No. 13-14065-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

THE STATE OF GEORGIA; and
BRIAN P. KEMP, SECRETARY OF STATE OF GEORGIA,
in his official capacity,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLEE UNITED STATES OF AMERICA

JOCELYN SAMUELS
Acting Assistant Attorney General

MARK L. GROSS
JODI B. DANIS
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-5768
Jodi.Danis@usdoj.gov

Case No. 13-14065-EE
United States v. *The State of Georgia, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellee United States states that the Certificate of Interested Persons and Corporate Disclosure Statement that Appellants filed with their Corrected Brief of Defendants/Appellants is complete.

s/ Jodi B. Danis
JODI B. DANIS
Attorney

Date: December 9, 2013

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

REGULATIONS: **PAGE**

LEGISLATIVE HISTORY:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-14065-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

THE STATE OF GEORGIA; and
BRIAN P. KEMP, SECRETARY OF STATE OF GEORGIA,
in his official capacity,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLEE UNITED STATES OF AMERICA

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument may assist this Court in reaching its decision in this case. This appeal raises a novel issue regarding the proper construction and interpretation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), 42 U.S.C. 1973ff *et seq.* To date, no other federal court of appeals has considered the issue of whether the 45-day

deadline for transmitting absentee ballots before a federal election, pursuant to 42 U.S.C. 1973ff-1(a)(8)(A), encompasses federal runoff elections.

STATEMENT OF JURISDICTION

Pursuant to Eleventh Circuit Rule 28-2, appellee United States is satisfied with appellants' (Georgia's) Statement of Jurisdiction. See Georgia Br. 1-2.

STATEMENT OF THE ISSUES

1. Whether the plain language in 42 U.S.C. 1973ff-1(a)(8)(A) that refers to "an election for Federal office" encompasses federal runoff elections.

2. Whether, if the Court determines that only 42 U.S.C. 1973ff-1(a)(9) applies to runoff elections, the "sufficient time" requirement in that provision reflects Congress's presumption that 45 days of advance ballot transmittal time normally are necessary to fully enfranchise UOCAVA voters.

3. Whether the district court properly held that Georgia does not comply with UOCAVA's 45-day deadline with respect to federal runoff elections by simply mailing a blank State Write-In Absentee Ballot (SWAB).

4. Whether the district court properly exercised its discretion in entering an injunction establishing a UOCAVA-compliant calendar for 2014 federal elections in the State of Georgia.

STATEMENT OF THE CASE

1. Nature Of The Case

This is an appeal from the district court's grant of summary judgment to the United States in a dispute over the provisions of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), 42 U.S.C. 1973ff *et seq.*, as amended by the Military and Overseas Voter Empowerment Act (MOVE Act), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009), that apply to federal runoff elections. Doc. 38/App. 17.[1] The United States contends that Section 1973ff-1(a)(8)(A), which requires States to transmit absentee ballots to UOCAVA voters no later than 45 days before "an election for Federal office," encompasses federal runoff elections. Georgia disagrees and contends that 42 U.S.C. 1973ff-1(a)(9), which requires States to create a written runoff election plan to ensure UOCAVA compliance, negates the 45-day deadline of Subsection (a)(8)(A) with respect to runoff elections and substitutes an amorphous, potentially much shorter "sufficient time" requirement that Georgia may interpret for itself.

[1] "Doc., __ at __/App. __" refers to the document recorded on the district court's docket sheet and the tab number in Georgia's Appendix. "Addendum at S____" refers to the excerpt of the Congressional Record that the United States has attached in the Addendum to this Brief.

2. Course Of Proceedings And Dispositions In The Court Below

The United States filed a Complaint for declaratory and injunctive relief on June 27, 2012, alleging that Georgia's runoff absentee voting scheme denies the rights of UOCAVA voters in violation of 42 U.S.C. 1973ff-1(a)(8). Doc. 15/App. 1. The United States filed a Motion for Temporary Restraining Order and Preliminary Injunction (Motion for TRO/PI) that same day. Doc. 2/App. 2. On July 5, 2012, the district court granted the United States' Motion, ordering, *inter alia*, express mail service and ballot receipt deadline extensions for six congressional districts in the event of August 21, 2012, federal primary runoff elections. Doc. 10, at 23-27/App. 4.

The parties filed cross motions for summary judgment. Doc. 24-25. The district court granted summary judgment to the United States on April 30, 2013. Doc. 33/App. 13. The court held that Georgia had violated UOCAVA because the 45-day deadline in 42 U.S.C. 1973ff-1(a)(8)(A) applies to all federal runoff elections, and that Georgia's use of a State Write-In Absentee Ballot (SWAB) without necessary runoff candidate information did not comply with Subsection (a)(8)(A). Doc. 33, at 24-25/App. 13. Upon Georgia's failure to submit a proposed federal election calendar that complied with UOCAVA, the court issued an injunction on July 11, 2013, establishing a new UOCAVA-compliant federal

election calendar for Georgia and entered a final judgment. Doc. 38-39/App. 17-18.

Georgia timely filed its Notice of Appeal on September 6, 2013. Doc.46/App. 20. The district court denied Georgia's Motion to Stay Permanent Injunction Pending Appeal on October 16, 2013. Doc. 57, at 18/App. 23.[2] Georgia filed its Motion to Stay District Court's July 11, 2013 and August 21, 2013 Orders with this Court on November 8, 2013.

STATEMENT OF THE FACTS

The parties generally agree on the pertinent facts (see Doc. 25-1), most of which are contained in the text of federal and state statutes. The United States provides a general overview of the statutory provisions at issue and the district court's orders.

1. UOCAVA And The Operation Of Georgia State Law

In 2009, the MOVE Act amended UOCAVA to ensure that States transmit absentee ballots to UOCAVA voters no later than 45 days before "an election for Federal office," if the ballot request was received by that time, unless a State

[2] On August 21, 2013, the court granted Georgia's Unopposed Motion to Alter Judgment, adjusting Georgia's federal primary and federal primary runoff election dates by two weeks to avoid conflicts with the Memorial Day weekend. Doc. 44/App. 19. On November 21, 2013, the court approved the specific dates that Georgia submitted for its new 2014 federal election calendar, in accordance with the court's August 21, 2013 order. Doc. 49/App. 21; Doc. 58.

receives a waiver from that deadline under UOCAVA's hardship exemption. See 42 U.S.C. 1973ff-1(a)(8) and (g). Georgia law requires holding a runoff election 21 days after any regular or special federal primary election, or 28 days after any regular or special federal general election, in which a candidate fails to receive a majority of the votes cast. See Ga. Code Ann. § 21-2-501(a) (West 2012). Georgia law also requires that absentee ballots be transmitted to UOCAVA voters only "*as soon as possible* prior to a runoff," rather than the 45 days before a federal runoff election that UOCAVA mandates. Compare Ga. Code Ann. § 21-2-384(a)(2) (West 2012) (emphasis added) with 42 U.S.C. 1973ff-1(a)(8)(A).

Georgia has a written plan for federal runoff elections, as UOCAVA requires. See 42 U.S.C. 1973ff-1(a)(9); Doc. 2-2/App. 2 Exh. A. The plan reiterates Georgia's law regarding the timing of runoff elections and specifies that "the runoff election ballot shall be also transmitted to the voter in the same mode of transmittal" as the preceding election unless the voter requests otherwise. Doc. 2-2, at 2/App. 2 Exh. A. When Georgia mails initial election absentee ballots to UOCAVA voters who select mail delivery, it also automatically sends them a blank SWAB. Doc. 2-2, at 2/App. 2 Exh. A. The blank SWAB does not include the offices for which a runoff election is required, or the names of any runoff candidates, because that information is not yet available. See Doc. 24-4/App. 8 Exh. 1. Georgia's dual mailing instead informs these UOCAVA voters that if a

runoff election is necessary, voters can electronically access the official runoff ballot from the Secretary of State's website, with the certified runoff candidate names included, after the official ballots are prepared and made available. Doc. 8-4/App. 3 Exh. C.

Under state law, Georgia's Secretary of State must receive certified election results from county election officials no later than six days after the election. See Ga. Code Ann. § 21-2-493(k) (West 2012). The Secretary "generally" certifies the official results within one day after receiving them from county officials, although the Secretary may take up to one week to do so. Doc. 28-1, at 11-12 ¶ 19; Doc. 17, at 34/App. 6. The six-day period for county election officials to certify results to the Secretary of State, combined with the one day within which the Secretary typically certifies results, subtracts a total of seven days from the 21-day period Georgia law provides between an initial primary election and primary runoff election. Ga. Code Ann. § 21-2-501(a) (West 2012). Only 14 days remain between the publication of official primary election results and the primary runoff election day. Similarly, because Georgia law provides 28 days between a general election and general election runoff, there are only 21 days left between the publication of the official results of a general election and any general runoff election.

Although the Secretary typically posts unofficial results on his website within a day after an election, certified results generally cannot be posted on the website until at least seven days after the election. See Doc. 28-2, at 3/App. 11. Unofficial results have not been uniformly available on the website for all federal elected offices throughout Georgia, however, and unofficial results may not always match the certified results if there is an extremely close election or a recount is required. See, *e.g.*, Doc. 17, at 30, 34/App. 6.

Georgia accepts the SWAB, a Federal Write-in Absentee Ballot (FWAB) or an official absentee ballot for runoff elections.[3] Doc. 24-8/App. 8, Exh. 4. Voters may only return their marked ballots by mail. Runoff absentee ballots from UOCAVA voters must be postmarked by the date of the election and received within the three-day period after the runoff to be counted. See Ga. Code Ann. § 21-2-386(a)(1)(G) (West 2012).

2. District Court Proceedings And Orders

Georgia's initial position in this litigation comported, in part, with the United States' view of Subsection (a)(8)(A)'s scope. Georgia conceded in its brief opposing the United States' Motion for TRO/PI, and at the July 3, 2012, motion

[3] A FWAB is similar to a SWAB, but does not include some of the information that is included on a SWAB (*e.g.*, the offices for which the initial election is being held and the mailing address for ballot return). Compare Doc. 24-4/App. 8, Exh. 1 with Federal Write-In Absentee Ballot, available at www.fvap.gov/reference/forms.html, *last visited* Nov. 8, 2013.

hearing, that the 45-day ballot transmittal deadline in 42 U.S.C. 1973ff-1(a)(8) applies to its runoff elections. Doc. 8, at 15/App. 3 ("UOCAVA requires that absentee ballots be transmitted at least 45 days prior to *any* election." (emphasis added)); Doc. 17, at 37-39/App. 6 (agreeing that Subsection (a)(8)(A) applies to runoff elections in Georgia). At that time, Georgia argued that its mailing of a SWAB to UOCAVA voters along with the initial election ballot nevertheless fulfilled that requirement. See Doc. 8, at 15/App. 3; Doc. 10, at 15/App. 4; Doc. 17, at 27-28, 37-39/App. 6.

The district court granted the United States' Motion for TRO/PI after concluding that Georgia's mailing of a SWAB lacking candidate names was a "partial and deficient" substitute for mailing an official absentee ballot 45 days before a federal runoff election, as 42 U.S.C. 1973ff-1(a)(8)(A) requires. Doc. 10, at 13/App. 4. The court rejected Georgia's argument regarding its use of the SWAB, stating that it had "no limiting principle" because it would allow a State to mail UOCAVA voters a "blank sheet of paper" without ever "communicating the candidate information" in order to meet the 45-day deadline. Doc. 10, at 12, 16-17/App. 4.

In its subsequent Order granting summary judgment to the United States, the district court held that the plain language of 42 U.S.C. 1973ff-1(a)(8) explicitly refers to "an election" for federal office, and thereby encompasses all types of

federal elections, including runoffs. Doc. 33, at 14/App. 13. In reaching its conclusion, the district court examined the use of the word "election" throughout the statute, and determined that any doubt as to the breadth of "an election" in Subsection (a)(8)(A) is "settled" by "looking to the interplay between § 1973ff-1(a)(7) and § 1973ff-1(f)":

> Section 1973ff-1(a)(7) addresses the transmittal of blank absentee ballots for 'general, special, primary, and runoff elections for Federal office' and requires that transmittal procedures be established in accordance with § 1973ff-1(f). Notably, § 1973ff-1(f)'s transmittal procedures apply to 'an election for Federal office.' Thus, considering § 1973ff-1(f) together with § 1973ff-1(a)(7), it is apparent that the reference to 'an election for Federal office' is applicable to any of the four types of elections listed in § 1973ff-1(a)(7).
>
> The term 'an election,' used in § 1973ff-1(f) to signify any of the four types of elections that are the subject of UOCAVA, is also present in § 1973ff-1(a)(8)(A). * * * When considered in the context of § 1973ff-1 as a whole, a reference to 'an election' in § 1973ff-1(a)(8)(A) has no further or different meaning than it has in § 1973ff-1(f). * * * Both in § 1973ff-1(f) and in § 1973ff-1(a)(8)(A), the term is used in setting the parameters for the transmittal of absentee ballots. In the context of § 1973ff-1(f), the term pertains to the circumstance under which the states are obliged to transmit blank absentee ballots to UOCAVA voters – that is, § 1973ff-1(f) explains that the states are required to transmit absentee ballots to UOCAVA voters 'for an election for Federal office.' As used in § 1973ff-1(a)(8)(A), the term pertains to the time frame for the transmittal of absentee ballots – that is * * * forty-five days before 'an election for Federal office.'

Doc. 33, at 15-17/App. 13.

The district court further held that the "sufficient time" requirement in Subsection (a)(9)'s written runoff plan provision "is not a carve-out" from the 45-day requirement of Subsection (a)(8)(A). Doc. 33, at 17/App. 13. The court

explained that because there is no indication in the statute that the "sufficient time referred to is a substitute" for the 45-day deadline of Subsection (a)(8)(A), Subsection (a)(9) "can be reasonably read as establishing an additional requirement that the states must comply with, that of establishing a written plan." Doc. 33, at 17/App. 13. The court found it "apparent" that a written plan would be useful in light of the "logistical complexities" of preparing for the contingencies of runoff elections, and concluded that there was "no inherent conflict" between the 45-day deadline of Subsection (a)(8)(A) and the written plan requirement in Subsection (a)(9). Doc. 33, at 17-18/App. 13. The court also reiterated its earlier holding that a SWAB was an emergency back-up measure that did not meet UOCAVA's 45-day deadline because it was a partial, deficient ballot that lacked, *inter alia*, certified candidate names. Doc. 33, at 19-21/App. 13.

In response to the court's order that Georgia submit a proposed new federal election calendar, Georgia proposed a calendar that did not extend the time between its initial federal elections and its federal runoff elections, or otherwise require ballot transmittal to UOCAVA voters 45 days in advance of federal runoff elections. Doc. 35/App. 15. Georgia instead proposed mailing absentee runoff election ballots at least one day before the runoff election, and allowing UOCAVA voters to receive, mark, and return their absentee runoff election ballots weeks after the actual runoff election day. Doc. 35/App. 15.

With no action by the General Assembly in sight (Doc. 38, at 5/App. 17), on July 13, 2013, the court entered a permanent injunction establishing a new UOCAVA-compliant federal election calendar for Georgia. Doc. 38, at 9/App. 17. The court expressed its "strong preference" for the Georgia General Assembly to "set the State's election calendar," but explained that it was left with "no choice but to act, and to act swiftly, * * * so that military and overseas citizens will have a chance to vote." Doc. 38, at 5/App. 17. The court's injunction "does not prohibit the State of Georgia from adopting its own UOCAVA-compliant calendar in future legislative sessions" or from harmonizing its state runoff election calendar with a UOCAVA-compliant federal election calendar. Doc. 38, at 8/App. 17. In its most recent Order approving the dates Georgia submitted for its 2014 federal election calendar, the district court specifically stated that it was not ruling on the dates for state elections. Doc. 58, at 2 n.2.

The district court subsequently denied Georgia's motion for a stay pending appeal. Doc. 57/App. 23. The court adhered to its plain language interpretation of the term "an election for Federal office" in Subsection (a)(8)(A) as encompassing all federal elections, including runoffs. The court also held that, regardless of whether Subsection (a)(8) or only Subsection (a)(9) governs runoff elections, Georgia's runoff election scheme violates UOCAVA as a matter of law because it does not provide sufficient time to vote. Doc. 57, at 10/App. 23. The court noted

that, "even if the 'sufficient time' requirement were not deemed to be forty-five days," there was a "distinct possibility" that UOCAVA voters who select mail delivery of their ballots "will be unable to vote in a runoff because they will not receive candidate information until after the election." Doc. 57, at 10/App. 23. Accordingly, the court held that Georgia has an insufficient likelihood of success on the merits to warrant a stay of the court's ordered injunctive relief. Doc. 57, at 10/App. 23.

STATEMENT OF STANDARD OF REVIEW

The Court first reviews *de novo* the district court's order granting summary judgment, including its interpretation of UOCAVA. See *United States* v. *McQueen*, 727 F.3d 1144, 1151 (11th Cir. 2013); *Keener* v. *Convergys Corp.*, 312 F.3d 1236, 1239 (11th Cir. 2002). Assuming a proper grant of summary judgment, the Court next reviews the district court's order granting injunctive relief for an abuse of discretion. *Keener*, 312 F.3d at 1239; see also *Florida Ass'n of Rehab. Facilities, Inc.* v. *Florida Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1216 (11th Cir. 2000).

SUMMARY OF THE ARGUMENT

Georgia's runoff election scheme violates 42 U.S.C. 1973ff-1(a)(8)(A), because Georgia's adherence to state-law runoff election dates precludes the State from sending absentee ballots at least 45 days before a federal runoff election to

those UOCAVA voters who have requested ballots by that time, as UOCAVA Subsection (a)(8)(A) requires absent a waiver.

1. The plain language of Subsection (a)(8)(A) encompasses federal runoff elections. This interpretation comports not only with the statutory language applying the 45-day deadline to "an election for Federal office," but also with the overall statutory context. The interplay between 42 U.S.C. 1973ff-1(a)(7), which applies to primary, general, special and runoff elections for federal office, and the cross-referenced Subsection (f) referring to "an election for Federal office," makes clear that Subsection (a)(8), which uses the same "an election for Federal office" phrase and also addresses the topic of ballot transmission, similarly encompasses *all* federal election types. Accordingly, the Court may begin and end its statutory interpretation by looking at the plain language of Subsection (a)(8).

A plain language reading of the statute also permits this Court to interpret Subsection (a)(9), which requires a written plan for runoff elections, harmoniously with Subsection (a)(8)(A) and the exclusive waiver provisions of Subsection (g). There is simply no evidence in the statutory language or UOCAVA's structure to suggest that Congress intended to exempt runoff elections from Subsection (a)(8)(A); this Court therefore should not treat Subsection (a)(9) as creating an exemption for runoffs absent any evidence of such congressional intent.

If this Court finds that Subsection (a)(8)(A) is ambiguous in relation to Subsection (a)(9), other tools of statutory construction still confirm that Subsection (a)(8)(A)'s 45-day deadline applies to runoff elections absent a hardship exemption. First, the legislative history demonstrates Congress's commitment to remedying longstanding UOCAVA voter disenfranchisement by imposing the 45-day deadline for transmitting absentee ballots for *all* federal elections absent a hardship exemption exclusively available through a Subsection (g) waiver process. Second, interpreting Subsection (a)(8)(A) to encompass runoffs is consistent with the reasonable interpretation of the federal entity – the Department of Defense's Federal Voting Assistance Program (FVAP) – primarily charged with administering UOCAVA. Third, interpreting Subsection (a)(8)(A) to require States to transmit absentee ballots to UOCAVA voters 45 days in advance of *all* federal elections, including runoffs, appropriately interprets a remedial statute liberally in favor of military service members.

2. Even if this Court determines that runoffs are not directly encompassed within Subsection (a)(8)(A)'s 45-day requirement, this Court should still uphold the district court's final judgment based on the correct interpretation of "sufficient time" in Subsection (a)(9). After considering substantial evidence, Congress concluded that 45 days of ballot transmittal time before federal elections typically were required to ensure that UOCAVA voters could participate fully. Under any

interpretation and application of the disputed statutory provisions, however, a single dispositive fact remains: Georgia currently does not provide UOCAVA voters sufficient time to vote in federal runoff elections because it gives them only approximately one-third of the time that Congress determined was needed.

3. This Court also should affirm the district court's holding that Georgia cannot mail a blank SWAB to UOCAVA voters 45 days before a runoff election in lieu of complying with UOCAVA's statutory mandates. As the district court held, Georgia's current runoff election procedures do not provide sufficient time to vote as a matter of law because many UOCAVA voters will not learn the runoff candidate names in sufficient time to return their ballots and have their votes counted. First, there is a "distinct possibility" that UOCAVA voters who select mail delivery of their ballots will have received only a blank SWAB by election day, and thus will not know the runoff candidates until *after* the runoff election date, (Doc. 57, at 10/App. 23). Second, there is a significant risk that voters receiving electronic ballot delivery will not be able to receive official primary election results from the Secretary of State's website in order to fill out their blank SWABs, or to download their official primary runoff ballots, in time to return marked ballots by mail in the 14-day window provided. Doc. 33, at 22/App. 13.

4. Finally, this Court also should affirm the district court's injunctive relief order as a proper exercise of its discretion. Absent any action by the Georgia

Legislature to correct the State's noncompliance with UOCAVA, the district court's injunction establishing a UOCAVA-compliant federal election schedule for Georgia was necessary. Accordingly, the district court did not abuse its discretion by establishing a calendar for federal elections that remains in effect unless Georgia takes one of the many actions within its power to bring its electoral calendar into compliance with federal law.

ARGUMENT AND CITATIONS OF AUTHORITY

I

SUBSECTION (a)(8)(A) SHOULD BE INTERPRETED TO ENCOMPASS RUNOFF ELECTIONS BASED ON ITS PLAIN LANGUAGE AND THE OVERALL STATUTORY STRUCTURE

This Court "begin[s] the process of legislative interpretation" and "should end it as well" with the text of 42 U.S.C. 1973ff-1(a)(8)(A). *Harris* v. *Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), cert. denied, 532 U.S. 1065, 121 S. Ct. 2214 (2001). "In statutory construction, the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." *United States* v. *Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013) (citation omitted), petition for cert. pending, No. 13-7451. The district court correctly interpreted Subsection (a)(8)(A) to encompass federal runoff elections based on the plain statutory language, and its interpretation creates harmony rather than conflict within the entirety of the statute.

A. The Plain Language Of Subsection (a)(8)(A) Encompasses Runoff Elections

Subsection (a)(8)(A) contains a straightforward command: when a covered voter requests an absentee ballot, a State must transmit the ballot "not later than 45 days before the election" if the request was received "at least 45 days before *an election for Federal office*," unless a waiver has been granted "as provided in subsection (g)." See 42 U.S.C. 1973ff-1(a)(8)(A) (emphasis added).[4] Because a federal runoff election is indisputably "an election for federal office," the 45-day requirement applies unless the State obtains a hardship waiver.

Although other subsections of 42 U.S.C. 1973ff-1 explicitly apply to only certain types of federal elections, see, *e.g.*, 42 U.S.C. 1973ff-1(c) (applying reporting requirement only to each "regularly scheduled general election for

---

[4] 42 U.S.C. 1973ff-1(a)(8) provides that States must:

> (8) transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter --
>
> (A) except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election; and
>
> (B) in the case in which the request is received less than 45 days before an election for Federal office --
>
> (i) in accordance with State law; and
>
> (ii) if practicable and as determined appropriate by the State, in a manner that expedites the transmission of such absentee ballot[.]

Federal office"), Subsection (a)(8)(A) neither limits its coverage to, nor exempts, any of the four type of federal elections (primary, general, special and runoff) covered by Section 1973ff-1– it applies to all federal elections. See 42 U.S.C. 1973ff-1(a)(1) (requiring States to permit UOCAVA voters to use absentee voting procedures in "general, special, primary, and runoff elections for Federal office"). The only federal elections excepted from Subsection (a)(8)(A)'s 45-day deadline are specified on the face of that provision: the deadline applies "*except as provided in subsection (g)*." 42 U.S.C. 1973ff-1(a)(8)(A). Subsection (g) is the hardship exemption available only through a waiver application process for a particular federal election. See 42 U.S.C. 1973ff-1(g). The plain language of Subsection (a)(8)(A) therefore encompasses all elections for federal office.

The inclusive meaning of the plain language "an election for Federal office" in Subsection (a)(8)(A) is confirmed by examining the interplay between two other provisions of UOCAVA: 42 U.S.C. 1973ff-1(a)(7) and 1973ff-1(f). See Doc. 33, at 15/App. 13. Subsection (a)(7) requires States to develop mail and electronic transmittal procedures for blank absentee ballots "with respect to general, special, primary *and runoff elections* for Federal office in accordance with subsection (f)" (emphasis added). The transmittal procedures of the cross-referenced Subsection (f), like Subsection (a)(8), expressly apply to "an election for Federal Office." See Doc. 33, at 15/App. 13. Thus, Subsection (a)(7) and its cross-reference to

Subsection (f) confirm the unremarkable fact that when Congress employs the phrase "an election for Federal office" without qualification, it means all federal elections, including federal runoff elections. The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 115 S. Ct. 1061, 1067 (1995) (citation omitted). The interplay of Subsections (a)(7) and (f) thus confirms that Subsection (a)(8)(A)'s plain language encompasses runoffs.

Georgia tries to assign meaning to the insignificant drafting variations Congress used when it referred to the term "election" in UOCAVA. Georgia argues that: 1) Congress variously used "an election," "the election" and "elections" in various provisions of UOCAVA; and 2) Congress occasionally enumerated all of the types of federal elections encompassed under UOCAVA rather than using the shorthand afforded by indefinite articles. None of those observations, nor Georgia's attempts to impute meaning to Congress's minor drafting variations (Georgia Br. 20-23 (citations omitted)), alters the fact that a federal runoff election is plainly "an election for federal office." Cf. *Lee* v. *Weisman*, 505 U.S. 577, 615 n.2, 112 S. Ct. 2649, 2670 n.2 (1992) (Souter, J., concurring) (explaining that "the indefinite article [an] before the word

'establishment' is better seen as evidence that the [Establishment Clause] forbids *any* kind of establishment." (emphasis added)).

Amicus curiae State of Alabama's attempt to recast the phrase "an election for Federal office" as a kind of legislative throwaway is equally unavailing. To the extent that Alabama argues that "for Federal office" simply connotes that UOCAVA applies to federal rather than state or local elections (see Ala. Amicus Br. 6-7), Alabama states the obvious; indeed, the entirety of Section 1973ff-1 is aimed at only "general, special, primary, and runoff elections for Federal office." 42 U.S.C. 1973ff-1(a)(1). The use of the phrase "Federal office" in the title of Subchapter I-G and many subsections of Section 1973ff-1,[5] including Subsection (a)(8)(A), serves as a reminder that Congress did not intend Section 1973ff-1 to impose obligations on States for *state* elections. See *Pugliese* v. *Pukka Dev., Inc.*, 550 F.3d 1303, 1304 (11th Cir. 2008) (explaining that disputed statutory language did not add meaning but simply served as a reminder that some properties were exempt from all provisions of the statute). The fact that "an election" is followed by "for Federal office" also does not alter the fact that "an election for Federal

[5] Since its enactment in 1986, UOCAVA's requirements have uniformly applied only to elections for federal office. The MOVE Act's amendments to UOCAVA, including Subsection (a)(8), comport with the original statute by similarly referencing their application to federal elections. Indeed, the phrase "federal office" or modifier "federal" before "election" appears throughout 42 U.S.C. 1973ff-a: in Subsections 1973ff-1(a)(1), (a)(2), (a)(3), (a)(6)(A), (a)(7), (a)(8)(A), (a)(9), (b)(1), (e)(4), (f)(1), (g)(1), (g)(2), (g)(3), and (g)(4).

office" in Subsection (a)(8)(A) means any of the types of federal elections that are within UOCAVA's reach.

B. A Harmonious Reading Of Subsections (a)(8)(A) And (a)(9) Offers The Most Reasonable Interpretation Of Subsection (a)(8)(A)

Subsection (a)(9), which requires a State that holds a "runoff election for Federal Office" to "establish a written plan that provides that absentee ballots are made available" to UOCAVA voters "in [a] manner that gives them sufficient time to vote in the runoff election," 42 U.S.C. 1973ff-1(a)(9) (emphasis added), supplements rather than supersedes Subsection (a)(8)(A)'s 45-day deadline in the case of runoff elections. Congress's use of inclusive and general language to refer to covered elections in Subsection (a)(8)(A), compared its use of language explicitly addressing only runoff elections in Subsection (a)(9), is presumed to be purposeful. See *Russello* v. *United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983). It does not follow, however, that the inclusion of only runoff elections in Subsection (a)(9) means that they are excluded from Subsection (a)(8)(A), as Georgia suggests; the inclusion of only runoff elections in Subsection (a)(9) more likely means that all other types of federal elections are excluded from the written plan requirement that Subsection (a)(9) imposes for runoffs. This interpretation of Subsections (a)(8)(A) and (a)(9) comports with well established statutory construction.

1. This Court Should Read Subsections (a)(8)(A) And (a)(9) Harmoniously Rather Than Find Conflict Where It Need Not Exist

This Court can properly effectuate Congress's intent to protect UOCAVA voters' rights to participate fully in runoff elections by reading the plain language of Subsections (a)(8)(A) and (a)(9) cohesively. When two statutory provisions can be read in tandem, so that they comport with both the plain meaning of broad language and Congress's intent, this Court consistently reads the two provisions harmoniously, rather than finding conflict where it need not exist.[6] See, *e.g.*, *United States* v. *Marion*, 562 F.3d 1330, 1339 (11th Cir. 2012) (interpreting the plain language of the phrase "an order of forfeiture" broadly in one statute, so that it would include preliminary orders of forfeiture that were subject to a 30-day deadline under another statute), cert. denied, 558 U.S. 930, 130 S. Ct. 347 (2009). There is no inherent conflict between meeting a 45-day ballot transmission

[6] Georgia misapplies a canon of statutory instruction by arguing that the more specific reference in Subpart(a)(9) controls the more general reference in Subsection (a)(8)(A), because that axiom applies only when two statutory provisions actually conflict. See *National Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 335-336, 122 S.Ct. 782, 787-788 (2002) ("It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope."); see also *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228, 77 S. Ct. 787, 791 (1957) (emphasizing, before applying the canon, that both statutes at issue were clear and both applied to patent infringement actions, but that they created different rules for determining the proper venue for such an action). Because the two provisions at issue here are complementary, not conflicting, and the State can comply with both, the canon Georgia asserts does not support its position.

deadline generally and creating a written plan to ensure that a State does so in the less usual electoral circumstances of a runoff. Indeed, complying with an obligation to create a written plan for the relatively rare runoff in a federal election[7] increases a state's likelihood of meeting the 45-day deadline without encountering unanticipated obstacles.

Contrary to Georgia's argument, the phrase "sufficient time" in Subsection (a)(9) does not supersede the specific 45-day advance transmittal requirement of Subsection (a)(8)(a), but simply refers back to the 45-day period in advance of a federal election that Congress mandated as the minimum period of time normally sufficient, as stated in the preceding provision. Accordingly, under Subsection (a)(9), a written plan for a runoff election allows "sufficient" time to vote if it ensures that absentee ballots will be mailed to voters at least 45 days before the runoff election as Subsection (a)(8) requires; a lesser time is sufficient only if a State receives a waiver based on an undue hardship that approves a lesser time as an adequate substitute for the 45-day rule under Subsection (g)'s explicit waiver criteria.

---

[7] In attempting to refute this reasonable, harmonious interpretation, Alabama's amicus brief (Ala. Amicus Br. 16-17 & nn. 3-7) recounts a number of runoff elections it has held over the past six years. *None* are federal elections subject to UOCAVA.

2. Interpreting Subsection (a)(8)(A) To Encompass Runoffs Does Not Render Superfluous Any Other Statutory Provisions, And Gives Every Word Meaning

Interpreting Subsection (a)(8)(A) to encompass runoff elections would not conflict with or render impermissibly superfluous either Subsection (a)(9) or the waiver provision of Subsection (g). The written plan is the only different and additional requirement Subsection (a)(9) imposes for runoff elections compared to the other federal elections within Section 1973ff-1's ambit. See 42 U.S.C. 1973ff-1(a)(9). The need for a federal runoff election is unknown before the initial election, and runoff elections typically involve a shorter timeframe for official ballot preparation and transmission. Thus, it is understandable that Congress would want States such as Georgia to plan ahead regarding their intended methods of UOCAVA compliance for runoff elections.

Contrary to Georgia's and amicus curiae Alabama's arguments, interpreting Subsection (a)(9) to add a written plan requirement only for runoff elections is not "absurd" (Georgia Br. 24; Ala. Amicus Br. 11). Of course, Subsection (a)(9) does not mandate that a State simply write down that it "plans" to meet a 45-day deadline the State is obliged to meet under Subsection (a)(8). Instead, a State must establish a written plan to demonstrate specifically *how* it will conduct runoff elections to ensure compliance with the 45-day deadline, exactly because such

compliance may pose special challenges in the case of runoff elections.[8] Indeed, there is ample evidence that some States, including Alabama, have repeatedly faced challenges in meeting advance ballot transmittal deadlines even for regularly scheduled federal elections for which the candidates are known well in advance. See, *e.g.*, *United States* v. *Alabama*, 857 F. Supp. 2d 1236 (M.D. Ala. 2012).

Interpreting Subsection (a)(9) to simply add a written plan requirement for runoff elections does not render any of its provisions, including its "sufficient time" language, superfluous. A State must create a plan setting forth *how* it will administer any runoff elections to ensure that it can meet the 45-day deadline in Subsection (a)(8)(A) in the less usual circumstance of a runoff election.

A State's written plan affording fewer than 45 days of ballot transmittal time before a runoff election may, in unusual circumstances, provide "sufficient time"

---

[8] Amicus curiae Alabama argues that there is no administrative or logistical reason to require a written plan specific to UOCAVA compliance in runoff elections, and that "such a requirement would have more logically applied to *special* elections." (Ala. Amicus Br. 17-18). Unlike runoff elections, state officials have significant control over when special elections will be held. See, *e.g.*, Ga. Code Ann. § 21-2-543 (West 2012) (the date of a special congressional election is set at the discretion of the Governor). That authority permits state officials to create a process that weighs competing state interests to determine the optimal timing. Runoff elections generally allow no such control or repose. They are uncertain links in a chain of already-calendared elections held in rapid succession and, as such, can present singular challenges to election officials, to the vendors upon whom election officials depend to prepare ballots, to state and local budgets, and, as Congress anticipated, to UOCAVA voters.

to vote, but *only* if the State has received a waiver under Subsection (g). Such a waiver would reflect the federal government's agreement that the State's intended deviation is due to an undue hardship and suffices as a substitute that also provides "sufficient time" in accordance with Subsection (g)'s explicit waiver criteria. To apply for a waiver under Subsection (g), a State must submit a "comprehensive" plan to demonstrate how its alternate procedures will provide UOCAVA voters "sufficient time to vote as a substitute for the requirements under *such subsection*," with "such subsection" explicitly referencing Subsection (a)(8)(A). See 42 U.S.C. 1973ff-1(g)(1) and (g)(1)(D). Such a "comprehensive" plan, if approved, may then also satisfy the State's "written plan" requirement in Subsection (a)(9).

In the majority of instances, though – *i.e.*, where a State's ordinary written plan under Subsection (a)(9) reflects the methods that it will use to comply with the 45-day deadline of Subsection (a)(8)(A) for runoffs, there is no need for any additional or more detailed "comprehensive" plan because the State will not need to seek a waiver. Thus, Subsection (a)(9)'s "written plan" requirement is not inherently subsumed by Subsection (g)'s "comprehensive [written] plan" requirement.

C. Georgia's Interpretation Of Section 1973ff-1(a)(9) Ignores The Statute's Hardship Exemption

Georgia ignores the fact that the only UOCAVA subsection that permits fewer than 45 days for advance ballot transmittal for any federal elections is Subsection (g). Indeed, Subsection (a)(8)(A) specifically cross-references Subsection (g) as providing the only exception to its 45-day deadline. If Congress wanted to exempt runoff elections totally from Subsection (a)(8)(A), it clearly would have included a reference to Subsection (a)(9), along with Subsection (g), when it specified Subsection (a)(8)(A)'s 45-deadline applies to "an election for Federal office" "except as provided" in Subsection (g)'s waiver provision. See *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 109, 100 S. Ct. 2051, 2056-2057 (1980). This Court therefore should reject Georgia's invitation to create implied judicial exemptions by reading in additional language to exempt runoff elections from Subsection (a)(8)(A) when Congress did not. See *Allstate Life Ins. Co.* v. *Miller*, 424 F.3d 1113, 1116 n.3 (11th Cir. 2005) (declining to recognize an implied exception beyond those explicit in the disputed statutory provision and explaining that where the legislature has included certain exceptions, "the doctrine of *expressio unis est exclusio alterius* counsels against judicial recognition of additional exceptions"); *Pugliese*, 550 F.3d at 1303-1304 (holding that because Congress demonstrated that it knew how to make specific exemptions

in certain provisions of a statute but chose not to do so in the disputed provision, this Court would decline to create new exemptions).

D. If The Court Determines That Subsections (a)(8) And (a)(9) Are Collectively Ambiguous, Other Statutory Construction Tools Confirm That Congress Intended Subsection (a)(8)(A) To Encompass Runoffs

1. Legislative History Demonstrates Congress's Intent To Apply The 45 Day Deadline To All Federal Elections Absent A Waiver

This Court can turn to legislative history if it believes that the statutory language of UOCAVA is unclear about the inclusion of runoff elections in 42 U.S.C. 1973ff-1(a)(8). See *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235, 106 S. Ct. 555, 557 (1985). This Court treats as most authoritative the portions of legislative history that reflect indicia of agreement between the House of Representatives and the Senate. See *Burns* v. *United States* 887 F.2d 1541, 1548-1549 (11th Cir. 1989). The House Conference Report for the 2009 Move Act, which contains such indicia of agreement, states that Congress intended for States to "transmit a validly requested absentee ballot" to a UOCAVA voter "*at least* 45 days before an election for federal office unless * * * a hardship exemption is approved." H.R. Rep. No. 288, 111th Cong., 1st Sess. 744 (2009) (emphasis added).

The Court may also consider the legislative history of the MOVE Act that was incorporated and printed in the Congressional Record by unanimous bipartisan consent as another weighty source of legislative history. See 156 Cong. Rec.

S4513-S4521, S4517 (daily ed. May 27, 2010) (statement of Sen. Schumer) (reflecting unanimous consent to inclusion of history in the record) (attached hereto as Addendum). The legislative history of the MOVE Act is replete with hearing testimony and reports attesting that 45 days of advance ballot transmittal time is the minimum time normally necessary to resolve the longstanding and distressing problem of service member disenfranchisement. See *Ibid.* and discussion at pp. 34-35 & n.10, *infra*. Indeed, Congress was clearly focused on solving that particular problem, and thus did not permit any exceptions to a 45-day ballot transmittal rule except, as stated in Subsection (a)(8)(A), those specifically outlined in the hardship waiver provision of Subsection (g). See Addendum, at S4518.

Neither the statutory language nor legislative history provides any reason to believe that runoff elections present fewer ballot delivery problems than the other federal election types Congress addressed in the MOVE Act. It thus would have been counterintuitive for Congress to have mandated more lenient deadlines, with fewer assurances of full election participation by UOCAVA voters, for runoff elections than for other elections. The Court therefore should affirm the district court's holding that all federal elections, including runoffs, are subject to the 45-day deadline of Subsection (a)(8)(A) absent a hardship exemption.

2. The Reasonable Interpretations Of Federal Agencies Are Consistent With A Plain Language Interpretation Of Subsection (a)(8)(A)

If this Court finds ambiguity in the statutory language, it should also consider the interpretations of federal agencies with roles in implementing and enforcing UOCAVA to determine the meaning of Subsections (a)(8) and (a)(9). The district court's plain language interpretation of Section 1973ff-1(a)(8)(A) is consistent with the interpretation of both the federal agency principally charged with administering UOCAVA and the Attorney General, to whom Congress assigned a role in enforcing the statute. See 42 U.S.C. 1973ff-1(g)(2).

FVAP, a Department of Defense office, has been delegated the primary responsibility for administering UOCAVA. See 42 U.S.C. 1973ff-1(a) and (b).[9] FVAP's February 7, 2012, guidance to all Chief State Election Officials specifies that the requirement to transmit absentee ballots 45 days prior to "*any* election for Federal Office" includes runoff elections. Doc. 25-7, at 1/App. 9, Exh. E (A-1); Doc 25-7, at 3 (emphasis in original). The Attorney General's interpretation of Subsection (a)(8)(A) as encompassing runoff elections is amplified in this brief.

[9] The Secretary of Defense was designated the Presidential designee under UOCAVA by Executive Order 12,642, 53 Fed. Reg. 21,975 (June 8, 1988). The Secretary of Defense has delegated this authority to the Under Secretary of Defense (Personnel & Readiness) through DoD Directive 1004.04. Pursuant to Section 5.1 of that Directive: "The Undersecretary of Defense for Personnel and Readiness shall * * * Designate a civilian employee as the Director, Federal Voting Assistance Program. The Director shall be responsible for all aspects of the FVAP, and shall have the necessary authority to administer that responsibility."

This Court should give *Skidmore* deference to the consistent interpretations of the two agencies – the United States Department of Justice and FVAP – that Congress assigned statutory roles in enforcing and implementing UOCAVA. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944); *Pugliese*, 550 F.3d at 1304-1305 (giving substantial deference, under *Skidmore*, to HUD director's letter opining on the scope of a disputed statutory exemption and the United States' amicus curiae brief explaining HUD's interpretation); *Durr* v. *Shinseki*, 638 F.3d 1342, 1348-1350 (11th Cir. 2011) (crediting a federal agency's longstanding interpretation of a statute, expressed in its personnel handbook, to resolve a dispute over two intrinsically conflicting statutory provisions).

3. The Canon Of Statutory Construction Requiring Liberal Interpretation of Statutes Benefitting Military Service Members Applies To Subsection (a)(8)(A)

Applying Subsection (a)(8)(A) to runoff elections also effectuates the canon that liberally construes statutes providing benefits to uniformed service members in their favor. See, *e.g.*, *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1206 (2011); see also *King* v. *Saint Vincent's Hosp.*, 502 U.S. 215, 220-221 & n. 9, 112 S. Ct. 570, 573-574 & n.9 (1991) (liberally construing a statute in favor of military service members to resolve a dispute over the time period during which statutory protections apply).

Although some UOCAVA voters are not military service members, this Court still should apply this canon of statutory interpretation when interpreting Subsection (a)(8)(A) because a significant number of military service members are among the intended beneficiaries of the MOVE Act. See Addendum. Indeed, there is ample evidence that Congress was especially concerned with amending UOCAVA to address the plight of military service members who risk their safety for this country but were prevented from casting ballots to elect its leaders. Addendum at S4517 (citing testimony of Lieutenant Colonel Joseph DeCaro at Rules Committee May 2009); see also 155 Cong. Rec. 18,991-18,993 (2009) ("They can risk their lives for us, we can at least allow them to vote." Not since UOCAVA "have we proposed such significant legislation designed to help the men and women of the military who * * * defend the rights and freedoms we Americans hold so sacred.").

Interpreting Subsection (a)(8)(A) to include runoff elections thus would be consistent with Congress's "solicitude" towards uniformed service members and Congress's indisputable goal of fully enfranchising them. See *Henderson*, 131 S. Ct. at 1205 (citation omitted); cf. *United States* v. *New York*, No. 1:10-cv-1214, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012) ("It is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone.").

II

IF ONLY SUBSECTION (a)(9) APPLIES TO RUNOFF ELECTIONS, GEORGIA'S RUNOFF PLAN PLAINLY FAILS AS A MATTER OF LAW TO PROVIDE "SUFFICIENT TIME" TO VOTE

If this Court concludes that Subsection (a)(8) is inapplicable to runoff elections, it should still affirm the district court's judgment based on a reasonable interpretation of "sufficient time" in Subsection (a)(9), because Georgia's runoff election scheme fails to provide UOCAVA voters sufficient time to participate fully in runoff elections. Doc. 57, at 10/App. 23.

A. Legislative History Confirms Congress's Presumption That 45 Days Of Ballot Transmittal Time Before Federal Elections Provides Sufficient Time To Vote, Yet Georgia Provides Only A Fraction Of That Time For Its Runoff Elections

If this Court concludes that the Subsection (a)(8) is inapplicable to runoffs, it should still affirm the district court's judgment because, under any circumstances, Georgia's written plan fails to provide "sufficient time" under Subsection (a)(9). Doc. 57, at 10/App. 23. This Court's interpretation of "sufficient time" under Subsection (a)(9) should reflect the pertinent statutory language and judgments Congress reached after gathering and considering substantial evidence regarding the minimum ballot transit time that would resolve the widespread problem of

UOCAVA voter disenfranchisement.[10] The most obvious evidence of Congress' judgment about what ballot transmittal procedures provide "sufficient time," is, of course, Congress's determination of a 45-day advance transmittal deadline for ballots of all federal elections in Subsection (a)(8)(A). See Addendum at S4518 ("The consensus recommendation emerged for a 45-day requirement following the hearing because it provided sufficient time for UOCAVA voters to request, receive and cast their ballots in time to be counted in the election for Federal office and better accommodates the laws of a number of states.").

[10] The legislative history of the MOVE Act is laden with evidence that Congress considered before concluding that no fewer than 45 days of ballot transmittal time would normally suffice to fully enfranchise UOCAVA voters. For example, the legislative history of Subsection (a)(8)(A) includes a May 2009 Congressional hearing ("Hearing on Problems for Military and Overseas Voters: Why Many Soldiers and Their Families Can't Vote") and citations to various studies exploring solutions to the problem of UOCAVA voter disenfranchisement. See Addendum at S4514. When enacting the deadline of Subsection (a)(8)(A), Congress heavily relied on testimony and other evidence attributing low UOCAVA voter participation rates to the insufficient time periods many States allotted for absentee voting process completion. See, *e.g.*, Opening Statement of Sen. Charles Schumer, *Testimony Before The Comm. On Senate Rules and Admin.*, 2009 WL 1316075 (May 19, 2009) (citing results of a Congressional Research Service Study); see also Addendum at S4514-S4515; Kevin J. Coleman, RS20764, Cong. Research Serv., *The Uniformed and Overseas Citizens Absentee Voting Act: Overview and Issues*, 5, 11-12 (2010) (noting "pressing issue" of the new 45-day advance ballot mailing requirement, citing Pew Center for the States and Overseas Vote Foundation Reports).

However, if the Court determines that Subsection (a)(8)(A)'s 45-day deadline does not directly apply to runoff elections, this Court can easily reject Georgia's argument that its current election procedures provide "sufficient time" to vote, as it gives UOCAVA voters only a fraction of the ballot transmittal time Congress otherwise required. Georgia's current procedures are so far from the 45-day benchmark that, as a matter of law, they cannot be considered to provide "sufficient time" to enfranchise UOCAVA voters. Doc. 57, at 10/App. 23. Mailing absentee ballots to UOCAVA voters only 14 or 21 days before a federal runoff election, as Georgia does, is insufficient because it virtually guarantees that many of their votes cannot be counted due to the realities of military and overseas mail delivery challenges. See Addendum at S4515-S4517. Georgia's election scheme therefore does not provide "sufficient time" as a matter of law, as the district court held.

B. Pre-Move Act Legislation That Does Not Address Absentee Voting Is Irrelevant To The Sufficiency Of Runoff Election Procedures Governed By The MOVE Act

Alabama suggests (Ala. Amicus Br. at 21) that when Congress passed the MOVE Act, Congress was aware of a law requiring the Virgin Islands and Guam to hold a runoff election 14 days after a general election if no candidate for Congressional delegate obtains a majority of the vote. See 48 U.S.C. 1712. However, there is no evidence in the legislative history to suggest that Congress

considered 48 U.S.C. 1712 when it passed the MOVE Act. Indeed, 48 U.S.C. 1712 does not address the topic of absentee voting at all, and certainly does not address the unique situation of UOCAVA voters.

The MOVE Act's omission of a conforming change to 48 U.S.C. 1712, a provision residing in a separate title from UOCAVA and affecting only two territories, does not create ambiguity or otherwise alter the plain language of the statute that was Congress's primary object when it legislated.[11] Because the 14-day runoff period in the Virgin Islands and Guam is less than 45 days, the better view is that, until Congress reconciles the two provisions, 48 U.S.C. 1712 provides

---

[11] Contrary to Alabama's suggestion (Ala. Amicus Br. 20), the section titles in the 731-page Public Law of which the MOVE Act was a small part also are immaterial. Titles or headings of public law sections cannot limit the plain meaning of the statutory text in Subsection (a)(8)(A). See *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R. Co.*, 331 U.S. 519, 528-529, 67 S. Ct. 1387, 1392 (1948); *Scarborough* v. *Office of Pers. Mgmt.*, 723 F.2d 801, 811 (11th Cir. 1984) (holding that formal section headings "cannot limit the plain meaning of [a statute's] text and may be utilized to interpret a statute, if at all, only where the statute is ambiguous"). Moreover, public law section titles reflect none of the careful deliberation and subsequent agreement among Senators and Members of Congress that this Court finds significant in assigning weight to various sources of legislative history, see, *e.g.*, *Burns*, 887 F.2d at 1545-1552. The legislative history incorporated in the Congressional Record with bipartisan consent, reflects Congress' intent to enfranchise UOCAVA voters in all federal elections by imposing the 45-day deadline of Subsection (a)(8)(A), along with a limited opportunity to obtain a waiver from those requirements. Even if the headings and their placement are considered, it is hardly surprising and certainly not definitive that a section of a Public Law imposing additional requirements for runoff elections would be titled "Runoff Elections" and placed near the section addressing UOCAVA's limited waiver process.

a limited exception to the 45-day advance transmission deadline that otherwise remains fully in effect in the other States that hold Federal runoff elections.[12]

III

GEORGIA'S PREEMPTIVE MAILING OF A BLANK SWAB DOES NOT COMPLY WITH UOCAVA

Neither UOCAVA's text nor legislative history supports Georgia's alternate argument that mailing a blank SWAB to UOCAVA voters when it sends initial election ballots to them constitutes compliance with UOCAVA. A State's mandatory acceptance of a Federal Write-in Absentee Ballot is only a "failsafe" or "back-up" option when a State's ordinary, UOCAVA-compliant voting procedures nevertheless fail to result in delivery of a timely ballot to a UOCAVA voter. See 42 U.S.C. 1973ff-2; Addendum at S4519; Doc. 10, at 12/App. 4 (holding that, "[l]ike the FWAB, the SWAB is merely an emergency measure that is no substitute for Georgia's official absentee ballot"). See *United States* v. *Cunningham*, No. 3:08cv709, 2009 WL 3350028, at *8 (E.D. Va. Oct. 15, 2009) (holding that the FWAB is a back-up that cannot substitute for timely transmission of an official state absentee ballot). The same is true of a SWAB, which likewise does not contain the names of the runoff election candidates, and thus provides no

[12] Indeed, those conflicting statutes, rather than the harmonious provisions in Subsections (a)(8)(A) and (a)(9), present the more appropriate opportunity to apply the "specific governing the general" canon of statutory construction that Georgia urges. See n.6, *supra*.

guarantee that UOCAVA voters have that essential information by the time they need to cast their ballots. See Doc. 24-2/App. 8 Exh. 1.

As the district court aptly observed, "the blank nature of the SWAB requires voters to have advance and separate knowledge of the runoff election in order to successfully fill" it out and vote. Doc. 10, at 12-14/App. 4. Georgia already has conceded that if a UOCAVA voter does not receive an official runoff absentee ballot by election day, the SWAB cannot be completed on time to be returned and counted without taking additional steps to obtain the "necessary" candidate information obtained from an outside source – a website. Doc. 10, at 12-14/App. 4; see also Doc. 8, at 12/App. 3 (explaining that a UOCAVA voter who does not receive his absentee ballot mailing can "vote by downloading a SWAB or FWAB from the Secretary of State's election website," and "may review the website to determine the necessary candidate information in order to complete the ballot"). Thus, even though a UOCAVA voter has requested to receive absentee ballots by mail rather than electronically (potentially because of unreliable internet access or a desire not to utilize electronic options), that voter does not receive an absentee runoff election ballot he or she can complete without using separate electronic methods. Such a result thwarts Congress's intent to allow UOCAVA voters to specify their preferred method of ballot delivery for all elections, see 42 U.S.C.

1973ff-1, and ignores the reality that internet access may not be readily or regularly available to military voters overseas.

Although UOCAVA does not define the "absentee ballot" a State must mail before an election, the district court properly concluded that interpreting "ballot" to include the SWAB for purposes of Subsection (a)(8)(A) would lead to absurd results. Permitting what was intended as an emergency backup measure – a FWAB or SWAB – in cases when a voter does not timely receive an official ballot – should not lead to permitting Georgia to mail what amounts to a blank piece of paper in lieu of routine statutory compliance.

Although the MOVE Act required States to also accept FWAB "back-ups" for special, primary, and runoff federal elections, see 42 U.S.C. 1973ff-2; Addendum at S4519, neither the statute nor any legislative history supports Georgia's reliance on a FWAB or SWAB to meet its UOCAVA obligations in the first instance in order to maintain a state law whose time frame conflicts with UOCAVA's 45-day requirement. While a SWAB contains slightly more information than a FWAB, see n.3, *supra*, it nonetheless fails to constitute the absentee ballot States are required to timely transmit to UOCAVA voters because, at a minimum, it fails to include the names of the certified candidates for a runoff election. Georgia's reliance on the SWAB as its primary method of UOCAVA compliance for runoff elections thus cannot meet the ballot transmittal

requirements of Subsection (a)(8)(A), or, alternatively, even the "sufficient time" requirement of Subsection (a)(9); the necessary candidate information to complete it is not available to UOCAVA voters in time for their voted ballots to be marked, returned and counted.

IV

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO ENSURE GEORGIA'S COMPLIANCE WITH FEDERAL LAW

Once it determines that the district court correctly granted summary judgment to the United States, this Court must affirm the lower court's injunction requiring Georgia's future UOCAVA compliance unless the injunction constitutes an abuse of discretion. See *Doe* v. *Chiles*, 136 F.3d 709 (11th Cir. 1998) (upholding district court injunction requiring Florida to provide Medicaid services to developmentally disabled individuals within 90 days under statute's "reasonable promptness" provision despite State's objections that injunction was overly stringent and infringed on its prerogatives to set programmatic priorities). This Court should affirm the election calendar established in the district court's July 13, 2013 Order, as amended by the August 21, 2013 Order (Doc. 44/App. 19) because the district court did not make "a clear error of judgment" or apply "an incorrect legal standard." See *Chiles*, 136 F.3d at 713 (citation omitted).

A. Georgia's Proposed Relief Was Unreasonable And Inconsistent With UOCAVA

Before it issued its injunctive relief, the district court first allowed Georgia to submit its own proposal to administer its federal runoff elections in a UOCAVA-compliant manner. Doc. 38, at 2, 4-5/App. 17. Georgia did not, however, propose any alteration to its unworkably short time periods. Instead, Georgia proposed mailing absentee ballots to UOCAVA voters within a time frame that still would not allow them to mark and return their ballots until well *after* the runoff election date. Doc. 38, at 3-4/App. 17. Despite UOCAVA's mandate to transmit absentee ballots 45 days *in advance* of the pertinent federal election, 42 U.S.C. 1973ff-1(a)(8)(A), Georgia instead proposed creating a 45-day roundtrip transit window by extending its deadline for receipt of marked ballots by the state election official from three days after federal runoff elections to 35 days *after* a federal primary runoff election or 28 days *after* a federal general runoff election. Doc. 35, at 6/App. 15.

First and foremost, the district court was correct to reject Georgia's proposal because it failed to provide the advance transmission time required by Subsection (a)(8)(A). The district court properly rejected Georgia's proposal because it would effectively result in many UOCAVA voters marking and returning their ballots well *after* the date of the actual runoff election. Doc. 38, at 3-4/App. 17. Since the absentee ballot transmission deadlines for runoff elections under Georgia law are

far too close to the runoff election day, UOCAVA voters are unlikely to receive their absentee ballots by the date of the election. UOCAVA voters therefore would have to mark their ballots after the election has already occurred, relying on Georgia's proposed extension of the ballot return date to ensure that their votes are received and counted.

Georgia's proposed relief was inconsistent with fundamental principles of democracy and voter equality, *i.e.*, the principle that no class of voters should have additional information about the likely impact of their votes on cumulative vote tallies before casting their ballots. See Doc. 38, at 3-4/App. 17. If the district court had adopted Georgia's proposal, UOCAVA voters likely would have been deterred from marking and returning their ballots – which might not occur until as much as one month after the actual runoff election date – because of media reports of the unofficial election results during that time. Such reports and awareness that they are marking their ballots weeks after the actual runoff election would likely deter UOCAVA voters' participation in the runoff election because of perceptions that their votes would not affect the outcome. The district court therefore properly exercised its discretion to reject Georgia's proposed scheme.

B. The District Court Properly Set A UOCAVA-Compliant Calendar For Georgia After Its General Assembly Declined To Act

The district court did not abuse its discretion by creating a UOCAVA-compliant federal election calendar for Georgia after first allowing time for the

Georgia General Assembly to exercise its own authority to bring its state runoff election procedures into compliance with federal law. See *Branch* v. *Smith*, 538 U.S. 254, 261-262, 123 S. Ct. 1429, 1435-1436 (2003) (affirming district court injunction due to State's failure to timely pre-clear a redistricting plan despite opportunity to do so); *United States* v. *New York*, No. 1:10cv-1214, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012) (establishing a federal non-presidential primary date for State, that would not preclude State from selecting a different UOCAVA-compliant date, upon finding a lack of political will to amend a state law to comply with UOCAVA). The proposal Georgia submitted in response to the district court's invitation frankly acknowledged that the members of Georgia's General Assembly were aware of the district court's July 5, 2012 Order granting preliminary injunctive relief, but had failed to introduce any legislation to remove the conflict between the state runoff election law and UOCAVA during its 2013 legislative session. Doc. 35, at 4/App. 15. By the time it awarded permanent injunctive relief, the district court had already waited to see whether Georgia's General Assembly would enact the state law changes necessary to permit compliance with both state law and UOCAVA for runoff elections. See Doc. 37, at 9 n.5/App. 16; Doc. 38, at 3-4/App. 17; cf. *New York*, 2012 WL 254263, at *1.

Faced with Georgia's deficient proposal leaving intact the problematic runoff election dates and ignoring bedrock democratic principles (Doc. 38, at

4/App. 17), and with no remedial legislative action by the General Assembly in sight, the district court was well within its discretion to impose a new UOCAVA-compliant federal election calendar reflecting the supremacy of federal law over conflicting Georgia law. See *New York*, 2012 WL 254263, at *2; *Favors* v. *Cuomo*, 866 F. Supp. 2d 176, 185-186 (E.D.N.Y. 2012) (holding that State's failure to enact redistricting plan within four months of a federal primary election posed injuries that were sufficiently non-speculative to confer standing on plaintiff voters).

C. The District Court Honored Congress's Priorities While Respecting State Autonomy To The Maximum Extent Possible

Congress repeatedly expressed its desire to prioritize the restoration of fundamental voting rights to military service members and other overseas citizens by ensuring that they timely received absentee ballots *in advance* of all federal elections, see 42 U.S.C. 1973ff-1(a)(8)(A) (expressing Congress's motivation to end an unacceptable status quo of UOCAVA voter disenfranchisement); see also Addendum at S4513. The district court therefore was not at liberty to ignore Congress' policy choices by rewriting UOCAVA. The lower court simply could not endorse long extensions of Georgia's post-election ballot receipt deadline for UOCAVA voters while allowing the State to maintain a runoff election date that failed to comply with the 45-day deadline and would have prevented many

UOCAVA voters from receiving absentee ballots in time to mark them by election day.

In crafting its injunction, the district court appropriately took a minimally disruptive approach that left the Georgia Legislature free to harmonize state election laws with federal requirements in the future. See *Favors*, 866 F. Supp. 2d at 185-186; *New York*, 2012 WL 254263, at *1 (establishing a federal non-presidential primary date for State, that would not preclude State from selecting a different UOCAVA-compliant date, upon finding a lack of political will to amend a State law to comply with UOCAVA). The challenged relief was a necessary and appropriate exercise of judicial discretion because the "injunction is crafted *only* toward generating" the changes to the state's election calendar necessary to ensure UOCAVA compliance. See *Chiles*, 136 F.3d at 722.

The district court displayed the proper respect for the State's lawful prerogatives when it crafted its injunction. For example, the district court left intact Georgia's decision to have a majority vote rule that may require runoff elections for federal office.[13] The district court also did not disturb Georgia's calendar for *state* elections. The district court explicitly deferred to Georgia's

[13] State proposals to eliminate Georgia's majority voting rule have been under consideration. See *Final Report and Recommendations of the Georgia Secretary of State's Elections Advisory Council* 8, available at http://www.sos.ga.gov/GAEAC/.

legislative prerogatives by specifying that the injunction "does not prohibit the State of Georgia from adopting its own UOCAVA-compliant election calendar in future legislative sessions." Doc. 38, at 8/App. 17. Most recently, the district court declined to rule on state election dates that Georgia incidentally included in its submission of UOCAVA-compliant federal election calendar for 2014 because the district court's injunction was not intended to direct the course of state elections. Doc. 58, at 2 n.2. Accordingly, the district court's injunctive relief comported with principles of state autonomy and reflected restraint in exercising its discretion to award only necessary injunctive relief for the federal elections UOCAVA covers.

Georgia state law indisputably is required to yield to the requirements of federal law, including UOCAVA, with respect to ballot transmission procedures for covered voters in federal elections. See *Arizona* v. *InterTribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256-2257 (2013). The district court thus was obligated to effectuate Congress's policy goal of re-enfranchising military service members and overseas citizens, regardless of potential minor inconveniences to other voters or additional unspecified costs that Georgia's General Assembly could avoid by

harmonizing the state election calendar with a UOCAVA-compliant federal election calendar.[14]

The fundamental right to vote is one of the most precious rights in a free country. See *Wesberry* v. *Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535 (1964); see also *Dunn* v. *Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 996 (1972). As Senator Chambliss of Georgia recognized when speaking in favor of the MOVE Act's amendment of UOCAVA to include a uniform 45-day advance ballot transmittal rule, "unfortunately our military is one of the most disenfranchised voting bloc[s] we have." 155 Cong. Rec. 18,922. The district court's injunctive relief thus was commensurate with Congress's and other courts' recognition that military service members, among all citizens, especially should be guaranteed full enfranchisement. See *Bush* v. *Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000); see also Addendum at S4513.

The district court properly exercised its discretion to protect fundamental voting rights, enforce the supremacy of federal law over inconsistent state law, and

---

[14] The Court should reject amicus curiae Alabama's attempt to interject into this appeal a single study that is not part of the record below. See Ala. Amicus Br. 22. Congress legislated to solve its prioritized problem – disenfranchisement of UOCAVA voters – and considered studies regarding the ballot transmission times necessary to solve that problem. A single post-MOVE Act study on voter attrition in runoff elections is irrelevant to the resolution of this appeal. The contents or conclusions of the study also are not appropriate subjects of judicial notice, since they have not been tested in an adversarial process and cannot be considered to be unequivocal facts.

effectuate Congressional intent. This Court therefore should affirm its Order granting permanent injunctive relief.

CONCLUSION

This Court should affirm the district court's final judgment in favor of the United States.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Jodi B. Danis
MARK L. GROSS
JODI B. DANIS
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-5768
Jodi.Danis@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF OF APPELLEE UNITED STATES OF AMERICA:

(1) complies with Federal Rule of Appellate Procedure 32 (a)(7)(B) because it contains 11,114 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 14-point Times New Roman font.

s/ Jodi B. Danis
JODI B. DANIS
Attorney

Dated: December 9, 2013

CERTIFICATE OF SERVICE

I certify that on December 9, 2013, I electronically filed the foregoing BRIEF OF APPELLEE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

I also certify that counsel of record who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on December 9, 2013, counsel of record listed below is not CM/ECF registered and will receive one paper copy by certified First Class mail, postage prepaid:

James Davis
Attorney General's Office
501 Washington Ave.
P.O. Box 300152
Montgomery, AL 36130-0152

s/ Jodi B. Danis
JODI B. DANIS
Attorney

ADDENDUM

doors away and see if there is a sniper on the roof. I basically expect to be shot any day. . . . It's a war zone. . . . It's very frightening and it ruins your life".

Now, I recognize that there is a deep divide on the issue of reproductive freedom. And I recognize that there are many heartfelt feelings on both sides of the aisle and even within my own caucus. But, no matter which side of this debate you are on, we should all be able to agree that violence is never the answer.

So today I urge all my colleagues to join me in condemning the kind of senseless violence that led to the death of Dr. George Tiller.

NATIONAL CANCER RESEARCH MONTH

Mr. DODD. Mr. President, I rise today to recognize May as National Cancer Research Month. This year, nearly 1.5 million Americans will be diagnosed with cancer and more than 500,000 will die from the disease. Of course, when we talk about cancer, we are referring to more than 200 diseases but taken together, cancer remains the leading cause of death for Americans under age 85, and the second leading cause of death overall.

In my capacity as a member of the Senate Committee on Health, Education, Labor, and Pensions, I have spent my career fighting alongside my colleagues to provide increased funding for medical research to ensure that organizations like the National Institutes of Health have the ability to continue their critical lifesaving work. It remains my hope that, as the NIH continues to provide us with new and innovative research and treatments, we will continue to provide them with the resources they need.

As a person directly affected by cancer, I believe we must continue to strengthen our Nation's commitment to this lifesaving research for the health and well-being of all Americans. The nation's investment in cancer research is having a remarkable impact. Discoveries and developments in prevention, early detection, and more effective treatments have helped to find cures for many types of cancers, and have converted others into manageable chronic conditions. The 5-year survival rate for all cancers has improved over the past 30 years to more than 65 per cent, and advances in cancer research have had significant implications for the treatment of other costly diseases such as diabetes, heart disease, Alzheimer's, HIV/AIDS and macular degeneration.

I take this opportunity not only to mention the value and importance of cancer research, but also to remember the people in my life who have been touched by this disease. Last year alone, we lost not only my sister Martha, but my dear friend Ted Kennedy to aggressive forms of cancer. Like many of my constituents whose lives have been touched by cancer, I think of them every day—and their battles strengthen my resolve to fight for better treatment and more cures.

I want to thank every one of my constituents who have come to my office to meet with my staff and me about this disease. It is no secret that cancer touches the lives of more Americans than those who are just diagnosed with it—friends and family also face the difficulty of supporting their loved ones through these hard times. I know how much time, effort and resources they expend on these trips. Many of them are sick or in recovery, or taking care of very ill loved ones, yet they still find the time to come down and share their stories with us, and I thank them for it. Their stories, anecdotes and struggles give a face to the people all across the country whose lives are touched by this important research, and hearing about them help us to do our jobs better. We could not have gotten health care reform passed without their constant efforts and support.

In commemorating May as National Cancer Research Month, we recognize the importance of cancer research and the invaluable contributions made by scientists and clinicians across the U.S. who are working not only to overcome this devastating disease, but also to prevent it. I lend my support as a father of two girls, as a husband, and as a public servant to supporting those who struggle with this deadly disease and I urge my colleagues to join me and do the same.

MILITARY AND OVERSEAS VOTER EMPOWERMENT (MOVE) ACT OF 2009

Mr. SCHUMER. Mr. President, since becoming chairman of the Committee on Rules and Administration with jurisdiction over Federal elections, I have come to have a better appreciation for and deeper understanding of the obstacles and barriers that our military men and women serving abroad and at home and U.S. citizens living in foreign lands encounter when they try to vote.

As I explained at a Rules Committee hearing held in May of 2009, every couple of years around election time, there is a great push to improve military and overseas voting. But as soon as the election is over, Congress all too often forgets the plight of these voters.

But last year, Congress delivered. Our motive was simple—we wanted to break down the barriers to voting for our soldiers, sailors, and citizens living overseas. On a bipartisan basis, we agreed that it was unacceptable that in the age of global communications, many active military, their families, and thousands of other Americans living, working, and volunteering in foreign countries cannot cast a ballot at home while they are serving or living overseas. For our military, what especially moved us to act was the fact that they can fight and put their life on the line for their country, but they can't choose their next commander-in-chief. This shouldn't happen—not in the United States of America where elections are the bedrock of our democracy.

With the 2010 elections less than 7 months away, a new law is on the books. The provisions of the Military and Overseas Voter Empowerment Act, MOVE Act, of 2009 were incorporated in Public Law 111-84, the National Defense Authorization Act of 2010. This law will make it easier for members of our Armed Forces and citizens living abroad to receive accurate, timely election information and the resources and logistical support to register and vote and have that vote count.

Mr. President, a legislative history of the MOVE Act is as follows:

BACKGROUND AND PURPOSE OF THE MOVE ACT

American citizens believe voting is one of the most treasured of our liberties and a right to be defended at any cost. It is therefore unacceptable that our military men and women serving abroad and at home, who put their lives on the line every day to defend this right, often face obstacles in exercising their right to vote.

Empirical evidence confirms that members of the military and citizens living overseas who have attempted to vote through the absentee balloting procedures that has been in place for the last 30 years were often unable to do so. The reasons were many, including insufficient information about military and overseas voting procedures, failure by States to send absentee ballots in time for military and overseas voters to cast them, and endemic bureaucratic obstacles that prevent these voters from having their votes counted. While the Uniformed and Overseas Citizens Absentee Voting Act, UOCAVA, enacted in 1986, created a Federal framework for both military and overseas citizens to vote it was clear that, in order to break down these barriers to voting, UOCAVA was in need of an overhaul.

A history of congressional efforts to aid military and overseas voters highlights the obstacles faced by these voters. In 1942, the first Federal law was enacted to help military members vote in Federal elections. The Soldier Voting Act of 1942 was the first law to guarantee Federal voting rights for servicemembers during wartime. It allowed servicemembers to vote in elections for Federal office without having to register and instituted the first iteration of the Federal Post Card Application for servicemembers to request an absentee ballot. Though this was a commendable first effort by Congress, the 1942 law's provisions only applied during a time of war, and barriers to voting remained. In 1951, President Truman commissioned a study from the American Political Science Association on the problem of military voting. Recognizing the difficulties faced by military members serving overseas during World War II and the Korean War in trying to vote, President Truman wrote a letter to Congress that called on our legislators to fix the problem. In response, Congress passed the Federal Voting Assistance Act, FVAA, in 1955 which recommended—but did not guarantee—absentee registration and voting for military members, Federal employees serving abroad, and members of service organizations affiliated with the military. In 1968, FVAA was amended to cover U.S. citizens temporarily living outside of the United States, thus increasing the number and scope of U.S. citizens that fell within the law's purview. In 1975, the Overseas Citizens

Voting Rights Act at last guaranteed military and overseas voters the right to register and vote by absentee procedures. In 1986, Congress enacted UOCAVA as the primary military and overseas voting law, incorporating the expansion of rights granted under prior Federal legislation and making several significant advances to improve military and overseas voting. UOCAVA has been the operational voting framework provided to military and overseas voters.

UOCAVA's main provisions placed several mandates on States. First, States must allow members of the uniformed services, their families, and citizens residing overseas to register and vote by absentee procedures for all elections for Federal office including all general, primary, special and runoff elections. Second, States are required under UOCAVA to accept and process all valid voter registration applications submitted by military and overseas voters—as long as the application is received no less than 30 days prior to an election. Third, UOCAVA created the Federal write-in absentee ballot, FWAB, a failsafe backup ballot for Federal general elections.

Congress has amended UOCAVA several times over the last 24 years. The 1998 amendments included certain reporting requirements on States to provide information on military and overseas voting participation; and the 2001 amendments required States to accept the Federal Post Card Application, FPCA, as a combined voter registration and absentee ballot request form, and gave voters the opportunity to request that the FPCA be a standing absentee ballot request for each subsequent Federal election in the voter's State that year. In 2002, the Help America Vote Act, HAVA, modified this provision to allow voters to automatically request an absentee ballot through the FPCA for the two subsequent regularly scheduled Federal election cycles after the election for which the FPCA was originally submitted. HAVA also added a number of substantive provisions to UOCAVA, including a provision to give voting assistance officers the time and resources to provide voting guidance and information to active duty military personnel, a mandate that the Secretary of each branch of the Armed Forces provide information to service personnel regarding the last date that an absentee ballot can reasonably be expected to arrive on time, and a requirement that States identify a single office for communication with UOCAVA voters. Finally, Congress amended UOCAVA in 2004 to allow military personnel to use the Federal write-in absentee ballot, or FWAB, from within the territorial United States.

Despite these improvements over the years, evidence revealed that significant barriers to voting continued for military and overseas citizens. Registration among military voters has been shown to be substantially lower than among other voting-eligible U.S. citizens. According to testimony submitted by hearing witnesses, in 2006, the registration rate among military personnel was 64.86 percent compared to a registration rate of 83.8 percent for the general voting age population. According to one survey of military and overseas voters conducted after the 2008 election, of those overseas voters who wanted to vote but were unable to do so, over one-third—34 percent—could not vote because of problems in the registration process. The same survey found that even among experienced overseas voters, nearly one-quarter—23.7 percent—experienced problems during the registration process. Military and overseas voters have had to deal with a lack of information about registration procedures and a slow, cumbersome registration process that often turns into the first roadblock to voting.

Military and overseas voters also have trouble even when they have been able to properly register. The Congressional Research Service, CRS, found that during the 2008 election military personnel and overseas citizens hailing from the seven States with the highest number of deployed soldiers requested 441,000 absentee ballots. Of these, 98,633 were never received by local election officials. Further, survey data shows that two out of every five military and overseas voters, 39 percent—who requested an absentee ballot in 2008 received it from local election officials in the second half of October or later—much too late for a ballot to be voted and mailed back in time to be counted on election day. Sending absentee ballots too late to have the opportunity to actually vote is an unacceptable situation for military and overseas Americans.

Finally, some States reject ballots from military and overseas voters for reasons unrelated to voter eligibility, including unnecessary notarization requirements and criteria such as the paper weight of the ballot or ballot envelope. As many as 13,500 ballots were rejected from military and overseas voters from the seven States with the greatest number of troops deployed overseas.

These numbers are totally unacceptable. These barriers effectuate rampant disenfranchisement among our military and overseas voters. Congress has a compelling interest to protect the voting rights of American citizens, and it is especially incumbent upon Congress to act when those very individuals who are sworn to defend that freedom are unable to exercise their right to vote.

The need for sweeping improvement was clear. The Military and Overseas Voter Empowerment Act is a complete renovation of UOCAVA that brings it into the twenty-first century and streamlines the process of absentee voting for military and overseas voters through a series of common sense, straightforward fixes.

First, it allows military and overseas voters to request, and when so requested, requires States to send, registration materials, absentee ballot request forms, and blank absentee ballots electronically. It ensures that military and overseas voters have at least 45 days to receive and complete their absentee ballots and return them to election officials. The legislation also requires that absentee ballots from overseas military personnel be sent through expedited mail procedures, making it faster and easier to send voted ballots back to local election officials. In addition, it prevents election officials from rejecting overseas absentee ballots for reasons not related to voter eligibility, like paper weight and notarization requirements.

Second, the MOVE Act expands accessibility and availability of voting resources for military and overseas voters. It shores up the Federal Voting Assistance Program, or FVAP, an organization within the Department of Defense, DOD. Under the provisions of MOVE, FVAP will make a number of improvements to its voter education efforts for our military and other Americans living and working abroad and serve as the central administrative office for carrying out the Federal responsibilities under UOCAVA and MOVE. It also increases the usability and accessibility of the FWAB. This failsafe ballot allows military and overseas voters to vote even when they face a situation where they don't receive a State-issued ballot in time. In addition to all these improvements, the legislation advances voter registration for our military by directing each of the Secretaries of the military departments to designate offices in military installations where soldiers and their families can register to vote, update their registration information, and request an absentee ballot.

The MOVE Act also aims to secure future voting rights for military and overseas voters. It increases accountability for future elections by directing the Department of Defense to regularly report to Congress on their activities for implementing the programs and requirements under MOVE, including information on ballot delivery success rates. It also authorizes the Defense Department to create a pilot program testing new technologies for the future benefit of military and overseas voters.

The enactment of the provisions of the MOVE Act brings to an end a system that could ever allow a quarter of ballots requested by U.S. troops to go missing. It instead aims to ensure that every single military and overseas vote be counted.

COMMITTEE HEARING AND CONSIDERATION AT MARKUP

The Committee on Rules and Administration held a hearing on May 13, 2009, which I chaired entitled "Hearing on Problems for Military and Overseas Voters: Why Many Soldiers and Their Families Can't Vote." The first panel consisted of one witness, Gail McGinn, Acting Under Secretary for Personnel and Readiness for the Department of Defense. Testifying on the second panel were Patricia Hollarn, board member of the Overseas Vote Foundation and former supervisor of elections in Okaloosa County, FL; Donald Palmer, director of the Division of Elections at the Florida Department of State; LTC Joseph DeCaro, active duty member of the U.S. Air Force, on his own behalf; Eric Eversole, former attorney at the Department of Justice Civil Rights Division, Voting Rights Section, adviser to the McCain-Palin campaign, and former member of the Navy's Judge Advocate General Corps from 1999–2001; and Robert Carey, executive director of the National Defense Committee.

The hearing focused on the reasons why so many military and overseas voters find it difficult or impossible to effectively cast their ballots, with special attention paid to recommendations from the witnesses who possess extensive experience with the military and overseas absentee voting process. The hearing opened with a discussion of the preliminary results from a study of military and overseas voting in 2008 conducted by the Congressional Research Service. The findings showed that in several of the largest military voting States, up to 27 percent of the ballots requested by military and overseas voters were not counted for one reason or another.

Letters from soldiers serving abroad who wanted to cast ballots in 2008 but were unable to do so were shared. One letter from a soldier in Alaska concisely summarized the problem underscored by the hearing: "I hate that because of my military service overseas, I was precluded from voting."

Gail McGinn, Acting Under Secretary for Personnel and Readiness at the Department of Defense, testified in detail about the logistical and administrative challenges facing military and overseas voters. Ms. McGinn identified time, distance, and mobility as the chief logistical barriers to these voters. She said, "Our legislative initiatives for states and territories to improve ballot transit time are, first, provide at least 45 days between the ballot mailing date and the date that ballots are due; give state chief election officials the authority to alter elections procedures in emergency situations; provide a state write-in absentee ballot to be sent out 90 to 180 days before all elections; and expand the use of electronic transmission alternatives for voting material." Ms. McGinn further pointed out that 23 States do not provide the minimum of a 45-day round trip for military and overseas absentee ballots. Patricia Hollarn, board member of the Overseas Vote Foundation and

former supervisor of elections in Okaloosa County, FL, testified about her personal experience with local election officials who, she said, had a lot of confusion about the proper absentee balloting procedures they needed to provide for overseas citizens and military personnel. She echoed Ms. McGinn in recommending that States and local jurisdictions provide a minimum of 45 days for absentee ballots to be delivered to overseas voters, completed, and returned before the state's deadline. She also emphasized the logistical challenge facing the U.S. Postal Service and military mail service with respect to the speedy delivery of overseas ballots.

Donald Palmer, director of the Division of Elections for the Florida Department of State, testified about Florida's experience serving its military and overseas voters. Mr. Palmer said that providing 45 days for ballot transmission and delivery, as Florida does, is "prudent" and "absolutely necessary, when relying solely on the mail service." Mr. Palmer also discussed Florida's experience using technology, including e-mail, fax, and the Internet, to communicate with military and overseas voters and transmit balloting materials to and from Americans abroad. Mr. Palmer testified about an invitation from the Department of Defense for Secretaries of State to travel to the Middle East and see firsthand how soldiers receive their absentee ballots. Florida Secretary of State Kurt Browning relayed to Mr. Palmer that soldiers abroad many times do not have access to fax machines and often use e-mail as a primary source of communication and expressed their desire to be able to use email or the internet to transmit balloting materials to local election officials. Mr. Palmer also detailed pilot programs in Florida which have used new technologies to facilitate ballot transmission from abroad. He also described Florida's efforts to work with the U.S. Postal Service to reduce error rates in ballot delivery and to use intelligent code technology to track absentee ballots while in the Continental United States.

United States Air Force LTC Joseph DeCaro, testifying on his own behalf, described his personal experiences with absentee voting while serving abroad in 2004. His experience illustrates the burdens facing uniformed servicemembers overseas who want to vote:

Every moment I spent researching and coordinating with state-side resources to be able to cast my ballot was against any personal time off. The mission is and always must be the main focus. Being deployed is difficult enough as it is . . . I think every American should do what they can to cast their ballot and make their voice heard. As with many other citizens, I will continue to do this, but there should be a better way in which [service personnel can] cast their ballot while deployed.

Lieutenant Colonel DeCaro also lamented that he had no way of knowing whether the ballot he mailed to his local election office would ever reach its destination.

Eric Eversole, former attorney at the Department of Justice Civil Rights Division, Voting Rights Section, began his testimony by arguing that "when it comes to the military members' right to vote, we seem to forget their sacrifices and we deny them the very voting rights that we ask them to defend." He cited statistics which showed that only 26 percent of Florida's deployed servicemembers were able to successfully request an absentee ballot in 2008. He also echoed prior testimony that States should mail out absentee ballots to military and overseas voters at least 45 days before the local deadline to have the ballot count. Mr. Eversole testified about the need for improvements in the Federal Voting Assistance Program. Mr. Eversole strongly advocated for military personnel to receive appropriate voting information and voter registration materials when they move or deploy to a new installation or port. In response to a question I asked, Mr. Eversole also testified that certain offices at the Department of Defense should be designed as voter registration agencies under the National Voter Registration Act.

Robert Carey, executive director of the National Defense Committee, testified about his own experience taking a leave of absence from his duty as a member of the U.S. Navy Reserves and flying back to New York City at his own expense in order to vote in the 2004 election. He cited research showing that only 26 percent of the ballots requested by overseas soldiers in 2006 were successfully cast. Mr. Carey emphasized that insufficient time was the chief reason for these statistics, arguing that States too often send out ballots too late for military voters to complete and return them in time to be counted. He pointed to a study conducted by the Pew Center on the States, Pew, which found that 23 States do not provide enough time for military and overseas voters to successfully cast their ballots. Mr. Carey also recommended that ballots be sent out at least 60 days before they were due.

Several organizations submitted statements for the hearing record. Pew submitted a copy of its 2009 study of military and overseas voting, No Time to Vote, for the committee record. In its accompanying letter, Pew highlighted several recommendations for reform from the study, including "sending out overseas absentee ballots sooner, eliminating notary and witness requirements and harnessing technology to allow for the electronic transmission of ballots and election materials to voters overseas."

The Overseas Vote Foundation, OVF, submitted a copy of its 2008 post-election survey for the record. The survey included data obtained from over 24,000 overseas voters and over 1,000 local election officials. Among OVF's key findings was that more than half, 52 percent, of those overseas military voters who tried but could not vote were unable to because their ballots were late or did not arrive. OVF also found that despite concerted efforts, less than half of UOCAVA voters were aware of the Federal write-in absentee ballot.

Democrats Abroad submitted a statement for the record emphasizing the difficulties for military and overseas voters stemming from the patchwork of varied State and local regulations, a lack of awareness of the Federal write-in absentee ballot, and general inability to effectively communicate with local election officials from abroad.

Tom Tarantino, legislative associate with Iraq and Afghanistan Veterans of America, submitted a statement for the record including testimony about his own experience as a voting assistance officer, citing the lack of sufficient training about how to effectively educate soldiers about absentee balloting procedures. Mr. Tarantino recommended improving the voting assistance officer program and suggested that the Department of Defense be required to ensure safe and timely passage of military ballots to their home districts.

The Federation of American Women's Clubs Overseas submitted a statement for the record in which it recommended that States send overseas absentee ballots at least 45 days before the deadline and that voter materials, including ballots, not be rejected for reasons unrelated to voter eligibility.

Everyone Counts submitted a "white paper" for the record comparing the effectiveness of various voting technologies for military and overseas voters.

Alex Yasinac, dean of the School of Information and Computer Sciences at the University of South Alabama, submitted a statement for the record analyzing various technological solutions to improve overseas absentee voting. Dr. Yasinac suggested the creation of a technological pilot program for overseas voters, including the use of virtual private networks, cryptographic voting systems, and document delivery upload systems to ensure secure electronic transmission of balloting materials.

INTRODUCTION OF THE BILL

I introduced S. 1415, the MOVE Act of 2009, on July 8, 2009, and was joined by Senators Saxby Chambliss and Ben Nelson as original cosponsors. After the bill's introduction, 56 additional Senators joined as cosponsors. The bill was referred to the Senate Committee on Rules and Administration.

COMMITTEE CONSIDERATION AT MARKUP

S. 1415 was considered by the Senate Rules Committee at a markup held on July 15, 2009. The committee adopted three amendments which I submitted on behalf of Senator John Cornyn, who had introduced separate legislation on improving military voting that was pending at the time in the Rules Committee. Senator Cornyn joined in this endeavor by contributing his knowledge and expertise on military voting to the MOVE Act. Senator Robert Bennett, ranking member of the Rules Committee, introduced an amendment with several provisions intent on improving the effectiveness of the MOVE Act.

The first amendment, which I submitted on behalf of Senator Cornyn, strengthened the bill by ensuring that overseas military personnel can mail their marked absentee ballots to their local election offices with confidence that those ballots will be received and counted by directing the Presidential designee to work with the U.S. Postal Service to provide expedited delivery services for ballots that are collected before a prescribed deadline. The provision provides ample discretion for the Presidential designee to extend that deadline for collection of ballots, allowing the Presidential designee to permit a longer transit time for completed ballots to be delivered to local election officials. To ensure Department of Defense accountability under this section, the amendment directed the Presidential designee to submit reports to the relevant congressional committees to explain the procedures implemented to provide the expedited mail delivery and inform the committees of the number of military overseas ballots successfully and unsuccessfully delivered to local election offices in time. Finally, the amendment included language requiring the Presidential designee to ensure, to the greatest extent allowable, that the privacy of military servicemembers and security of their ballots are protected during the delivery process.

The second amendment, which Senator Cornyn and I worked on together, fortified the bill by expanding voter registration opportunities, services, and information for military and overseas voters. It also required the Department of Defense to provide voting information and an opportunity for servicemembers to register and update voting information during certain points in service and provided the Secretary of Defense flexibility to designate certain pay, personnel, and identification offices as voter registration agencies. In addition to voter registration, the amendment required written information to be provided to servicemembers on absentee ballot procedures. Finally, the amendment contained reporting requirements for the Department of Defense to evaluate its voter support services and send Congress its

recommendations for improving those programs.

The third amendment was technical in nature and altered no substantive provisions of the bill.

Ranking Member Bennett offered a package of amendments modifying several provisions of the bill. First, the amendment clarified that States may delegate the obligations under the MOVE Act to local jurisdictions. Some local and State election administrators contacted the Rules Committee to express concern because they thought that the MOVE Act could be interpreted to require States, instead of localities, to take administrative responsibility for running elections for UOCAVA voters. Though there was no intent to shift routine administrative responsibility of elections to States, for the sake of clarity in the bill, I supported this amendment. While clarifying that the MOVE Act can be administered and implemented at the local level, the amendment did not modify or otherwise alter the ultimate responsibility of MOVE Act compliance, which remains with the State. Accordingly, States retain the responsibility to ensure local jurisdictions' compliance with UOCAVA and MOVE and thus the State will continue to be the focus of any potential enforcement actions that need to be taken by the Attorney General.

Senator Bennett's amendments also modified provisions of the MOVE Act which had originally required States to transmit balloting materials "by mail, electronically, or by facsimile." The text of the amendment instead read to require transmission of balloting materials "by mail and electronically." This change clarified the requirement on State and local election administrators that, in addition to mail, they must provide at least one method of fast and effective electronic means of transmitting balloting materials to U.S. citizens overseas and uniformed servicemembers. It is important to note that Bob Carey during his testimony before the Rules Committee on May 13, 2009, testified that "[R]ecent research by the National Defense Committee indicates that fax transmission is not an effective option for military personnel, especially those suffering the greatest disenfranchisement in this process." However, at the same time, the amendment's language clarified that election administrators may provide multiple means of electronic communication in order to ensure speedy transmission of information, registration and balloting materials.

Senator Bennett's amendments also reinforced the privacy and security provisions of the original legislation by directing States to protect, to the extent practicable, the integrity of the voter registration and absentee ballot process through procedures that shield identity and personal data.

The amendments also simplified the timing provisions of the original legislation by mandating that whenever a State receives an absentee ballot request at least 45 days before a Federal election it must send out an absentee ballot not later than 45 days before the election. With respect to valid ballot applications received after 45 days prior to such an election, States are required to transmit a validly requested absentee ballot in accordance with State law and as expeditiously as possible. However, the amendment did not impact the 30-day requirement under UOCAVA. At the same time, the amendment removed language from the original version of the bill which would have required States to accept and count absentee ballots received up to 55 days after the date on which an absentee ballot was transmitted or the date on which the State certified an election, whichever was later. The negotiated modification placed a 45-day mandate on States to promptly respond to military and overseas absentee ballot requests.

The amendments also strengthened Department of Justice oversight of absentee voting by uniformed services and overseas voters by requiring the Presidential designee to consult with the Attorney General before approving any hardship exemptions from States unable to comply with the bill's timing provisions. This will help ensure a unified governmental response to State compliance with the MOVE Act.

Finally, the amendments repealed subsections (a) through (d) of §104 of the Uniformed and Overseas Absentee Voting Act, which allowed military and overseas absentee ballot applicants to indicate on their Federal Postcard Application form that their application should be considered a continuing application for an absentee ballot through the next two regularly scheduled general elections. Given the highly mobile nature of military and overseas voters, there was a concern among States that this provision of UOCAVA required a large number of ballots to be sent to old and outdated addresses. Election officials reported receiving a large number of these continuing absentee ballots as "returned undeliverable," thus artificially inflating the number of failed ballots, and potentially wasting State resources. Repealing these sections addressed those concerns. This amended section does not prohibit States from providing continuing applications for absentee ballots, or accepting ballots received under such continuing applications. This amended section also does not prohibit States from considering a Federal Postcard Application submitted for a primary election to carry over to the general election in that same election cycle.

The committee agreed to all of the proposed amendments and adopted them by voice vote. The committee then voted to report S. 1415, the Military and Overseas Voter Empowerment Act, as amended. The committee proceeded by voice vote, and all members present became cosponsors of the legislation. S. 1415, as amended, was ordered reported to the Senate.

PASSAGE BY THE SENATE OF THE MOVE ACT PROVISIONS IN THE DOD AUTHORIZATION BILL

On July 22, 2009, I offered Senate amendment No. 1764 to S. 1390, the National Defense Authorization Act for fiscal year 2010, on the Senate Floor.

Senator Cornyn spoke in support of this amendment that day:

Our military servicemembers put their lives on the line to protect our rights and our freedoms. Yet many of them still face substantial roadblocks when it comes to something as simple as casting their ballots and participating in our national elections . . . This important amendment contains many other commonsense reforms suggested by other Senators and will help end the effective disenfranchisement of our troops and their families. Our goal has been to balance responsibilities between elections officials and the Department of Defense, and I believe this amendment accomplishes that goal.

On July 23, 2009, I urged my colleagues to support the MOVE Act amendment to the DOD authorization legislation:

Now, if [our soldiers] can risk their lives for us we can at least allow them to vote. They take orders from the commander-in-chief. They are the first people who ought to be allowed to elect and vote for a commander-in-chief. And if we can deploy tanks and high-tech equipment and food to the front lines, we can figure out a way to deliver ballots to our troops so they can be returned and counted. And that, Mr. President, is what the MOVE Act does.

Senator Bennett spoke in support of the amendment:

Now, then the legislation was introduced in its original form, I raised concerns with Senator Schumer about some of its provisions. He worked with me and my staff to address these concerns and the amendment that we have before us today effectively does so. That's why I'm pleased to now be a cosponsor of the bill. The difficulties our service personnel face in voting and the Senator from New York has described them, and I believe this amendment deals with them in a proper fashion.

Senator Chambliss also spoke in support of the amendment:

[N]ot since the passage of the Uniform and Overseas Voting Act in 1986 have we proposed such significant legislation designed to help the men and women of the military who time and time again are called upon to defend the rights and freedoms that we Americans hold so sacred. Unfortunately, our military's one of the most disenfranchised voting blocs we have and today we have the opportunity to correct this.

Senator Nelson also added comments in support:

We owe it to our men and women in uniform to protect their right to vote. And for military and overseas votes, that right is only as good as their ability to cast a ballot and have it counted. For years, we have known of the obstacles these brave Americans face in exercising their right to vote, often when far from home and in harm's way. I firmly believe this legislation will make a huge impact in empowering our military and overseas voters to have their votes counted no matter where they find themselves on election day.

Senate amendment No. 1764 to S. 1390 was agreed to by voice vote on July 23, 2009. The Senate took up H.R. 2647 on July 23, approved an amendment that substituted the text of S. 1390, then passed the bill by unanimous consent and requested a conference with the House. A Senate-House conference was held, and the House passed the conference report to H.R. 2647, H. Rept. 111–288, on October 8, 2009, and the Senate passed it on October 22, 2009. H.R. 2647 was signed by the President on October 28, 2009, and became Public Law 111–84.

THE MOVE ACT TODAY

The Military and Overseas Voter Empowerment Act of 2009 is a response to an unacceptable situation—the disenfranchisement of Americans serving and living abroad who are unable to vote because of logistical and geographic barriers.

The MOVE Act brings to an end a system that in the past allowed a quarter of the ballots requested by U.S. troops to go unreturned. It does so by insisting that every military and overseas vote be counted. Congress recognized that those who fight to defend America's freedom often face the greatest obstacles in exercising their right to vote. Congress acted to break down the challenges and barriers to voting faced by these citizens with passage of the provisions of the Military and Overseas Voter Empowerment Act.

Most of the MOVE Act provisions will be in place for the November 2010 general elections. States started implementing measures and procedures to comply with the MOVE Act almost immediately after passage of Public Law 111–84. At the Federal level, the Department of Defense has been in consultation with the Attorney General to develop and promulgate regulations to administer the waiver process. As the 2010 Federal election approaches, the States and the Department of Defense are making every effort to

ensure that military and overseas voters have every opportunity to register, vote, and have their vote counted.

Mr. President, I ask unanimous consent that a section-by-section of the MOVE Act provisions in the National Defense Authorization Act for fiscal year 2010 be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SECTION-BY-SECTION ANALYSIS OF THE MOVE ACT IN THE NDAA

The following is an explanation of each provision of the bill, what it does, and how it improves the ability of military and overseas voters to register, vote, and have their votes count in elections. It should be noted that in conference, there were two major substantive changes in the MOVE Act provisions as passed by the Senate.

One, the section on "Findings" was stricken. The "Findings" section provided an explanatory foundation for MOVE and why it was critical for its provisions to be enacted. It highlighted the fundamental nature of the right to vote; the logistical, geographical, operational, and environmental barriers that create obstacles for military and overseas voters to exercise their right to the franchise; the central role shared by States and the Department of Defense in overseeing and facilitating military and overseas voting; and the need for the relevant State, local, and Federal government entities to work together to ensure the ability of military and overseas voters to have their ballots count.

Two, the responsibilities attributed to the Department of Defense in ensuring military voters can effectively register to vote was changed in conference from the Senate-passed version. The reason for this change is explained in the summary of Section 583.

Section 575. Short title.

Title: "Military and Overseas Voter Empowerment Act".

Section 576. Clarification regarding delegation of State responsibilities to local jurisdictions.

This section clarifies that while the MOVE Act contains a number of mandates on the States with respect to military and overseas absentee voting, States remain free to delegate those responsibilities to local officials as they did under UOCAVA. In effect, this provision puts States on notice that the MOVE Act does not intend to and does not in fact take administrative control of military and overseas voting out of the hands of local officials. Compliance with MOVE's mandates, however, ultimately remains a State responsibility, and States will continue to be the main entity against which the provisions of MOVE and UOCAVA will be enforced should enforcement by the Department of Justice become necessary.

Section 577. Establishment of procedures for absent uniformed services voters and overseas voters to request and for States to send voter registration applications and absentee ballot applications by mail and electronically.

This section amends UOCAVA to require States to allow military and overseas voters the choice of requesting voter registration applications and absentee ballot applications either by mail or electronically. It mandates that the voter's choice of mail versus electronic extends to the mode of delivery of both the voter registration and absentee ballot applications. States must give all UOCAVA voters the option of receiving their applications by mail or electronically. To ensure military and overseas voters have an opportunity to choose their desired delivery method, States must provide a way for voters to designate their preferred method of delivery, and States are required to send these materials in accordance with the voter's designation. If no delivery preference is indicated, States are to transmit these materials according to applicable State law or, in the absence of such law, by mail. The requirements of this section apply to all general, special, primary, and runoff elections for Federal office.

Allowing military and overseas voters to request and receive voter registration and absentee ballot applications electronically requires States to establish at least one means of electronic communication for military and overseas voters to use. States are free to establish multiple means of electronic communication if they wish. In addition to using the electronic format to give voters the option of requesting and receiving voter registration and absentee ballot applications, it is also to be used to provide any other related voting, balloting, and election information requested by or otherwise provided to the voter.

In addition to email and the Internet, this provision contemplates the use of fax machines as a legitimate means of electronic transmission. This gives States an additional method of electronic communication. However, it is important to note that the Rules Committee received testimony regarding the challenges of solely relying on fax technology for military and overseas voting. Robert Carey, the Executive Director of the National Defense Committee pointed out in his written testimony that ensuring the privacy of a faxed absentee ballot is difficult. He also cited research indicating that only 39% of junior enlisted personnel had daily access to a fax machine. This provision therefore contemplates the use of fax technology as States gradually transition to more accessible forms of transmission for military and overseas voters through internet and email usage.

Information about how to communicate with States electronically, including any official designated email, web addresses, and phone numbers, should be readily accessible and is required to be included with any informational or instructional materials that accompany balloting materials sent to military and overseas voters.

The provisions of this section are a direct response to evidence gathered by the Rules Committee that showed lengthy mail transit times for voting materials, including registration forms and absentee ballot applications. This was a fundamental reason why so many of these voters did not have enough time to vote, and it showed the difficulty military and overseas voters have in communicating efficiently and effectively with State and local election officials. Taking advantage of modern technology is an important part of the solution to the "no time to vote" problem. The testimony of Lieutenant Colonel Joseph DeCaro at the Rules Committee's May 2009 hearing, in which he repeatedly expressed his gratitude for internet connectivity while serving in Air Force and described how he was able to use email to quickly communicate with local election officials, is particularly instructive. Lt. Colonel DeCaro testified that postal mail can sometimes take up to three weeks to reach its destination.

Compliance with this provision of the law may save States a substantial amount of money. Using a multiplier of $12.95 for a 1 oz. United States Postal Service Priority Mail international flat-rate mailing, States can potentially save as much as $1,295,000 for every 100,000 military and overseas voters that utilize electronic transmission methods of sending voter registration and ballot request materials.

This section also directs the Federal Voting Assistance Program of the Department of Defense to maintain and make available an online repository of State contact information with respect to Federal elections for use by military and overseas voters. The repository should include contact information for all the relevant State and local election officials in each State, including any designated email and Internet addresses and phone and fax numbers instituted to comply with the provisions of this law.

Finally, this section contains additional provisions directing States, to the extent practicable, to ensure the integrity of the voter registration and absentee ballot request process, as well as the protection of personal data.

Section 578. Establishment of procedures for States to transmit blank absentee ballots by mail and electronically to absent uniformed services voters and overseas voters.

This section amends UOCAVA to require States to establish procedures for transmitting blank absentee ballots to military and overseas voters both by mail and electronically for all general, special, primary, and runoff elections for Federal office. States are to use the preferred method of transmission identified by the voter and institute a procedure for allowing the voter to designate whether their preferred delivery method is by mail or electronic delivery. As in the previous section, if no delivery method is specified, States should follow applicable State law or, in the absence of such law, should deliver the blank absentee ballot to the voter by mail.

Additionally, this section contains the same language with respect to election integrity and voter privacy as the prior section, and the same rationale for the efficiency and effectiveness of electronic transmission also applies to this section with equal force.

Section 579. Ensuring absent uniformed services voters and overseas voters have time to vote.

This section amends UOCAVA to require States to transmit validly requested absentee ballots to military and overseas voters not later than 45 days before an election for Federal office, if a ballot request form is received by the relevant local election official at least 45 days before the election. In a circumstance when the absentee ballot request is received less than 45 days before the election, States must transmit a validly requested absentee ballot in accordance with State law and in as practicable a manner as possible that expedites the ballot's transmission so that the voter receives the ballot with enough time to cast the ballot and to have it counted. If States receive an absentee request less than 45 days before the election that contains an electronic delivery designation and related contact information, the State can expedite the blank ballot by electronic means. Of course, the UOCAVA voter still may request his or her ballot to be sent by mail. States may not be able to send the ballot electronically if the State lacks the necessary information, for example a correct email address or facsimile number.

The language "validly requested" in the MOVE Act refers to how this provision interacts with the pre-existing UOCAVA statute. Under §102a(2) of UOCAVA, each State is required to "accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election." The language "validly requested" in MOVE refers to applications that are received by local election

officials in accordance with §102a(2). It should be noted that although UOCAVA requires election officials to accept and process applications up to at least 30 days before an election under §102a(2), States are of course free under UOCAVA to shorten that time period to less than 30 days to give military and overseas voters more time to send in their applications. In such circumstances, the language "validly requested" also refers to ballots that are requested in time under the more permissive State law.

Also relevant here is that UOCAVA, as amended by the MOVE Act, creates a 15-day "gap" in which a State might receive an absentee ballot application from a military or overseas voter less than 45 days in advance of an election, and thus cannot comply with the 45-day rule under MOVE, but is still required to accept and process the application due to the 30-day rule under §102a(2). To ensure that military and overseas voters whose applications are received during this 15-day gap are given enough time to vote, the MOVE Act directs States to transmit such ballots "in accordance with State law," which is a directive for States to deliver ballots in accordance with any procedures that may exist under State law for transmitting ballots to UOCAVA voters, and in as practicable a manner as possible that expedites the ballot's transmission. This shall not supersede the MOVE requirement that UOCAVA voters be able to designate their preferred method of ballot delivery (mail or electronic) and the State's obligation to comply. State law may allow state election officials to fulfill requests that arrive less than 30 days before the election.

The "time to vote" provision was at the top of the list for potential reforms of military and overseas voting at the May 2009 Rules Committee hearing, with witnesses for both the Majority and the Minority endorsing such a measure. The original draft of the MOVE Act contained a 55-day mandate, under which States were required to send out ballots 45 days before an election and accept ballots up to 10 days after the election or by the State's certification date, whichever was later. This original provision was a response to complaints that certain jurisdictions refuse to count ballots from UOCAVA voters when those ballots are sent to States on or before Election Day but do not reach State or local election officials until after the polls have closed. However, there were concerns that this post-election requirement would intrude on States' ability to certify their elections in a manner that complies with their respective State laws or constitutions. Therefore the bill was modified to require that ballots be sent out at least 45 days before Election Day. The consensus recommendation emerged for a 45-day requirement following the hearing because it provides sufficient time for UOCAVA voters to request, receive and cast their ballots in time to be counted in the election for Federal office and better accommodates the laws of a number of states.

However, recognizing that circumstances may arise that prevent States from complying with the mandate to send ballots 45 days before Election Day, the MOVE Act also includes procedures whereby States can apply for a waiver from that provision. Waivers are submitted to the Presidential designee who, after consultation with the Attorney General, will decide whether to approve or deny the waiver request. If approved, the waiver is valid only for the election for which the State requested it. MOVE does not contemplate permanent waivers. Nor does MOVE contemplate "automatic" renewals of waivers—a waiver that is approved for one election is not automatically valid for or applicable to the State's next election. The reason is to protect UOCAVA voters from situations where a State's plan is approved by the Presidential designee, but ultimately proves insufficient to serve as a substitute for the 45-day rule. For example, if a waiver is granted for an election because the Presidential designee determines that the comprehensive State plan will give military and overseas voters enough time to vote, but evidence subsequently shows that, in practice during the election cycle, the State plan did not provide enough time to vote, a future waiver request with a similar State plan may not be granted just because it had been approved for the prior election. However, if a waiver is approved and the State plan is proven effective, a similar State plan resubmitted in a subsequent election cycle may be approved again. The key is that the State plan must provide adequate substitute procedures so that UOCAVA voters are given an opportunity to vote that is at least as sufficient as if the State complied with the 45-day rule. In some cases, the State waiver plan may provide even greater protection for UOCAVA voters, and such plans would serve the interests of the UOCAVA voters and the intent of the law. Thus state plans that offer protection for UOCAVA voters that is better than or equal to the 45-day provision and procedures that go beyond other minimum requirements for state assistance for those voters could merit repeated waivers.

This section mandates that the Presidential designee can only approve or reject a waiver after consulting with the Attorney General, since the Attorney General is the office that enforces UOCAVA and the provisions of the MOVE Act, and there should be coordination between the two entities. Consultation between the Presidential designee and Attorney General will promote consistency so that election officials do not receive mixed messages about the viability of waiver requests.

The Presidential designee may only grant a waiver if a specific standard is met, which is laid out in the MOVE Act. First, the Presidential designee may grant a waiver if one or more of the following circumstances exist to prevent a State from complying with the 45-day rule: (1) the State has a late primary election date, making it impossible to send validly requested ballots to voters 45 days before the election; (2) the State has suffered a delay in generating ballots due to a legal contest, such as a contested primary; or (3) the State's Constitution prohibits the State from complying with the 45-day rule. These are the only three circumstances under which a waiver request may be sought under MOVE.

In addition to a finding that at least one of these circumstances exists, the waiver request itself must include, in writing, the following: a recognition of the need to provide overseas voters with enough time to vote; an explanation of the hardship that prevents the State from transmitting absentee ballots 45 days before the election; the number of days prior to the Federal election that the State will transmit absentee ballots to military and overseas voters; and a comprehensive plan ensuring that military and overseas voters are able to receive and return requested absentee ballots in time to be counted. The plan must include the specific steps the State will take to ensure military and overseas voters have time to receive, mark, and submit their ballots in time to have them counted, an explanation of how the plan serves as an effective substitute for the 45-day rule, and relevant information that clearly explains how the plan is sufficient to substitute for the 45-day rule in a manner that allows enough time to vote. States are free to use innovative methods to ensure their comprehensive plan gives military and overseas voters enough time to vote.

Testimony before the Rules Committee supported the practice of some States that accept and count UOCAVA ballots after Election Day as one way of protecting the voting rights of their UOCAVA voters. This can be an acceptable option for states whose constitution and laws allow it and who want that flexibility. States must be mindful that even when they count UOCAVA ballots after an election, those voters may not be aware of that procedure. Therefore, a state should ensure that voters get ballots with enough time to vote and inform them of the state's procedures for receiving and counting ballots.

To summarize, the Presidential designee can issue a waiver only if one or more of three exigent circumstances exists: a prohibitively late primary date; a legal contest that results in a delay in generating ballots; or a conflict with a State's Constitution. In addition, the Presidential designee makes a determination that the State requesting the waiver has submitted an acceptable plan, containing all necessary information, which provides military and overseas voters with enough time to receive, mark, and submit their absentee ballots in time to have that ballot count in the election. The Presidential designee must consult with the Attorney General before approving a waiver request, since the Attorney General is charged with enforcing and ensuring State compliance with the provisions of UOCAVA and MOVE.

Waiver requests must be submitted by the chief State election official to the Presidential designee not later than 90 days before the Federal election for which it is requested, and the Presidential designee must approve or deny the waiver not later than 65 days before the election. If the hardship at issue is a legal challenge arising in a way that makes compliance with the 90-day deadline impossible, the State must submit the waiver request as soon as possible and the Presidential designee will approve or reject it not later than 5 business days after its receipt. It is certainly possible that DOD in consultation with DOJ, rather than rejecting a waiver request, might request the State to make modifications in the waiver request that would allow the waiver to be granted.

A waiver approved by the Presidential designee is valid only for the Federal election for which the State requested it and cannot be used by a State for any subsequent Federal election. If a State wishes to request a waiver for a subsequent Federal election, it must submit another waiver request.

Section 580. Procedures for collection and delivery of marked absentee ballots of absent overseas uniformed services voters.

This section amends UOCAVA by directing the Presidential designee to develop and implement procedures for collecting marked absentee ballots, including the Federal write-in absentee ballot, from absent overseas uniformed services voters, and facilitating their delivery in a manner that ensures that the ballots are received by the appropriate election officials in time to be counted.

This provision was a response to evidence gathered by the Rules Committee about the unpredictable nature of serving overseas. At the Rules Committee hearing in May 2009, Eric Eversole, formerly an attorney with the Department of Justice Civil Rights Division's Voting Rights Section, testified that an expedited mail delivery system would reduce the ballot delivery time. In circumstances, such as unforeseen military action, where overseas military personnel might be prevented from sending in time to be counted, an expedited mail delivery system would compensate for those numerous,

unforeseen factors. This requirement also is supported by the statement from Tom Tarantino, Legislative Associate with Iraq and Afghanistan Veterans of America, that the Department of Defense should be responsible for collecting overseas servicemembers' absentee ballots to ensure their delivery, and to make certain that military voters serving overseas are able to return their ballots in a timely and predictable fashion because to do so is "the most immediate step that Congress can take in protecting the voting rights of service men and women." This provision also incorporates language similar to a legislative initiative introduced by Senator Cornyn, who has advocated for DOD to take a direct role in providing expedited ballot delivery.

This section directs the Presidential designee to establish procedures for collecting absentee ballots from overseas military voters, and to facilitate their delivery so they are received by local election officials in time to be counted. The Presidential designee must work in conjunction with the U.S. Postal Service to provide expedited mail delivery for all absentee ballots from overseas military members. These ballots will be collected up until noon on the seventh day preceding the date of the upcoming election for expedited transmittal. This section also gives the Presidential designee flexibility to change that deadline if remoteness or other factors associated with military service, such as being located in a combat zone, warrant collecting and transmitting ballots prior to the regular deadline to ensure the ballots can be counted in time.

Finally, this section mandates that all ballots sent by military members overseas have to be postmarked by the Military Postal Service with the date the ballot was mailed. In accordance with existing law, it must be carried free of postage. Without a postmark, election officials have been unable to tell when a ballot was mailed, increasing the likelihood of uncounted votes from military personnel. This provision addresses the postmark problem and eliminates the risk of a ballot not being counted for this reason.

In carrying out this provision, the Presidential designee is charged with the responsibility of making certain that overseas military voters are aware of the expedited mail procedures and deadlines involved. The Presidential designee shall do this in a number of ways within his discretion, such as making information available via the Global Military Network, through easily accessible websites frequently used by military members, and in the informational forms made available to military members during critical points in service, such as the administrative in-processing at a new installation or base. A later section of MOVE requires the Presidential Designee to create online information portals and use the Global Military Network to inform military voters of voter registration information and absentee ballot rights.

In drafting this legislation, the Rules Committee considered a direct mandate on the Department of Defense which would have required that absentee ballots be transmitted to the appropriate election officials by a date certain. In consultation with the Department of Defense, however, personnel of that agency responsible for overseeing absentee voting for overseas military personnel expressed concern that complying with such a provision would be beyond its control. Absentee ballots mailed from abroad enter the domestic mail system once those ballots reach the United States and are no longer under DOD control. This section recognizes that reality, while at the same time solidifying the DOD's role in expediting transit times for these ballots so they can reach local election officials in time to be counted.

This section includes three supplemental provisions. First, it directs the chief State election official in each State, working alongside local officials, to develop a free access system whereby all military and overseas voters can track whether or not their absentee ballots have been received by the appropriate election official. This language was suggested by Lt. Col. Joseph DeCaro and others, to ensure that UOCAVA voters know their ballots are similarly situated to domestic absentee voters. Receipt of the UOCAVA ballot by the local election official marks the most important hurdle for overseas voters: getting the completed ballot back to the election office.

Second, it mandates that those soldiers who cast ballots at locations under the jurisdiction of the Presidential designee, such as military installations, are able to cast their ballots as privately and independently as possible. Ensuring the privacy of all voters is important, and military voters should be able to vote in a private and independent manner.

Third, it directs the Presidential designee to ensure, to the extent practicable, that absentee ballots in the possession or control of the Presidential designee remain private. Again, absentee ballot procedures should protect the privacy of the voters, to the extent practicable.

This section only requires expedited mail procedures for overseas service personnel and not all UOCAVA voters. In crafting the legislation, the Rules Committee staff was concerned about the challenges facing non-military overseas voters seeking timely return of their ballots to State election officials. Unfortunately, the problems inherent in engaging every foreign, nonmilitary post office to provide such assistance made this expansion of the expedited mail requirement impractical at the present time. Additionally, several of the challenges justifying the provisions of this section, such as the sporadic lack of postmarks on military mail and unpredictable conditions associated with service, are pervasive problems faced by overseas military personnel. However, under this section State officials are required to develop the tracking system for absentee ballots from both military and overseas voters. Lieutenant Colonel Joseph DeCaro of the United States Air Force testified at the Rules Committee's May 2009 hearing about his frustration at not knowing whether his ballot had been received by State officials. The tracking provision addresses this concern. The Help America Vote Act already requires a free access system to notify voters about whether or not their provisional ballots have been counted. The MOVE Act absentee ballots are not provisional ballots. However, it should not be too difficult for State election officials to develop a system that military and overseas voters can use to get information about the status of their ballots that is similar to the system mandated under HAVA for provision ballots. This will allow those voters to complete FWAB ballots if it becomes clear their ballot was not received in a timely fashion.

Section 581. Federal write-in absentee ballot.

This section amends UOCAVA to expand the availability and accessibility of the Federal write-in absentee ballot and to promote its use among military and overseas absentee voters.

The FWAB functions as a failsafe ballot for military and overseas voters. It allows them to submit this ballot to local election officials in every State in circumstances where they have not received a requested ballot in time from their respective election officials. However, information gathered during Congressional hearings clarified the fact that awareness of the FWAB among military and overseas voters is very low, and therefore an underutilized resource. At the May 2009 hearing on military voting problems held by the Elections Subcommittee of the House Committee on Administration, Gunnery Sergeant Jessie Jane Duff (Ret.) testified that she had never heard of the FWAB despite a twenty-year career as a marine.

Under this section, the Presidential designee is required to adopt procedures to promote and expand the use of the FWAB as a back-up measure. As part of this effort and required by other sections of MOVE, the Presidential designee shall take steps to make servicemembers aware of its existence and function, by promoting it through the Global Military Network and at critical points of service (example: such as the administrative check-in of soldiers at a new base or installation).

This section also expands the availability and utilization of the FWAB in two significant ways. First, it expands the mandatory availability of the FWAB as a failsafe ballot from use only in general elections, under the original UOCAVA statute, to also include special, primary, and runoff elections for Federal office. This is an important expansion of its use, because special, primary and runoff elections generally have shorter time periods between the time when ballots are made available to voters and Election Day.

Second, this section directs the Presidential designee to expand and promote the use of the FWAB as a back-up ballot. As part of this effort, the law directs the Presidential designee to use technology to develop a system under which a military or overseas voter can enter his or her address or other appropriate information, and the system will generate a list of all candidates for Federal office in the voter's jurisdiction. The voter will now have the information needed to fill out the FWAB and submit it to his or her election official. Such technology has already been developed through a partnership between the Pew Center on the States and the Overseas Vote Foundation, as noted in Pew's No Time to Vote: Challenges Facing America's Overseas Military Voters report submitted for the record for the Rules Committee's May 2009 hearing.

Section 582. Prohibiting refusal to accept voter registration and absentee ballot applications, marked absentee ballots, and Federal write-in absentee ballots for failure to meet certain requirements.

This section amends UOCAVA by prohibiting States from rejecting registration applications, ballot request applications and ballots for reasons unrelated to voter eligibility. The section is a response to evidence gathered by the Rules Committee highlighting the unfortunate practice, in certain jurisdictions, of rejecting absentee ballots and other election materials for immaterial reasons. In his testimony at the May 2009 Rules Committee hearing, Robert Carey of the National Defense Committee recommended eliminating notarization requirements for UOCAVA voters. That recommendation was echoed by representatives of the Pew Center on the States and the Overseas Vote Foundation. While the original draft of MOVE in S. 1415 also eliminated witness requirements in UOCAVA ballots, that provision was removed through committee negotiations. Any witness requirements that may be imposed by States should allow flexibility to ensure a voter can easily complete an absentee ballot. Any complex witness requirements make it more difficult for military and overseas voters to complete and cast an absentee ballot.

The first provision of this section prohibits States from rejecting otherwise valid voter

registration applications, absentee ballot applications (including the official post card form prescribed under UOCAVA), and marked absentee ballots submitted by military and overseas voters solely on the basis of notarization requirements, restrictions on paper type, and restrictions on envelope type. In some cases, the need to photocopy a ballot may result in a completed absentee ballot on different paper. No jurisdiction should reject a properly completed form simply because of the paper used.

The second provision contains similar prohibitions on rejecting the FWAB. It prohibits States from rejecting marked FWAB ballots solely because of notarization requirements, restrictions on paper type, and restrictions on envelope type.

Section 583. Federal Voting Assistance Program ("FVAP").

This section amends UOCAVA to improve the Federal Voting Assistance Program for military voters. These provisions increase the availability of materials containing information on absentee voting procedures for military voters, as well as expand the overall awareness of such procedures.

The section directs the Presidential designee to take two major steps to meet this end—first, to create an online portal of information where our military can access information about registration and balloting procedures in their respective States; and second, to establish a program using the Global Military Network, an email network that reaches out to virtually every member of our military, to notify servicemembers 90, 60, and 30 days prior to each election for Federal office of voter registration information and resources, the availability of the Federal postcard application, and the availability of the FWAB as a fail-safe ballot.

It should be noted that the sponsors of the MOVE Act acknowledged that the Department of Defense already had a number of regulations in place to try to assist servicemembers in exercising their right to vote. Therefore, a provision was included to clarify that the provisions of MOVE were not meant to eliminate any other duties or obligations promulgated by the DOD that are not inconsistent or contradictory with the MOVE Act.

The section mandates that not later than 180 days after passage of the MOVE Act, the Secretary of each military department of the Armed Forces must designate offices on military installations under their jurisdiction to provide comprehensive voter registration services for troops and their families. The office will serve as a clearinghouse for providing servicemembers the opportunity to receive information on the following: voter registration and absentee ballot procedures, information and assistance with registering to vote in their States, information and assistance with updating the individual's voter registration information, including instructions on how to use and submit the Federal postcard application as a change of address form, and information and assistance with requesting an absentee ballot from the voter's local election official.

The section gives priority to individuals transitioning through critical points in their service, such as individuals who are undergoing a permanent change of duty station, deploying overseas for at least six months, returning from an overseas deployment of at least six months, or who otherwise request assistance related to voter registration. These resources are required by this section to be provided at least during the administrative processing associated with these points in service. By detailing exactly which points in time servicemembers are to receive such information, this section ensures that these voter resources can be most easily and efficiently provided to our troops. As a result, their ability to participate in Federal elections will be dramatically increased.

The Secretary of each military department (or the Presidential designee) is required to take steps to make the availability of these resources known to military voters through outreach efforts that include the availability of the designated voter registration offices and the time, location, and manner in which military voters may access such assistance. The Presidential designee and Secretaries of military departments are free to undertake a variety of methods to satisfy this provision, including the requirements in other sections of MOVE to inform servicemembers of the ballot collection and expedited delivery procedures.

Finally, this section allows the Secretary of Defense to authorize the Secretaries of the military departments of the Armed Forces to designate offices on military installations as voter registration agencies under §7(a)(2) of the National Voter Registration Act of 1993 (NVRA).

Under the provisions of the MOVE Act as passed by the Senate, the offices designated to provide voter registration assistance were required to be uniformly deemed voter registration agencies under the NVRA. In the conference committee for the NDAA, this requirement was changed from mandatory NVRA designation to giving the Secretaries the option of designating the voter registration offices as NVRA agencies.

There are good reasons for designating these voting assistance offices as voter registration agencies under the NVRA. Designation provides a minimum, uniform standard by which these offices must provide voter registration assistance and ensures such assistance is effective. First, pursuant to §7(a)(4)(A) of the National Voter Registration Act, such offices must provide mail voter registration forms, assistance in completing voter registration application forms, and acceptance of such forms for transmittal to State officials. The Federal postcard application can be used for this purpose because it is an acceptable voter registration form under the NVRA. Second, under §7(d), accepted registration forms have to be transmitted to State officials within 10 days of acceptance, or if accepted, within 5 days before the last day for registration to vote in an election, not later than 5 days after the date of acceptance. Furthermore, any individuals providing registration assistance in such an office are prohibited from doing the following: seeking to influence an applicant's political preference or party allegiance; displaying any political preference or party allegiance; making any statement to the applicant that would discourage registration; or making any statements with the purpose or effect of leading the applicant to believe that a decision to register has any bearing on other services provided at that office. The NVRA sets a uniform standard by which these offices must provide voter registration by ensuring an expansive provision of voter registration assistance and protecting against inadequate assistance and deficiencies in registration services. Without the opportunity or ability to register in an effective way, our military cannot vote.

While some have expressed concern with requiring DOD to run an NVRA voter registration agency, this is not a new role for the Department of Defense. The Department is already responsible, and has been for well over a decade, for administering the NVRA at designated offices. More than 6,000 military recruitment offices are currently required to provide information, registration assistance, and opportunities to register to vote in conformance with the NVRA. Further, these offices would only be required to provide the necessary voting assistance to individuals who are seeking other appropriate services at the military recruitment offices and not to any person who may happen to walk in and request it.

Nor are these offices required to operate as stand-alone voter registration agencies. Similar to other State government agencies operating NVRA-designated voter registration agencies, such as State social service offices, Departments of Motor Vehicles, and the like, DOD can provide voter registration services in offices that have a different primary function such as pay, personnel, and identification offices.

Following the passage of the MOVE Act, it is notable that Chairman Schumer and Senator Cornyn sent a letter on December 4, 2009 to Secretary Gates requesting that he make the determination, which he authorized to do under the NVRA, that the Department of Defense would be designated as a "voter registration agency" under the Act. In a letter back to Senators Schumer and Cornyn, dated December 16, 2009, the Deputy Secretary of Defense William J. Lynn, III, agreed to "designate all military installation voting assistance offices as NVRA agencies."

Finally, the Secretary of Defense is required to prescribe regulations relating to the administration of this section, which must be prescribed and implemented by the November 2010 Federal elections.

Section 584. Development of standards for reporting and storing certain data.

This section amends the UOCAVA statute to direct the Presidential designee to work with the Election Assistance Commission and the chief State election official of each State to develop standards for reporting data on the number of absentee ballots transmitted to and received from overseas voters, as well as other data the Presidential designee determines to be appropriate. States are required to report this data as the Presidential designee, in accordance with the standards developed by the Presidential designee under this section. The Presidential designee is directed to store such data, and should make that data publically available as appropriate under the law.

Section 585. Repeal of provisions relating to use of single application for all subsequent elections.

This section repeals §104(a)—§104(d) of the UOCAVA statute. These provisions required States, once they processed an official post card form received by military and overseas voters, to send an absentee ballot to that voter for each Federal election held in the State through the next two regularly scheduled general elections for Federal office, provided the voter indicated he/she wished the State to do so. It has been reported by State and local officials that this section of UOCAVA has led to inefficiency as blank absentee ballots are sent to voters who have moved or are no longer registered in the same location where they originally registered. Because some military and overseas voters in particular tend to be highly mobile, it is reported that this provision was difficult to implement effectively. The Committee responded by eliminating this federal mandate. States, however, are free to continue absentee programs that they find effective and convenient for voters, whether they be domestic or overseas voters.

Section 586. Reporting requirements.

This section amends UOCAVA to include additional requirements for reporting information to the Congressional committees of jurisdiction, including the Senate Committee on Appropriations, the Senate Committee on Armed Services, and the Senate

Committee on Rules and Administration, and the House Committee on Appropriations, the House Committee on Armed Services, and the House Administration Committees.

The first provision is a requirement for the Presidential designee to submit a report to these committees not later than 180 days after the enactment of the MOVE Act. The report is to include (a) the status of the implementation of the procedures on collection and delivery of absentee ballots from overseas military personnel, including specific steps taken in preparation for the November 2010 general election; and (b) an assessment of the Voting Assistance Officer (VAO) Program of the Department of Defense, including an evaluation of effectiveness, an inventory and full explanation of any programmatic failures, and a description of any new programs to replace or supplement existing efforts.

The Voting Assistance Officer (VAO) program is administered by the Department of Defense to provide military personnel with person-to-person guidance in understanding absentee voting procedures and helping overseas military personnel with the absentee voting process. However, the Rules Committee gathered evidence during the drafting of this legislation indicating the need for improvements in the VAO program. Tom Tarantino, Legislative Associate with Iraq and Afghanistan Veterans of America, submitted written testimony that he had been poorly trained when he served as a VAO. A report from the Department of Defense Inspector General revealed that in 2004, voting assistance officers made contact with only 40%–50% of military voters. Also, it was made known to the Rules Committee that serving as a VAO is often seen as a low-level military assignment, so it is not given much priority in practice. The reporting requirements established under this section will provide the new FVAP chief with the time to assess existing programs and suggest improvements, all with the goal of providing more overseas and military voters with the information and support necessary for them to exercise their right to vote.

The second reporting requirement is an annual report to Congress, due no later than March 31 of each year. In this report, the Presidential designee must include the following: (a) an assessment of the effectiveness of the FVAP program, including an examination on the effectiveness of the new responsibilities established by the MOVE Act; (b) an assessment of voter registration and participation by overseas military voters; (c) an assessment of registration and participation by non-military overseas absentee voters; and (d) a description of cooperative efforts between State and Federal officials. The report should also include a description of the voter registration assistance provided by offices designated on military installations utilized by servicemembers and a description of the specific programs implemented by each military department of the Armed Forces to designate offices and provide assistance. Finally, the report should include the number of uniformed services members utilizing voter registration assistance at the designated offices.

When the annual report is issued in years following a general election for Federal office, it should include a description of the procedures utilized for collecting and delivering marked absentee ballots, noting how many such ballots were collected and delivered, how many were not delivered in time before the closing of polls on Election Day, and the reasons for non-delivery.

These reporting requirements are a direct consequence of the interest of Congress in initial compliance with the MOVE Act and with its routine implementation over time. These reports will provide a key indicator of how effective absentee voting procedures are for overseas Americans in case additional reform is needed in the future.

Section 587. Annual report on enforcement.

This section amends the UOCAVA statute to require the Attorney General to send a report to Congress no later than December 31 of each year regarding what actions the Department of Justice has taken to enforce UOCAVA and the MOVE Act amendments to UOCAVA.

Since UOCAVA's passage in 1987, the Justice Department has filed 35 compliance suits against the States. Congress should be updated on a regular basis on efforts made to comply with federal military and overseas voting statutes. These reports will provide the Rules Committee and other Congressional committees with a key tool for oversight, in anticipation of the Justice Department playing a key role in overseeing the implementation and enforcement of the MOVE Act.

Section 588. Requirements payments.

This section amends the Help America Vote Act (HAVA) of 2002 to establish a new funding authorization, in addition to the funding authorizations already in place under HAVA, intended to be used only to meet the new requirements under UOCAVA imposed as a result of the provisions of and amendments made by MOVE. The language of the MOVE Act indicates that separate from a HAVA requirements payment; Congress has authorized, and can specifically appropriate funds for requirements payments "appropriated pursuant to the authorization under section 257(a)(4) only to meet the requirements under the Uniformed and Overseas Citizens Absentee Voting Act imposed as a result of the provisions of and amendments made by the Military and Overseas Voter Empowerment Act." The appropriation would specifically reference a MOVE requirements payment. That MOVE requirements payment can be used only to meet the requirements of the MOVE Act. Nothing in this section impacts the ability of States to receive and spend funds on the traditional HAVA requirements payment program.

States must describe in their State plan how they will comply with the provisions and requirements of and amendments made by MOVE. Under amendments made in conference committee, chief State election officials may access MOVE requirements payments without providing the 5% match upfront. This section was amended in contemplation of providing funding for those States whose legislatures do not meet on an annual basis.

Further, States may choose to use the original funding authorizations under HAVA, those adopted as part of the original HAVA statute, to fund MOVE related compliance efforts so long as the State meets all of its other obligations under HAVA. The provisions of the MOVE Act can certainly be considered an activity "to improve the administration of elections for Federal office" under the HAVA requirements payments language.

Section 589. Technology pilot program.

This section gives the Presidential designee the authority to establish one or more pilot programs under which new election technologies can be tested for the benefit of military and overseas voters under the UOCAVA statute. The conduct of the program will be at the discretion of the Presidential designee and shall not conflict with any existing laws, regulations, or procedures.

Mindful of security concerns, the Rules Committee included several items for the Presidential designee to consider in crafting this pilot program. These include transmitting electronic information across military networks, cryptographic voting systems, the transmission of ballot representations and scanned pictures of ballots in a secure manner, the utilization of voting stations at military bases, and document delivery and upload systems. There may be many positive developments made by DOD pilot programs that can assist in expedited voting procedures for military and overseas voters. Security and privacy, of course, are essential components to any pilot program.

Under this section, the Presidential designee is required to submit to Congress reports on the progress of any such pilot programs, including recommendations for additional programs and any legislative or administrative action deemed appropriate.

This section directs the Election Assistance Commission (EAC) and the National Institute of Standards and Technology (NIST) at the Department of Commerce to work with the Presidential designee in the creation and support of such pilot programs. The bill requires the EAC and NIST to provide the Presidential designee with "best practices or standards" regarding electronic absentee voting guidelines. In particular, the MOVE Act directs the EAC and the NIST to work to develop best practices which conform with the electronic absentee voting guidelines established under the first sentence of section 1604(a)(2) of the National Defense Authorization Act for Fiscal Year 2002 (P.L. 107–107), as amended by §507 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (P.L. 108–375). The Committee staff contemplates that NIST will be helpful in addressing the election integrity and security concerns involved in developing electronic voting systems, as illustrated by NIST report entitled "Threat Analysis on UOCAVA Voting Systems" of December 2008 (NISTIR 7551).

This section also directs that, if the EAC has not established electronic absentee voting guidelines by not later than 180 days after enactment of the MOVE Act, then the EAC is to submit to Congress a report detailing why it has not done so, a timeline for the establishment of such guidelines, and a detailed accounting of its actions in developing such guidelines. This should provide to Congress and the public a roadmap on progress made, as well as the next steps the EAC plans to take.

RECOGNIZING THE ARKANSAS AIR NATIONAL GUARD

Mrs. LINCOLN. Mr. President, today I pay tribute to our Arkansas Air National Guard and their efforts to keep our Nation safe. In particular, I recognize the members of the 188th Fighter Wing, who are returning home throughout May after a 2 month deployment overseas.

The airmen spent 2 months at Kandahar Airfield in southern Afghanistan, flying 12 to 16 flights a day. Their day-and-night operations supported the ground troops who were fighting enemy insurgents. The work in Afghanistan was the unit's first combat deployment using A–10s. The unit flew F–16s until April 2007, including during their 4 month deployment in 2005 to Balad Air Base in Iraq.

Along with all Arkansans, I honor these servicemen and women for their bravery, and I am grateful for their service and sacrifice.