> American Enterprise Institute, “MOVE Act Ensures Less Military Vote Disenfranchisement,” October 2009 <http://blog.american.com/?p=6492>

<sup>6</sup> Office of Sen. Charles Schumer (D-NY), “Senate Passes Bipartisan Bill to Ease Voting Process for Military, Overseas Voters,” October 2009

[http://schumer.senate.gov/new\\_website/record.cfm?id=319278](http://schumer.senate.gov/new_website/record.cfm?id=319278)

<sup>7</sup> Noah Kristula Green, “The Joy of Ballot-Stuffing,” The New Republic Blog, 9 September 2009, <http://www.tnr.com/slideshow/ballot-stuffing-through-the-ages>

<sup>8</sup> Fox News, “Mayor Bloomberg Slams Board of Elections for Failure to Mail Ballots,” October 2010 <http://www.foxnews.com/politics/2010/10/11/mayor-bloomberg-slams-board-of-elections-for-failure-to-mail-ballots/>

<sup>9</sup> Fox News, Bloomberg

<sup>10</sup> Clair Whitmer, “What the MOVE Act Means for You,” Overseas Vote Foundation: January 2010 <https://www.overseasvotefoundation.org/node/282>

<sup>11</sup> Pew Center on the States, “Being Online is Not Enough,” October 2008

[http://www.pewcenteronthestates.org/uploadedFiles/VIP\\_FINAL\\_101408\\_WEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/VIP_FINAL_101408_WEB.pdf)

<sup>12</sup> Clair Whitmer, “What the MOVE Act Means for You”