



## **CALTECH/MIT VOTING TECHNOLOGY PROJECT**

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

**TITLE      UOCAVA: A State of the Research**

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**Key words:**

**VTP WORKING PAPER #69**  
**September 15, 2008**

## **Executive Summary**

The problems faced by overseas civilians, military personnel, and their dependents—individuals covered by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—have existed since the nation's founding. From the Civil War to today, there have been efforts to improve voting for military voters, often to little avail. Since the 1960s, there have also been efforts to address the voting needs of civilians living overseas and the dependents of military personnel to cast ballots. UOCAVA and its amendments are the latest in this history that attempted to improve the voting experience for these individuals.

Unfortunately, there is little high quality research today on UOCAVA voters generally, or military voters in particular. There are fewer than five academic articles that directly address the problems with these voters. These studies are all limited by the lack of quality data that would allow scholars and policy makers to systematically understand the types of problems faced by UOCAVA voters and the scope of these problems. Although there are data on the general issues faced by these voters, such as the issue of ballot transit for by-mail voting, there are not good data that carefully define these policy problems and attempt to identify policy solutions for these issues. The current data collection regimes need to be improved so that they are more useful to policy makers and policy analysts.

### **The Data Problem**

Understanding the problems that are faced by the UOCAVA population is difficult because these groups have not been a common population to study. Studies of general population voting behavior, turnout, and election administration have typically not included overseas civilians, military personnel, and their dependents. For example, these populations are generally excluded from the major longitudinal studies of elections—the American National

Election Study—and from other studies of elections (e.g., the Cooperative Congressional Election Study (CCES)). When attempts are made to study these populations through surveys, the sampling and weighting of such surveys can be quite difficult. As the Defense Manpower Data Center (DMDC) in the Department of Defense has noted, surveys of military personnel require extensive sampling and weighting across service branches, and across active and reserve components, before data can be collected and analyses done. In addition, deployment conditions have to be considered as well; military personnel at their home base in the United States or deployed within the United States or rear echelon areas overseas may have very different experiences compared to those who are deployed in combat situations.

One of the problems with the current state of research related to UOCAVA voters is the lack of peer-reviewed data and methods for studying UOCAVA voters. The only mandated study of UOCAVA voting behavior has been conducted by the Federal Voting Assistance Program and FVAP does not release the survey's methodology or the raw survey data to policy makers or to scholars. When FVAP makes the claims that it does about the UOCAVA population and its voting patterns, there is no way to evaluate these findings and whether the data can be generalized. Unless FVAP is coordinating closely with DMDC, using the DMDC methodology, and working with them in the conduct of its analyses, it would be quite difficult to collect meaningful data that can then be evaluated for policy purposes. The current data collection regime also places FVAP in a difficult position of evaluating their own program as well as advocating for improvements. Identifying areas of improvement from these data may require FVAP to be critical of its own efforts or of the efforts of its key clients, which is obviously not an easy task.

The 2006 DMDC voting study is an excellent first step in studying military voting, although having the data released for public dissemination would be helpful for scholars and

organizations interested in the military voting process. It would also be beneficial for FVAP and DMDC to work with the academic and policy community in the development of their survey instrument. For the overseas civilian population, the difficulty of conducting surveys is much greater, since there are not good data on how many American civilians live overseas and therefore it is exceedingly difficult to know if any given sample is representative and to weight a survey sample to make inferences about populations. The Census Bureau's sole attempt to conduct such a survey was not successful and there is no intention of surveying this population in 2010.

The Election Assistance Commission's mandated study of ballots cast by UOCAVA voters provides more information about the status of these ballots across states, as well as the number of states that fail to adequately collect these mandated voting information. This study helps show, in aggregate, the UOCAVA experience.

## **Procedural Issues**

What we do know about the UOCAVA population is that they operate in a legal environment where there is wide variation in how they vote across states. The time when ballots are sent out to voters, the deadlines for receiving ballots, and the rules for determining whether ballots are included in the count process vary across states. No systematic study has been done to determine how these rules affect the ability of UOCAVA voters to get ballots in a timely manner and to return the ballot for inclusion in the process, although some studies of absentee voting have considered the UOCAVA vote in their analyses. There have also not been systematic studies examining the factors that lead the Department of Justice to file lawsuits against states and localities for non-compliance with statutes related to the UOCAVA voting process.

There are also issues related to the education of UOCAVA voters that have not been studied. The Department of Defense Inspector General found that the Federal Voting Assistance Program's extensive Voting Assistance Program, with unit Voting Assistance Officers deployed throughout the military, still only reaches 40-50% of the military voters and far fewer of the military dependents who do not work in the military units. The problem is likely even more acute for overseas civilians who do not enjoy that same, albeit inadequate, voting assistance support available to military voters. Analyzing how best to reach these individuals, through the use of intermediary groups, such as corporations, colleges and universities, or other non-governmental organizations who serve this population, would be helpful.

In addition, there has been no study of the effective messages for communicating with UOCAVA voters in order to encourage them to register and vote. Effective communication messages and specific communication modes have been shown to be critical in mobilizing voters in the general population; UOCAVA voters likely are also individuals who would benefit from specific messages and certain modes of communication.

Finally, little study has been done of alternatives to the paper-ballot mode of voting. Efforts to vote via the Internet or to facilitate ballot transit using the Internet, email, or fax have not been studied carefully, nor have efforts been made to study the experiences in other nations in the use of these technologies to serve their UOCAVA populations. Where a detailed analysis has been conducted, such as with the Department of Defense's SERVE program, its project analysis has never been made public. Releasing that information would likely illuminate much on the issues facing electronic support of voting to this population. Also, several states are currently considering such experiments to address the ballot transit problem but there is no systematic research effort to identify legal or technological barriers to future deployments of these systems.

## **Research Agenda**

The following recommendations provide a road map for moving forward the research agenda for UOCAVA voters.

### **1. Improved Survey Research**

There should be statistically meaningful, large sample surveys conducted to study the voting experience of military personnel, their dependents, overseas civilians, and the local election officials who serve them. Such data should be released to the academic community for analysis as well. These surveys should use the DMDC survey methodology currently used for surveying military personnel and their dependents, and a similar methodology should be developed for surveying overseas civilians. The DMDC should also work with the academic community, key stakeholders, and policy makers to develop a survey instrument that studies and the voting experience of military and overseas civilian voters more completely. Finally, there should be an effort made to identify specific overseas civilian populations—such as individuals working abroad for multi-national corporations and their dependents—to determine if it is possible to identify and survey these populations as well in order to assess their voting experience from abroad.

### **2. Understanding State and Local Compliance with UOCAVA Voting**

There should be studies of state compliance with the requirements of the UOCAVA statute and the related components of the Help America Vote Act. These laws place only the most basic requirements on states; it is important to see which states collect and report the data required and have in place the state personnel required for implementing the HAVA requirements for UOCAVA voting. Studying compliance will also likely serve to improve the data collection required under HAVA and the quality of these data.

### **3. UOCAVA Laws and the Impact on Voting**

Studies should be conducted to determine how the rate at which ballots are rejected vary across states with more accommodating or stringent laws for sending, receiving, and counting UOCAVA ballots. The federal government has historically allowed states to vary their laws; however, it may be that certain laws create steep barriers that UOCAVA voters cannot easily surmount. Similar studies in the area of voter registration played an important role in identifying barriers to voter participation for policy makers that have led to increased access to voting for all Americans.

### **4. Understanding Remote Voting**

A meta-analysis should be conducted of the ways in which remote voting has been conducted in the United States and internationally, the legal framework that is necessary for such systems to be effective, and how these methods might be adopted in the future for the UOCAVA population generally or the military population specifically.

### **5. Information and Voting**

The way in which UOCAVA voters are educated about the voting process should also be studied. Social scientists know that the information provided to voters and the mode by which this information is transmitted affect whether individuals turn out to vote. Through both survey research and more importantly, through field experiments, it would be possible to evaluate the efficacy of different messaging and education techniques for UOCAVA voters, especially military personnel and their dependents.

## 1. The Scope of the UOCAVA Population<sup>1</sup>

Estimates indicate that there are between six and seven million Americans who are overseas, in the Armed Forces, or dependents of Armed Forces members residing away from their voting jurisdiction of record.<sup>2</sup> Specifically, the GAO reports that the Uniformed and Overseas Absentee Voting Act (UOCAVA) covers more than 6.5 million people, including approximately 3.7 million overseas citizens not affiliated with the government (about 2 million of which are of voting age), 1.4 million military service members, and 1.3 million military dependents of voting age.<sup>3</sup> These American citizens include soldiers stationed in places such as Iraq and Afghanistan, who are currently fighting the war against terrorism; missionaries working in remote regions of the world; younger Americans studying abroad; and Americans who work overseas, building economic opportunities in the global economy.<sup>4</sup>

Each of these populations present their own challenges for voting officials and government officials generally, but the primary difficulty is merely locating them in order to provide them with election information about voting. In 2003-2004, the Census attempted to count Americans abroad. As the GAO noted, "...counting all American citizens overseas as part of the census would require enormous resources, but still not yield data at the level of quality needed for purposes of congressional apportionment."<sup>5</sup> In addition, the GAO wrote that:

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1. This report draws in places directly from "Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem." 2007. Fordham Urban Law Review. XXXIV, 3: 935-996. This was written by R. Michael Alvarez, Thad E. Hall, and Brian Roberts.

2. Derek B. Stewart, Dir., Def. Capabilities and Mgmt., Testimony Before Committee on Armed Services, U.S. Senate, in U.S. Gen Accountability Office, Report No. GAO-06-1134T, Elections: DOD expands Voting Assistance to Military Absentee Voters, But Challenges Remain 1 (2006).

2. GAO-06-521 "Elections: Absentee Voting Assistance to Military and Overseas Citizens Increased for the 2004 General Election, but Challenges Remain." April 7, 2006.

4. See, e.g., Americans Abroad: People & Groups, <http://www.americanabroad.com/demographics.html> (last visited Apr. 9, 2007).

4. 2010 Census: Counting Americans Overseas as Part of the Census Would Not Be Feasible. GAO-04-1077T, September 14, 2004.

...the response levels fell far short of what the Bureau planned for relative to the number of questionnaires it printed. For example, although the Bureau printed about 520,000 census forms for the three test sites— France, Kuwait, and Mexico—the actual number of paper responses it received only totaled 1,783, as of the end of the test in early July 2004. Another 3,607 responses were received via the Internet. Further, because of the low response levels, the data were expensive to obtain on a unit cost basis— around \$1,450 per return. In contrast, the unit cost of the 2000 Census was about \$56 per household. Although the 2000 Census costs are not directly comparable to the 2004 overseas test because the 2000 test included operations not used in the overseas test, the 2000 Census was the most expensive census in our nation's history.

Further, substantially boosting overseas response levels might be infeasible. For example, during the 2000 Census, the Bureau spent \$374 million on a months-long publicity campaign that consisted of television, radio, and other forms of advertising that helped secure a 72-percent return rate. Replicating this level of effort on a worldwide basis would be impractical at best, and would not produce a complete count.<sup>6</sup>

Moreover, research conducted as part of the Secure Electronic Registration and Voting Experiment (SERVE) found that actually identifying UOCAVA voters by election jurisdiction or projecting the number of UOCAVA voters in a jurisdiction was very difficult given the poor data that exists on UOCAVA voters and the mobility of these voters. For example, the 2006 Election Day Survey conducted by the EAC found that several states reported no UOCAVA voters and that the two states with the most reported military personnel—Texas and Florida—reported relatively low UOCAVA voting.

In addition, it is difficult if not impossible to know what percent of UOCAVA voters ever participate in a given election because the population is unknown at any given time. The problem here is that, although the military may know where its servicemen and servicewoman are deployed, this information is not readily accessible to local election officials. Moreover, the information might change for a military person over the course of an election cycle—from

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5. 2010 Census: Counting Americans Overseas as Part of the Decennial Census Would Not Be Cost-Effective GAO-04-898, August 19, 2004.

training to deployment to tours within a theatre—that make getting timely information to military personnel difficult.

One of the difficulties in identifying issues with voting by UOCAVA-eligible military personnel is that this is often done through surveys. These surveys of military personnel can be a problematic because the soldiers who are most likely to have trouble voting are also the voters most likely to either not receive or not respond to surveys, including personnel on covert missions, personnel deployed on submarines, and personnel in other remote locations.

### **FVAP Survey of UOCAVA Voters**

It is also difficult to estimate military voting and the role that the Federal Voting Assistance Program (FVAP) plays in the process. Differences in estimates of UOCAVA participation come from different sources, which are presented below. First, FVAP reported the following data on participation:

The total voting participation rate among the Uniformed Services members was 79% in 2004, as compared to the 64% rate of the general public. Participation includes 53% voting absentee (37% in 2000), 20% voting in person (no change from 2000), and 6% attempting to vote (12% in 2000). The 79% overall participation rate is an increase of 10 percentage points from 2000.

The total voting participation rate among federal civilian employees overseas was 80% in 2004. Participation includes 72% voting absentee (52% in 2000), 5% voting in person (3% in 2000) and 3% attempting to vote (10% in 2000). The 80% overall participation rate is an increase of 15 percentage points from 2000.

The total voting participation rate among non-federally employed overseas U.S. citizens was 58% in 2004. Participation includes 49% voting absentee (20% in 2000), 4% voting in person (2% in 2000) and 5% attempting to vote (15% in 2000). The 58% overall participation rate is an increase of 21 percentage points from 2000.<sup>7</sup>

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7. Polli Brunelli, *The Federal Voting Assistance Program, 17<sup>th</sup> Report* (Washington, DC: Department of Defense, Federal Voting Assistance Program, October 2005), p. ii.

These data, from the 17<sup>th</sup> Federal Voting Assistance Program report, present a very high level of military participation. However, the report and the data it contains also illustrate the shortcomings of the FVAP survey process. As the Government Accountability Office (GAO) noted in 2006, “using data from its postelection surveys, FVAP attributed increased voter participation rates to an effective voter information and education program. However, in light of low survey response rates, FVAP’s estimates and conclusions should be interpreted with caution.”<sup>8</sup> There are other critiques to consider as well. First, there is no methodology provided in the report explaining how the survey sample was drawn, what the survey response rate was, or how the data estimates were then weighted so that the results reflected the general populations. The GAO’s 2006 report explicitly criticizes this. Second, it is possible to note that some of the data reported are problematic at face value. For example, UOCAVA populations—the *overseas* federal employees and *overseas* civilians—are not in a position to vote in person (no states have in-person polling places overseas). The reporting of in-person UOCAVA voting in the 2004 raises questions about the validity of the data. Third, given that the US Census cannot estimate the overseas population, it is very important to know the weighting methodology used to determine what the vote rate for this population was. Fourth, although FVAP reports military voting in person, these voters are participating but not through the UOCAVA process. Military personnel who can vote in their local precinct are not covered by the UOCAVA process; for example, a soldier and his family who are stationed at a base in Florida, are Florida residents, and are registered to vote there, could vote in their precinct on election day. Although they are considered military voters (and dependents), they are not UOCAVA voters.

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7. <http://www.gao.gov/new.items/d061134t.pdf>

## **DMDC Voting Surveys**

The Defense Manpower Data Center estimated participation in 2006 at 22% of the active duty military voted in 2006, as compared to 39.8% for the overall population. The survey they conducted is very effective because it shows the variations in turnout among various types of military personnel. For example, reservists voted at higher rates than did active duty personnel and there are differences in voting across service branches. Not surprisingly, the Army had the lowest turnout and also had the most soldiers outside the country on election day. It is interesting though that the DMDC survey also reports individuals who were outside the United States voting in person, a question that raises obvious need for follow up, as was noted above. These points bear out in the DMDC survey data that found only 17% of military voters outside the United States voted, and 24% of those in the United States on election day voted.

The DMDC survey has a survey methodology section that notes the explicit difficulties of conducting Status of Forces Surveys. The DMDC reports dates the survey was in the field, the response rate, the sample size, and the margin of error. It also discusses the way in which the sample was then reweighted to the population, which is critical for having meaningful results. It is also important to note that the DMDC question on voting is the standard question in the political science literature on voting. Individuals often lie about whether they voted—voting is a socially desirable activity—so voting estimates are normally biased upward and the way in which the question about voting is asked can bias these results even more. This difficulty in surveying military personnel is one of the reasons why DMDC has developed specific methodologies for surveying military personnel that address these concerns, which are important given its role in informing policy makers about defense personnel issues. For this reason, data from DMDC is considered to be quite reliable, especially given the difficulties of

surveying military personnel.<sup>9</sup> In sum, if policy makers need data upon which to make decisions and craft programs for UOCAVA voters, the DMDC survey methodology, and the data it produces, can best inform them about the needs of our nation's diverse military population.

### **EAC UOCAVA Report**

In 2007, the Election Assistance Commission (EAC) issued a report on UOCAVA voting in the 2006 election. These data were drawn from states, not based on survey reports from voters. The EAC data found that only 333,179 UOCAVA ballots were cast or counted (or 5.5% of the potential UOCAVA population) out of the almost 1 million ballots that were sent out. This rejection rate suggests that the UOCAVA population is highly mobile between elections and the HAVA requirement of keeping these voters on the rolls for multiple federal elections may require some retuning. There were 14 states that do not collect the UOCAVA data mandated. The EAC survey illustrates that data collection at the state level about UOCAVA voting is difficult. Some states do not collect the needed data and others may not note that a voter is a UOCAVA voter if they request a ballot using the regular absentee process (instead of an FPCA).

A ballot request is further complicated by the various voter registration forms. Some forms serve as only registration forms and other forms may serve as a registration form and a ballot. Different ballots may also be received depending on the election jurisdiction the individual is registered in or if the individual has permanently relocated overseas or still maintains a residence in the U.S. Timeliness of delivered materials compounds the problem. It can take well over two weeks for overseas military personnel to receive his or her absentee ballot, and returning a ballot to the U.S. presents the same issue.<sup>10</sup>

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9. Defense Manpower Data Center [DMDC], 2006 Survey Results on Voting Assistance Among Military Members and DoD Civilian Employees, Survey Note No. 2007-010, table 1, p. 2.

10. <http://www.gao.gov/new.items/d04484.pdf>

A paper on the UOCAVA voting experience that builds on data collected as a part of an EAC study found that overseas civilians have a harder time registering and voting than do military overseas citizens. Like other UOCAVA studies, they found that the timely transmission of voting materials is a key barrier to voting and that respondents viewed electronic transmission of voting materials favorably. However, as with other studies of UOCAVA voting, this study is based on a convenience sample and it is not possible to generalize beyond the sample surveyed.<sup>11</sup>

## **2. The UOCAVA Voting Problem**

Although a few scholars have argued that military voters have no problem voting, data from numerous studies and analyses conducted since the 2000 election show that civilians living overseas and personnel in the uniformed services have a difficult time participating in the electoral process using the current paper-based absentee voting system.<sup>12</sup> In an examination of absentee voting in Los Angeles, California, researchers found that UOCAVA voters were roughly two times more likely to not return a requested absentee ballot and approximately three times more likely to have that ballot challenged when compared to non-UOCAVA voters. In raw terms, almost half of all UOCAVA ballots in 2000 in Los Angeles were not returned by the voter, but of those that were cast, almost 10% of those were challenged and not counted (primarily because the ballots were returned late). Los Angeles County keeps very effective statistics on voting and their data mirrors the general findings made by the EAC in its 2006 UOCAVA study.

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11. Bruce E. Cain, Karin Mac Donald, Michael H. Murakami. Administering the Overseas Vote. *Public Administration Review*. 68, 5: 802-813.

12. See, e.g., R. Michael Alvarez, Thad E. Hall & Betsy Sinclair, *Whose Absentee Votes Are Counted: The Variety and Use of Absentee Ballots in California* 1-3 (Caltech/MIT Voting Technology Project, Working Paper No. 34, 2005).

The difficulties that this population has voting are not new. In 1942, 137,686 applications for federal “war ballots” were received, but only 28,051 of these ballots were cast in the election.<sup>13</sup> The low response rate in 1942 was due to several factors that still present problems today. The main factor is simply the speed at which a paper ballot can be created, mailed to an overseas voter, filled out, and mailed back. Such time scales are not conducive to some states’ regulations about when voting materials become available, as a result of administrative processes or simply the schedule between primaries and general election, or the date by which they must be returned to an election official to be considered valid.

### **3. Legal Barriers: State Control Versus The Federal Role**

The U.S. Constitution authorizes Congress to use its plenary power and take whatever steps it deems necessary in conducting federal elections. Congress could simply dictate to states the deadlines for sending, receiving, and counting federal ballots but instead this entire process is voluntary. The federal government’s Election Assistance Commission recommended in 2004 that forty-five days be the minimum requirement for total transmission time of ballots from election officials to overseas voters and their return.<sup>14</sup> As of late 2004 only thirty states (plus the District of Columbia) had laws requiring that ballots be sent overseas at least forty-five days prior to the deadline for their return. Twenty states failed to meet the recommended time-frame for facilitating military and overseas voting.

The U.S. Congress has passed various statutes for decades in an attempt to facilitate the process for overseas and military voting<sup>15</sup> including the Soldier’s Vote Act of 1942, the Federal Voting Assistance Act of 1955, the Overseas Citizens Voting Rights Act of 1975, and the

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13. Boyd A. Martin, *The Service Vote in the Elections of 1944*, 39. *American Political Science Review* 720, 725 (1945).

14. See U.S. Election Assistance Commission, Report: Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act 5 (2004).

15. See Kevin J. Coleman, *The Uniformed and Overseas Citizens Absentee Voting Act: Background and Issues*, Cong. Research Serv. Report No. RS20764 1 (2003, last updated 2006).

currently operating law that superseded them all, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Such attempts have met with varying levels of success in making it easier for overseas and military voters to vote in state-run elections.

For example, the deadline for registering as a UOCAVA voter ranges from thirty days prior to an election in twenty-one states to absolutely no registration requirement in fifteen states.<sup>16</sup> Similarly, ballots have to be received prior to Election Day in several states, but can be received even after Election Day in fifteen states. This variation can easily create confusion among overseas and military voters and impact the very ability of these voters to receive their ballots in time to return them for tabulation. According to the Department of Defense's ("DoD") most recent survey of military and overseas voters, almost one-third of all military personnel and twenty percent of non-federally employed overseas civilians that did not vote in the 2000 election reported that they did not cast ballots because either they did not receive the ballot they requested, or they received the ballot too late for it to be returned in time.<sup>17</sup> News coverage noted that soldiers experienced significant problems in receiving mail in Iraq with some reporting not receiving mail up to four months after being sent.<sup>18</sup> Such problems are symptomatic of a long history of balloting difficulties for military voters, much of which stems from the multi-layered structure of election law that often results in conflict between state and federal principles.

Congress has been more proactive in the past. For example, it attempted to address the non-uniformity of state laws prior to the 1942 mid-term election via the Soldier's Vote Act by requiring states to create a federal ballot that allowed soldiers to vote for the four major

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16. See David M. Walker, Comptroller Gen. of the U.S., Testimony Before the Subcommittee on Military Personnel, Committee on Armed Services, U.S. House of Representatives, in U.S. Gen. Accounting Office, Report No. GAO-01-704T, Elections: Issues Affecting Military and Overseas Absentee Voters 10 (2001).

17. See Fed. Voting Assistance Program, Department of Defense, Voting over the Internet Pilot Project Assessment Report 4-12 to 4-13 (2001).

18. Karen Jowers, *Troops Want to Know: Where's My %&#@ Mail?!*, Army Times, May 10, 2004, at 1.

federal offices—a President, Vice-President, Senator, and Representative; states could also choose to add state or local races.<sup>19</sup> The Department of War provided soldiers with a post card which, if sent to their state's Secretary of State, would result in receipt of a federal ballot. The Department of War would then facilitate getting the ballot back to the appropriate Secretary of State to be counted.

One interesting feature of the 1942 law is that it had a mechanism for each Secretary of State to submit to the Treasury Department an estimate of the costs associated with implementation of this Act.<sup>20</sup> The Treasury would reimburse the state for the costs incurred, including “the expense of preparing and printing post cards, official war ballots, booklets, envelopes, instructions, and other supplies, and the cost of mailing and express charges.”<sup>21</sup> This makes the 1942 law one of the first, if not the first, case where the federal government subsidized state and local election administration.

#### **4. UOCAVA Voting is a Historical Problem**

The military voting problem began with the Civil War. The 1864 election featured new legal mechanisms—remote and absentee voting—that allowed military personnel serving away from home to participate in the electoral process. For example, election officials from a state traveled to the units in the field, set up a polling place, and collected ballots from the soldiers. Laws governing the participation of military voters varied from state to state, but in nineteen Northern states, military men could vote using absentee procedures, creating one of the first instances of remote voting in America.

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19. See Martin, 1945.; see also Soldier's Vote Act (Armed Forces Absentee Voting Act), ch. 561, 56 Stat. 753 (1942) (repealed 1955) (stating it was “[a]n act to provide for a method of voting, in time of war, by members of the land and naval forces absent from the place of their residence”).

20. See Martin, 1945.

21. See 56 Stat. 753 § 10 (“There are authorized to be appropriated, to be expended as provided in this section, such amounts as may be necessary to pay the expenses of carrying out the provisions of this Act, including the expense of preparing and printing post cards, official war ballots, booklets, envelopes, instructions, and other supplies, and the cost of mailing and express charges.”).

In the congressional elections of 1918, approximately two million soldiers were stationed overseas. State election laws and federal governance issues effectively disenfranchised military personnel serving overseas.<sup>22</sup> The governance issues were highlighted by the War Department's decision that men stationed overseas would not be able to participate in the 1918 election.

In 1942, several million American soldiers were stationed away from home and they did not serve in units or battalions based on their place of origin, unlike during the Civil War, making it extremely difficult for states to send out election material. One battalion in Italy, for example, was comprised of men from thirty-nine different states. Most states also retained the stringent voter registration requirements that expected to register to vote—often in person—and to maintain their registration—often through annual renewals—while serving overseas or otherwise away from home. Most states failed to differentiate among those absentee voters serving overseas, those serving in the continental United States, and civilians on the home front serving the nation in other ways. The absentee ballot laws in the forty-eight states remained quite divergent. In total, thirty-four states had relatively liberal absentee voting laws and another eleven states had limited absentee voting laws. For instance, some states would not allow military voting in primary elections or voting for any office except the presidency. The implementation of state absentee voting laws for military voters remained difficult primarily because of ballot transit issues. In many states, the statutory requirement for the time from when an absentee ballot would be issued to when it had to be returned was less than thirty days.<sup>23</sup> Even in peacetime this would be a challenge for a soldier stationed outside the United States; the war made this challenge more daunting.

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22. See Martin, 1945.

23. For more on UOCAVA voting in World War II, see Martin 1945, Keyssar 2000, and American Political Science Association, *Findings and Recommendations of the Special Committee on Service Voting*, 46. American Political Science Review. (1952) (republishing portions of H.R. Doc. No. 82-407 (1952)).

In the Korean War, it was estimated that forty percent of the 2.5 million military personnel were directly disenfranchised because of complex state absentee voting regulations in place at the time.<sup>24</sup> For example, there were approximately 260,000 soldiers stationed in Korea in 1952, and officers estimated that approximately thirty percent attempted to vote.<sup>25</sup>

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

The Board of Elections of Suffolk County [New York] must truly live in an isolated, automated world if they think mail can travel 14,000 miles by plane from Singapore to Kuching; 150 miles from Kuching to Sibuluan by plane; sixty miles by Chinese launch from Sibuluan to Oya; eight miles by bus from Oya to Mukah and a half-mile by bicycle from the post office to me (the last 78 1/2 miles taking twice the time of the first 14,000) and be returned in 12 days . . . . The Board of Elections should become more realistic about world mail systems and stop depriving concerned overseas Americans of their right to vote.<sup>26</sup>

## 5. Intermediaries

Intermediary groups have more recently played a key role in identifying and mobilizing voters. For example, the political parties began to engage in more organized efforts to turn out the military vote, and in the 1960s the issue of military voting took on a decidedly partisan tone.<sup>27</sup> In 1968, the Republican National Committee appointed absentee voting chairmen in forty-five states and the District of Columbia to register and mobilize the estimated 3.5 million military voters. The European Republican Committee encouraged Americans in Europe to vote by having Shirley Temple Black tour European cities to encourage Republicans overseas to

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24. Robert Alden, *Stevenson Leads by 2 to 1 in Poll of 500 U.S. Army Men in Korea*, N.Y. TIMES, Nov. 1, 1952..

25. Robert Alden, *30% of Soldiers in Korea Voting*, N.Y. TIMES, Nov. 3, 1952, at 1.

26. Stephanie Miranda, Letter to the Editor, *Absentee Ballots*, N.Y. TIMES, Nov. 17, 1968, at E11.

27. See, e.g., *Absentee G.I. Votes Sought by Republicans*, N.Y. TIMES, Sept. 23, 1968, at 31.

vote.<sup>28</sup> Democrats tried to mobilize overseas voters in twenty-six countries through “Americans Abroad for Humphrey-Muskie” committees that ran ads to encourage Democrats to vote.<sup>29</sup>

Today, intermediaries play a key role in the UOCAVA voting process and they can serve as a tool or barrier to the voting process. Corporations, universities, non-governmental organizations, federal agencies, and the Department of Defense are all key intermediaries in the election process. However, not all of these intermediaries are effective all the time. For example, the Department of Defense Inspector General found that, in the military bases that they surveyed, most soldiers did not know who their Voting Assistance Officer was; these VAOs are supposed to be the key intermediary for military personnel and their dependants in navigating the UOCAVA process. Interestingly, although the survey method used here is not a random sample, in many ways the bias here is in favor of FVAP; they did not survey bases in combat areas where voting assistance might be an even lower priority. However, the results are not generalizable but are still indicative of problems on the bases studied.

In the SERVE project, more than 150 non-corporate intermediaries were identified in the process of scanning the UOCAVA environment. Most of these groups were small but many have a large impact on voter education, such as the Overseas Vote Foundation. The ability of these groups to contact individuals and educate them about the UOCAVA process is important for effective UOCAVA participation. In addition, it was recognized in SERVE that corporations, universities, federal agencies, and similar groups would be important intermediaries in the process of educating voters about the UOCAVA process.

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28. Associated Press, *European Branch is Set up by G.O.P.*, N.Y. TIMES, Sept. 2, 1968, at 21.

29. *Both Parties Woo Absentee Voters, Especially the G.I.*, N.Y. TIMES, Oct. 30, 1968, at 28.

## 6. Current Problems

When studying the current UOCAVA process, there are several issues that need to be given close evaluation. First, there are issues associated with the usability of the process. Second, there are issues related to variations across states in the UOCAVA process; this state variability can be seen in the lawsuits filed by the Department of Justice against states to enforce compliance with UOCAVA, as well as in the data collection reported previously by the EAC. Given that there is no federal standard, state variability is important for knowing what barriers most hinder UOCAVA voting.

### Current System Background

The current federal policy regime for overseas voting was established in 1986, when Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), which superseded both the 1955 Federal Voting Assistance Act and the Overseas Citizens Rights Act of 1975.<sup>30</sup> This law further eased absentee voting for both military personnel and American citizens residing overseas. It required states to provide for absentee registration and voting by uniformed services and overseas voters<sup>31</sup> and established a federal voting assistance program to facilitate absentee registration and voting by eligible voters. It also provided for a standard Federal Post Card Application (“FPCA”) form that it recommends states allow for registration and application purposes, and provides for postage-free mailing of FPCAs and other balloting materials. Additionally, it stipulated that U.S. citizens overseas may continue to vote for federal office even if they have no current address in the United States. Properly registered military

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30. *See* Registration and Voting by Absent Uniformed Services Voters and Overseas Voters in Elections for Federal Office, 42 U.S.C. § 1973ff to ff-6 (2006).

31. *See id.* § 1973ff-1(a) (“In general. Each State shall -- (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office; (2) 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.”).

and overseas voters are also allowed to submit a federal write-in absentee ballot for federal offices in a general election if they did not receive in a timely manner the state absentee ballot they requested.

### **Issues of Discretion**

Given the absence of a broad federally mandate on how military and overseas voters are served, discretion on most aspects of UOCAVA voting is left with the states. Therefore, variations in registration requirements, deadlines for submitting ballots, and tight time frames between when ballots are sent to military voters and when they are due to be returned will continue to cause problems. These problems were illustrated by the 2000 election. In Florida, issues such as ballot transit times continued to disenfranchise voters. For instance, the *New York Times* conducted an independent examination of late overseas absentee ballots received in the 2000 Florida election.<sup>32</sup> These late ballots were received after November 7, 2000, but were ultimately examined by canvassing boards between November 17, 2000 and November 26, 2000.<sup>33</sup> The researchers examined 3,704 of these overseas ballots received after November 7, of which 2,504 were accepted and counted by canvassing boards. Thus, nearly 69% of these overseas ballots received after November 7, 2000 were invalidated for various reasons. The researchers then examined the 2,504 overseas absentee ballots that were accepted by the canvassing boards and included in county tabulations.<sup>34</sup> Based on the Florida regulations for what constitutes an acceptable overseas absentee ballot, 680 (27%) of the accepted late ballots were legally flawed. If these 680 ballots had not been accepted and counted (as they would

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32. See David Barstow and Jr. Don Van Natta. July 15, 2001. "How Bush Took Florida: Mining the Overseas Absentee Vote." (noting the "late overseas absentee ballots: Bush: 1,575; Gore: 836, Leader and margin (pct. of all votes): Bush by 739").

33. See Barstow & Van Natta 2001; see also Kosuke Imai, and Gary King. (2004). "Did Illegal Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?." *Perspectives on Politics*, Vol. 2, No. 3 (September), pp.537-549.

34. See Barstow & Van Natta 2001 (stating that 680 late overseas absentee ballots with flaws were accepted and 1,824 late overseas absentee ballots without flaws were accepted).

not have been under the strict application of Florida law), a full 51% of the late overseas absentee ballots would have been rejected in the 2000 Florida election. The only reason late ballots were counted at all was because, as discussed in greater detail below, there had been a previous problem with overseas voting in Florida resulting from the tight time frame between sending out ballots and the deadline for their return. This failure of UOCAVA to directly address such issues with solutions, such as mandatory lead-times that are sufficient for sending out ballots or expanded deadlines for their receipt, leads to state-level difficulties resulting from incompatible state election procedures and regulations.

The passage of the Help America Vote Act of 2002 (“HAVA”)<sup>35</sup> and the National Defense Authorization Act for Fiscal Year 2002<sup>36</sup> made six major changes to the UOCAVA process in an effort to improve the ability of these voters to vote. First, states are required to designate a single state office to serve UOCAVA voters in the registration and ballot application process.<sup>37</sup> Second, states must collect and publish statistics on UOCAVA registration and balloting. Third, a single absentee ballot request is now valid for two federal elections.<sup>38</sup> Fourth, there is a standard oath for all voting documents promulgated by the Federal Voting Assistance Program

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35. Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at scattered sections of 42 U.S.C.).

36. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

37. *See* 42 U.S.C. § 1973ff-1(b)(1) (2006) (“Each State shall designate a single office which shall be responsible for providing information regarding voter registration procedures and absentee ballot procedures to be used by absent uniformed services voters and overseas voters with respect to elections for Federal office (including procedures relating to the use of the Federal write-in absentee ballot) to all absent uniformed services voters and overseas voters who wish to register to vote or vote in any jurisdiction in the State.”).

38. *See* Pub. L. No. 107-107 § 1606(b) (“If a State accepts and processes an official post card form (prescribed under section 101) submitted by an absent uniformed services voter or overseas voter for simultaneous voter registration and absentee ballot application (in accordance with section 102(a)(4)) and the voter requests that the application be considered an application for an absentee ballot for each subsequent election for Federal office held in the State during that year, the State shall provide an absentee ballot to the voter for each subsequent election for Federal office held in the State during that year.”); *see also* Pub. L. No. 107-252 § 704 (codified as amended at 42 U.S.C. § 1973ff-3(a)) (striking “during that year” from the National Defense Authorization Act (“NDAA”) amendment and replacing it with “through the next 2 regularly scheduled general elections for Federal office (including any runoff elections which may occur as a result of the outcome of such general elections), the State shall provide an absentee ballot to the voter for each such subsequent election”).

("FVAP"), which oversees UOCAVA voting.<sup>39</sup> Fifth, states must accept all absentee ballot requests, even if they are received before the state typically accepts them. Finally, states must notify UOCAVA voters if their registration application is rejected.

One obvious area for future study is compliance with UOCAVA, especially data collection requirements, by states and localities.

### **Ballot Completion Errors**

It is clear that military UOCAVA voters still face serious problems in voting because of logistical difficulties and variation among state laws. In 2001, 2006, and 2007, the GAO found that UOCAVA voting process very cumbersome, resulting in the disenfranchisement of many voters.<sup>40</sup> The paper-based process is also a source of many problems. As the GAO noted,

[M]ilitary and overseas voters do not always complete absentee voting requirements or use federal forms correctly. The basic steps that absentee voters must take to register and request an absentee ballot are similar for all states. Nevertheless, absentee voting schedules and requirements vary from state to state . . . . County officials said that problems in processing absentee voting applications arise primarily because voters do not fill in the forms correctly or do not begin the voting process early enough to complete the multiple steps they must take.<sup>41</sup>

As the EAC report noted—and similar to the Los Angeles County data noted before—ballots are often rejected because they are returned late. However, problems with the forms are also sources of ballot rejection as well, for those ballots that are returned in time.

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39. See Pub. L. No. 107-252 § 705 (codified as amended at 42 U.S.C. § 1973ff-1(a)(5)) (stating that “if the State requires an oath or affirmation to accompany any document under this title, use the standard oath prescribed by the Presidential designee”).

40. See generally U.S. Gen. Accounting Office, Report No. GAO-01-1026, Elections: Voting Assistance to Military and Overseas Citizens Should Be Improved (2001), see also Office of Inspector General., Department of Defense., Report No. D-2003-072, DoD Compliance with the Uniformed and Overseas Citizens Absentee Voting Act ii (2003), (finding that voter assistance programs were “partially effective” in six of ten locations inspected and “ineffective” in four), U.S. Gen. Accounting Office, Report No. GAO-06-521, Elections: Absentee Voting Assistance to Military and Overseas Citizens Increased for the 2004 General Election, but Challenges Remain (2006); Elections: Action Plans Needed to Fully Address Challenges in Electronic Absentee Voting Initiatives for Military and Overseas Citizens (2007)

41. See U.S. Gen. Accounting Office, Report No. GAO-01-1026, 2001 233, at 40-41.

## Ballot Transit

Ballot transit times are another important potential problem. In its study of UOCAVA voting, the GAO also found that transit times for first class mail can range from as little as five days to as much as a month. A survey by the GAO found that almost two-thirds of all disqualified absentee ballots were rejected because election officials received them after the official deadline. The report also noted that there are special types of mail transit, such as transit to naval vessels underway that are difficult to service. For example, mail transit averages seven days for eighty percent of mail. Remote areas and forward deployed locations, however, such as Bosnia or Kosovo, may take an average of nine days. In the legislative history for the UOCAVA law, Congress documents these and other problems.<sup>42</sup>

More recently, a 2004 GAO study found that ballot transit times to Iraq fell within the Army standard of twelve to eighteen days for prograde mail (mail sent from the United States into Iraq) for every month between February, 2003 and September, 2003, but that this “standard” hid the fact that twenty-five percent of test letters were delivered more than eighteen days after the date mailed.<sup>43</sup> Moreover, the delivery time for retrograde mail (mail from Iraq to the United States) was outside the twelve to eighteen day delivery standard for two of the six months of the evaluation. Thus, under most circumstances it was difficult, if not impossible in many cases, for mail to be sent and returned from Iraq in less than thirty days, a typical deadline lead-time for absentee ballots to be sent to prospective voters. At best, it

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42. See Hans A. von Spakovsky, *The Federalist*. Society for Law and Public Policy Studies, *Voting by Military Personnel and Overseas Citizens: The Uniformed and Overseas Citizens Absentee Voting Act 5* (Jan. 2005) *see also* H.R. Rep. No. 99-765, at 10-11 (1986) (“Mail delivery is a problem for overseas voters. Members of the military may be in locations where mail service is sporadic, or they may be away for days or weeks at a time on temporary duty or on maneuvers. Among civilians overseas, missionaries and Peace Corps Volunteers in particular often work in remote areas where mail delivery is slow. Citizens working on oil rigs or on remote construction sites regularly encounter mail delays. Based on surveys of the U.S. Postal Service and of military postal authorities, ballots should be mailed to overseas addresses at least 45 days prior to an election in order to ensure adequate time for a ballot to reach a voter and be returned.”).

43. U.S. Gen. Accounting Office, Report No. GAO-04-484, *Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved* 13 (2004).

provided only a very short window for personnel to individually receive their mail, properly fill out the documentation, and then be in a position to place it in return mail. Interestingly, the Military Postal Service Agency urges all military personnel deployed to Iraq or Afghanistan to mail their ballots no later than September 30<sup>th</sup>, 2008, a full 35 days prior to the election.<sup>44</sup> Congress, in its examination of the issue during the UOCAVA debates, indicated that to overcome such problems, ballots should be mailed out at least forty-five days prior to the election to ensure enough time for their return. As is discussed below, delivering ballots to voters electronically may help to overcome part of the ballot transit problem.

### **FPCA Issues**

Such problems not only affect the ballot itself but the registration and request for ballots that must be sent in order to receive a ballot in the first place. As stated above, UOCAVA authorizes military and overseas voters to use the Federal Post Card Application (“FPCA”) for registration and absentee ballot requests.<sup>45</sup> Service members appear to have difficulty, however, with the post cards. The Federal Post Card Application (FPCA), SF 76, is used to register to vote and request an absentee ballot. However, only twenty-five percent of respondents were aware of the FPCA in the study conducted by the DoD Inspector General. Absentee voters must also receive the FPCA in a timely manner to properly register and be eligible to vote. Only twenty-four percent had received SF 76 by the January 15 deadline. In addition, only twenty-five percent of the respondents were aware that the Federal Write-in Absentee Ballot (FWAB), SF 186, is a backup ballot that can be used if they did not receive the regular absentee ballot. In 2001, only eighteen percent were aware of the FVAP Web site, and only fourteen percent knew of the Service or component voting Web site. Potentially, greater

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<sup>44</sup> Military Postal Service Agency website, <http://hqdainet.army.mil/mpsa/vote.htm> (accessed September 9th, 2008).

<sup>45</sup> 42 U.S.C. § 1973ff(b)(2) (2006).

use and access to voting Web sites could minimize the need for physical distribution of SF 76s.<sup>46</sup> The proposed solution to the transit problem is clearly not serving its function or is at least failing to meet its full potential.

### **Cut off Dates and Litigation**

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

Under Section 105 of the Act, the Attorney General is authorized to bring civil actions to enforce its requirements. The Attorney General has assigned this enforcement responsibility to the Civil Rights Division. The Civil Rights Division typically brings enforcement actions after FVAP notifies it that absentee ballots for overseas voters have been mailed so late that there is a substantial risk that some overseas voters will not be able to return them by the deadline established by State law.<sup>47</sup>

A discussion of a few of these cases will highlight the difficulties continually at issue between state election officials and federal officials seeking to guarantee military and overseas voters the ability to receive ballots in a timely fashion.

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46. Office of the Inspector Gen., U.S. Department of Defense., Report No. IE-2006-001 Evaluation of the Voting Assistance Program 4-5 (2006). The Inspector General has similar findings for more recent years.

47 [http://www.usdoj.gov/crt/voting/misc/activ\\_uoc.htm#enforce](http://www.usdoj.gov/crt/voting/misc/activ_uoc.htm#enforce)

## Florida

The most famous instance of this type of litigation occurred even before the current UOCAVA statutory framework was in place. In 1980, the United States sued the State of Florida alleging that the late scheduling of primary elections, resulting in the mailing of ballots at the earliest twenty days before the general election and in some cases only a few days before, violated the Overseas Citizens Voting Rights Act because the late scheduling made it impossible for such voters to return them before the statutory deadline of 7 p.m. on Election Day. The court provided injunctive relief for the 1980 election mandating that ballots received within ten days of Election Day must be counted.<sup>48</sup> As the 1982 election approached, Florida and the United States entered into a consent decree that allowed ballots to again be accepted for ten days after the election and also required that absentee ballots be sent out thirty-five days prior to the election. The court also required the state to submit a plan of compliance showing that it had enacted sufficient measures to ensure that overseas voters had a reasonable opportunity to receive and return their ballots. In 1984, when the Florida Legislature failed to act to provide such measures to the satisfaction of the court, the court ordered Florida to implement an administrative rule, ultimately enacted as Florida Administrative Code section 1S-2.013, containing the thirty-five-day advance mailing requirement and the ten-day extension for receipt of ballots after Election Day. Florida operated with an administrative rule that directly contradicted a state statute for sixteen years without much fanfare.

In 2000, after the statutorily mandated 7 p.m. Election Day deadline, Florida received 2,411 overseas ballots which, if counted, gave Bush/Cheney a 537 vote edge in the state and, if rejected, gave Gore/Lieberman a 202 vote edge. The U.S. District Court for the Northern

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<sup>48</sup> Harris v. Fla. Elections Canvassing Comm'n, 122 F. Supp. 2d 1317, 1321-22 (N.D. Fla. 2000), *aff'd*, 235 F.3d 578 (11th Cir. 2000).

District of Florida therefore had to determine whether a statute or administrative rule was the applicable standard for the counting of absentee ballots. The court contradicted precedent and ruled that the administrative rule superseded the directly contradictory statute because the rule was mandated by a federal court as part of the enforcement of federal overseas and military voting statutes. The resolution of a logistical problem with the timely mailing of overseas ballots nearly twenty years prior had a dramatic and decisive effect on the election of a president.<sup>49</sup>

This same Florida administrative rule providing for an extension for the return of UOCAVA ballots was again attacked following the 2004 presidential election, this time by the American Civil Liberties Union (“ACLU”) seeking to expand its protections to all absentee voters.<sup>50</sup> The ACLU claimed that failing to provide the ten-day extension for receipt of absentee ballots to all absentee voters violated the Civil Rights Act of 1957 and the Equal Protection Clause of the Fourteenth Amendment.<sup>51</sup> The DOJ argued that overseas and military voters, because of the logistical issues involved with mailing such ballots recognized by Congress in passing the federal statutes, were legitimately distinguished from other absentee voters.<sup>52</sup> The court dismissed the ACLU claim.

## Georgia

One would think with such a high-profile and consequential incident as the 2000 election controversy that states would take notice of the logistical problems and legal ramifications of

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49. *But see* *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1315-16 (N.D. Fla. 2000) (holding that overseas and military ballots that did not have APO, FPO or foreign postmarks and for which no application was on record must be counted pursuant to UOCAVA and other federal protections).

50. *See generally* Complaint, *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004) (No. 04-22787).

51. *Friedman*, 345 F. Supp. 2d at 1358.

52. *See* *De La Rosa v. United States*, 32 F.3d 8, 11 (1st Cir. 1994) (ruling that distinction between those living abroad and those who do not is not a suspect class and was supportable on a reasonable basis); *see also* *Romeu v. Cohen*, 121 F. Supp. 2d 264, 285 (S.D.N.Y. 2000), *aff'd*, 265 F.3d 118 (2d Cir. 2001) (same); *Howard v. State Administrative Bd. of Election Laws*, 976 F. Supp. 348, 352 (D. Md. 1996); Letter from Sheldon T. Bradshaw, Principal Deputy Assistant Attorney Gen., to Alan S. Gold, U.S. Dist. Court Judge (Nov. 9, 2004).

the issue of military and overseas ballots and endeavor to avoid such situations. This was not the case, however, and in 2004 the DOJ filed two enforcement actions, one in Georgia and the other in Pennsylvania, pertaining to the late mailing of absentee ballots by local election officials. As discussed in a GAO report, Georgia state law requires counties to have absentee ballots on hand 45 days before a general election. Georgia missed the September 20, 2002, deadline for the November 5, 2002, general election because of the compressed election schedule in 2002. The 45-day deadline was set to comply with federal mandates to make it easier for U. S. military personnel stationed outside the United States to vote. Georgia had compressed its 2002 primary and runoff election schedules such that the runoff was held only 49 days before the November 5 general election. This precluded the printing of the general election ballot in time for the mailing deadline required under state law. Georgia election officials had contacted FVAP during the first week of October regarding the state's compliance with the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA). Catoosa County ballots omitted the names of the Republican candidate for the U.S. Senate and the Republican gubernatorial candidate from the ballot. An allegation was made that this, among other absentee ballot irregularities, violated UOCAVA because the correct ballots, even if sent at the time this concern was raised on October 16, 2002, would not be received in time. Georgia's Secretary of State asked DOJ to bring suit against the state to extend the deadline for receipt of military and other absentee ballots.<sup>53</sup>

Despite this prior instance, Georgia again had a problem with mailing absentee ballots in 2004, and the DOJ again brought suit to force an extension in the deadline for receipt of overseas and military ballots in the 2004 election.<sup>54</sup> The court granted a three-day extension in

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53. U.S. Gen. Accounting Office, Report No. GAO-04-1041R, Department of Justice's Activities to Address Past Election-Related Voting Irregularities (2004).

54. See Memorandum of Understanding Between Ga. and Sec'y of State of Ga. and the U.S., *United States v. Georgia* (N.D. Ga. July 25, 2005) (No. 1:04-CV-2040).

the deadline as well as “accelerated means for the transmission and return of [UOCAVA] voters’ absentee ballots, including facsimile, email, and express mail at public expense.”<sup>55</sup> The case was ultimately resolved in 2005 by a Memorandum of Understanding that recognized that the Georgia General Assembly had taken sufficient steps to ensure long-term compliance with UOCAVA.

## **Pennsylvania**

In Pennsylvania, similar litigation was required when multiple county election boards failed to send out absentee ballots early enough to comply with UOCAVA requirements. The court provided injunctive relief, extending the deadline for receipt of ballots in the primary election statutorily set at 5:00 p.m. on the Friday before Election Day, for twenty-one days and providing for overnight delivery of ballots at state expense. The judge specifically denied the DOJ’s request for relief to use technological means such as facsimile and email even though it conceded that such procedures “‘make sense’ in this electronic age” because it “would involve this Court devising and superimposing it’s [sic] own election scheme on a complex legislatively sanctioned system spread across sixty seven diverse counties.”<sup>56</sup> This statement encapsulates much of the tension between the federal government’s desire for ensuring military and overseas voters a chance to vote and the localized control over the mechanisms of voting.

Later in the election year, the same case was revitalized with respect to the general election under circumstances that show that it is not always the local control and scheduling of elections that can cause problems for military voters. Beginning on August 24, 2004, Pennsylvania began issuing absentee ballots to overseas and military voters, ultimately sending

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65. See Order, *United States v. Commonwealth* (M.D. Penn. Apr. 16, 2004) (No. 1:CV-04-830).

<sup>56</sup> See Order, *United States v. Commonwealth* (M.D. Penn. Apr. 16, 2004) (No. 1:CV-04-830).

out a total of 26,739.<sup>57</sup> The problem arose when the eligibility of Ralph Nader to appear on the Pennsylvania ballot was challenged, Nader was ordered removed from the ballot, and was then allowed back on only to be removed again as the case wound its way up the appeals process. As a result, thousands of overseas and military voters received ballots that were different than the one officially certified as correct. The federal government again intervened and sought relief in the form of resending the ballots through electronic means or express mailing, and extension of the deadline for processing the ballots. The district court denied such relief on the grounds that doing so would “harm the Pennsylvania election system and the public at large by undermining the integrity and efficiency of Pennsylvania elections,” and that “the ‘remedies’ proposed by the Government invite unpredictability to an otherwise orderly and time tested elections process.”<sup>58</sup> The court failed to explain why this was the case. The court could be faulted for not taking advantage of all possible means of ensuring the timely transmission of votes from military and other overseas voters, but the fault truly lies at the feet of Congress as it continues to maintain the dual-authority nature of federal elections. The court was duly concerned about treading too heavily on the state election procedures and laws that Congress allows to dictate deadlines for federal ballots.

### **Other States**

Such battles between state and federal authorities have not ended, and the U.S. government has filed several more lawsuits during the most recent presidential election regarding the mailing of overseas ballots and deadlines for receipt from military voters. In 2006, the DOJ brought actions and obtained either injunctive relief or stipulated agreements

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57. *See* Memorandum and Order, *United States v. Commonwealth*, 2004 WL 2384999 (M.D. Penn. Oct. 20, 2004) (No. 1:CV-04-830).

58. Memorandum and Order, *United States v. Commonwealth*, 2004 WL 2384999 (M.D. Penn. Oct. 20, 2004)

from the states of Alabama,<sup>59</sup> South Carolina, Connecticut,<sup>60</sup> and North Carolina.<sup>61</sup> Despite years of efforts and multiple litigations, states thus continue to give short shrift to overseas and military voters in how they handle election deadlines, ballot transmission, and absentee deadlines.

## 7. From Procedures to Technology

HAVA's six legal changes to UOCAVA voting discussed above are procedurally focused, attempting to make the existing by-mail process work more efficiently.<sup>62</sup> As shown above, however, the primary problem with UOCAVA voting is ballot transit time, something that can only be improved by improving the mail, which is clearly outside the province of election reforms.<sup>63</sup> So, in 2001, Congress passed a specific provision, as part of the National Defense Authorization Act for Fiscal Year 2002 ("2002 NDAA"), concerning the use of technology to improve UOCAVA voting by moving the ballot transit issue away from the mail and into cyberspace.<sup>64</sup> Specifically, section 1604(a)(1) of the 2002 NDAA states:

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

This requirement was designed to experiment using technology, as opposed to merely procedural improvements, as a means to solve the problems UOCAVA voters face in receiving

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59. See Press Release, U.S. Dep't of Justice, Justice Department Announces Resolutions to Protect Rights of Military and Overseas Citizens to Vote in Federal Primary Elections in Alabama and South Carolina (June 8, 2006).

60. See Stipulated Agreement, *United States v. State* (D. Conn. Aug. 2, 2006) (No. 3:06-cv-1192).

61. See Consent Decree, *United States v. State* (E.D.N.C. Mar. 20, 2006) (No. 5:06-cv-00118-H).

62. See generally 116 Stat. 1666.

63. See generally Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (codified as amended in scattered sections of 42 U.S.C., 39 U.S.C., 18 U.S.C.).

64. See Pub. L. No. 107-107, 115 Stat. 1012 (2001) (codified as amended as Electronic Voting Demonstration Project, 42 U.S.C. 1973ff).

and returning absentee ballots within the time restraints of state-run federal elections. The desire to find technological solutions to the UOCAVA problem recognizes that the continued reliance on state and local actors, variations in state election laws, and limitations on addressing ballot transit hinder UOCAVA voting. Technology can allow the local election official and the voter to transmit information immediately, thereby solving one of the critical roadblocks in UOCAVA voting.

## **7.1 Fax Balloting**

The Gulf War and the military buildup that preceded the war, Operation Desert Shield, were the first large-scale military operations undertaken since the Vietnam War. This new war footing allowed FVAP to initiate an innovative use of fax technology to facilitate voting.<sup>65</sup> Specifically, FVAP provided for a centralized data collection and transmission program for faxed ballots.<sup>66</sup> This Electronic Transmission Service (“ETS”) served as a broker between the local election official (“LEO”) and the voter. LEOs faxed voting information—ballots and other election information—to the ETS, and the ETS then transmitted that information to the voter.<sup>67</sup> With cast ballots, the process was reversed. Having a process centralized through the ETS created several important benefits. First, the ETS was a one-stop shop, since voters and LEOs only needed to know one fax number to transmit election materials.<sup>68</sup> Second, the ETS operated twenty-four hours a day, receiving ballots securely and then retransmitting them to

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65. Ralph C. Keikkila, *The Electronic Transmission of Election Materials*, in 12 *Innovations in Election Administration* 1, 1 (Federal Election Commission, No. 12, 1995).

66. See Fed. Voting Assistance Program, Dep’t of Def., 2006-07 Voting Assistance Guide app. B (last updated Feb. 3, 2006).

67. See, e.g., Auditor’s Instructions: Absentee Ballot Email or Fax Transmissions To and From UOCAVA Voters 1-2, (instructing Iowa LEOs on how to fax material to FVAP transmission center and that FVAP center will return fax of voter’s application and ballot).

68. See Fed. Voting Assistance Program, 2006.

the voter or LEO at specific times.<sup>69</sup> This kept LEOs from receiving ballots in an unsecured manner, which was important since secrecy was one of the key victims of voting by facsimile.

During the two months that the system operated in 1990, 1,675 voters took advantage of the fax system.<sup>70</sup> Today, the DMDC finds that most military personnel do have access to fax and most have access to DoD email (although personal email access is less available). In 2004, many more took advantage of the fax system to request ballots. With the large number of troops abroad, the ETS processed 46,614 faxes for the forty-four states that allowed the FPCA to be faxed. This included 38,194 post card applications from military voters for ballots and 1,844 blank ballots sent from LEOs to voters. Only 879 voted ballots, however, were faxed to election officials through the ETS. These numbers concerning the fax system point out two sets of limitations to this system. First, as reflected by the low number of voted ballots sent through the ETS, voters believe the system is not private; their vote is being cast in the open and can be seen by the person receiving the ballot in the LEO office. The voter must choose between having a public ballot cast and not casting a ballot at all. The second, and more critical, limitation is the issue of local adoption and utilization of the system as shown by how few ballots were faxed through the system. While it is difficult to tell how many ballots were faxed directly from LEOs to overseas voters, the very low percentage of LEOs using the centralized ETS for returning blank ballots to voters likely indicates that LEOs are still using the mail as a means of sending out the ballot.<sup>71</sup> Reasons for this low LEO usage rate could include varying LEO ability to adopt and utilize the new technologies (i.e. facsimile machines), LEO staff knowledge of how to operate the system, or lack of secure locations to place the machine and the cast ballots so that ballots are not received or stored in an inappropriate environment.

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69. See Fed. Voting Assistance Program, *Electronic Transmission Service Manual, Instruction to Local Election Officials* 8 (2006).

70. See Keikkila, 1995.

71. See Keikkila 1995 (noting that military voters sent 38,194 FPCAs through the ETS central facsimile system but that LEOs only faxed 1,844 blank ballots via the ETS).

Lack of secrecy is one of the main problems with transmitting ballots by facsimile, as it is difficult to separate the identity of the voter from the ballot, and the information is transmitted through a third party. One example of how such issues play out is California's attempt to deal with the secrecy issue. California requires overseas voters who are allowed to vote by facsimile<sup>72</sup> to also sign a waiver of secrecy that states as follows:

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

This waiver was initially deemed to violate the California Constitution's provision that all voting should be in secret.<sup>73</sup> Subsequently, the California Court of Appeal reversed and made the following highly salient observation:

In our view, given a choice between fax voting and not voting at all, citizens should be able to choose to vote by fax and to waive their right to a secret ballot. In such circumstances, voting by fax is a "reasonable measure . . . to facilitate and increase exercise of the right to vote."<sup>74</sup>

This view seems to be gaining popularity among states. According to the Election Assistance Commission, twenty-one states and the District of Columbia allow for the return of ballots by facsimile.<sup>75</sup> Military voters send ballots through the centralized FVAP program and sign a waiver similar to California's, which states: "I understand that by faxing my voted ballot I am voluntarily waiving my right to a secret ballot."

Federal courts have had limited review of voting by facsimile, but those that have addressed the issue have expressed contradictory views. In the two recent cases brought by

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72. See CAL. ELEC. CODE § 3103.5 (West 2004) ("A special absentee voter who is temporarily living outside of the territorial limits of the United States or the District of Columbia may return his or her ballot by facsimile transmission.").

73. See *Bridgeman v. McPherson*, 45 Cal. Rptr. 3d 813, 820 (Cal. Ct. App. 2006).

74. *Id.* at 819 (quoting *Peterson v. San Diego*, 34 Cal. 3d 225 (1983)).

75. See Fed. Voting Assistance Program, U.S. Dep't of Def., 2006-07 Voting Assistance Guide Ch. 3: State Absentee Registration and Voting Procedures: Alabama to Wyoming.

the DOJ to enforce UOCAVA protections in Georgia and Pennsylvania, the courts each took a different tactic. The Pennsylvania district court highlighted many of the concerns with voting by facsimile, and described fax and electronic mail voting as “problematic” as these methods “are not legislatively sanctioned, are incapable of implementation by all counties, and they deprive voters of the right of secrecy.”<sup>76</sup>

In contrast, the Georgia district court specifically ordered that ballots be accepted by facsimile and proscribed a specific procedure for doing so:

The Georgia Secretary of State and the registrars of Georgia’s 159 counties are given the authority to send requested ballots to voters by facsimile transmission or email and to accept the returned of voter oaths and voted ballots to a single secure facsimile machine that is under the supervision of the Secretary of State. The Secretary shall promptly place each ballot received via facsimile in a sealed unmarked envelope and place that envelope within a second envelope containing the voter’s oath. The Secretary shall then immediately transmit the ballots by overnight or personal delivery to the election superintendent in the appropriate county for verification and counting with all other absentee ballots. Transmission of returned voted ballots under this order may be made directly from the voter via facsimile, or may originate as image files sent via electronic mail to the Federal Voting Assistance Program’s read-only computer facilities and then relayed to the Secretary via facsimile. In duplicating the received facsimiles of the ballots for purposes of permitting those ballots to be read by the appropriate counting equipment, the county election officials shall use the duplication of ballot procedures and the vote review panel as described in state law in order to assure the integrity of the ballot duplication process.<sup>77</sup>

These cases highlight the fact that facsimile voting is gaining acceptance as a means of resolving ballot transmission time problems for overseas voters but still faces some reservations or outright opposition because of its lack of secrecy. As has been seen in other areas, there is a patchwork of state laws concerning the acceptance of facsimile ballots, which could be resolved by stronger and more direct congressional measures. The combination of this variation and the lack of security means that facsimile voting still has to make significant progress for it to be accepted as the solution to the problems associated with overseas voting.

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76. *United States v. Commonwealth*, No. 1:CV-04-830, 2004 WL 2384999, at \*6 (M.D. Penn. Oct. 20, 2004).

77. *Order, United States v. State, Section A* (N.D. Ga. July 15, 2004) (No. 1:04-CV-2040).

## 7.2 Internet Voting

In contrast to the security problems faced by facsimile voting, Internet voting offers at least the hope of instantaneous electronic transmission, security, and secrecy. In practice, however, it has not proven to fulfill this potential. In keeping with its mandated role as an innovator, FVAP has promoted projects to test the effectiveness of both email and internet voting for the UOCAVA population, with mixed results. The first Internet voting project that FVAP promoted was the Voting Over the Internet (“VOI”) pilot project, which sought to test the feasibility of remote registration and voting over the Internet.<sup>78</sup> VOI was a proof of concept design to ascertain whether secure and accessible Internet voting could be deployed for FVAP clients.<sup>79</sup> The project was a cooperative effort between federal, state, and local governments with FVAP acting as the Program Manager. Four states (Florida, South Carolina, Texas, and Utah) and four specific counties (Okaloosa and Orange Counties in Florida, Dallas County in Texas, and Weber County in Utah<sup>80</sup>) agreed to participate in the program for the November 2000 presidential election.<sup>81</sup> The pilot project identified 127 potential participants, ninety-one of whom registered and eighty-four of whom voted over the system.

VOI was also designed to address each problem associated with the UOCAVA voting process. It had a voter registration component to facilitate voters completing the first step in the voting process successfully. Voters requested a ballot online and could check the status of their registration and ballot request, thus making any voter error in the process known quickly.

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78. *See generally* R. Michael Alvarez & Thad E. Hall, *Point, Click and Vote: The Future of Internet Voting* (2004) (discussing the problems associated with UOCAVA voting in detail, as well as the VOI project).

79. Fed. Voting Assistance Program, Dep’t of Def., *Voting Over the Internet Pilot Project Assessment Report ES-1* (2001).

80. The importance to some state governments of UOCAVA procedures that are technologically-focused can be seen in the case of Utah. Utah enacted legislation stating: “Notwithstanding any other provisions of this title, any county may, if selected by the Department of Defense, participate in the Federal Voting Assistance Program pilot project to allow military and voters overseas as defined by Section 20A-3-403 to register to vote and cast their votes electronically.” UTAH CODE ANN. § 20A-6-103 (2006). Without such legislative permission, counties and LEOs cannot engage in experiments of this type.

81. *See* Defense, VOI Report, 2001.

The Internet also solved the problems associated with ballot transit, as all communication occurs almost instantaneously over the Internet. Also, because voters were using an electronic voting platform, it was possible to design a voting system that was more accurate and effective than the absentee voting technologies. Problems associated with ballot rejection could also be minimized because the LEOs designed their own ballots within the system to meet the requirements of their individual jurisdictions.

The VOI pilot project's assessment report reached three basic conclusions. First, the technology worked; there were no major problems with the VOI system. Second, within the scope of the pilot project, the risks introduced into the remote registration and voting process by technology could be mitigated and the integrity of the electoral process could be maintained. The report also noted that the Internet voting system had the potential to enhance the accessibility of the electoral process for UOCAVA citizens. Third, the VOI pilot showed that FVAP could collaborate successfully with state and local election officials in the development and implementation of an Internet voting system.<sup>82</sup> Because FVAP relied on these state and local officials to carry out the provisions of UOCAVA, the success of this collaboration was a critical element and a harbinger of the possibility of successful collaborations in the future. Ultimately, however, the assessment concluded that the system was not sufficiently "mature," and that further development was needed for "Internet remote registration and voting [to] be provided effectively, reliably, and securely on a large scale."<sup>83</sup>

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

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82. See Defense, VOI Report, 2001, at 4-10 to 4-11.

83. Defense, VOI Report, 2001, at 4-10 to 4-11.

general election cycle.<sup>84</sup> A report prepared by four computer scientists, a minority of the peer-review group asked by the FVAP to evaluate the system, however, raised concerns about the security of Internet voting and its vulnerability to cyber-attack and led the Department of Defense to cancel the experiment. It is therefore unclear whether the Internet will be a tool in the continuing effort to facilitate the franchise of military and overseas voters despite its promise.

### **7.3 Email Voting**

Finally, FVAP has also encouraged localities to use email to facilitate the transfer of voting information and ballots under the 2002 NDAA mandate. For example, in the 2002 elections, twenty-two jurisdictions in Virginia engaged in pilot email absentee voting efforts for UOCAVA citizens.<sup>85</sup> Because of the events of September 11, 2001 and the resulting increase in military members overseas, Cameron Quinn, the Secretary of the Virginia State Board of Elections, declared an election emergency for all active-duty military voters deployed outside the United States.<sup>86</sup> According to the statute:

The provisions of this section shall apply in the case of an emergency that will not allow sufficient time for the distribution and handling of absentee ballot applications and absentee ballots, in accordance with the procedures of this title, for qualified voters who are unable to vote in person because of the emergency. The Secretary of the State Board of Elections shall have the authority to designate alternative methods and procedures to handle such applications and ballots.<sup>87</sup>

Under the emergency order, election boards were directed to email an absentee ballot—as the alternate method and procedure—to the email address that an eligible absentee voter

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84. See David Jefferson et al., A Security Analysis of the Secure Electronic Registration and Voting Experiment (SERVE) 4 (2004).

85. See Va. Bd. of Elections, Report: Emergency Email Absentee Voting & Pilot Programs (unpublished internal report) (on file with authors) [hereinafter Va. Bd., Report].

86. Press Release, Va. Bd. of Elections, Virginia Announces Emergency Voting Procedures for Overseas Military Voters and Pilot Program for Other Uniformed and Overseas Voters (Sept. 6, 2002).

87. Va. Code Ann. § 24.2-713 (2002).

had provided on her absentee ballot request.<sup>88</sup> The packet sent to the voter included the ballot, cover letter, and instructions, all of which were prepared by the State Board of Elections.<sup>89</sup>

How successful was this pilot? The fifteen voters who requested ballots, seven of whom returned ballots that were counted, reported that they found the program to be exciting. The primary problems that voters encountered included technical problems with downloading the ballot file, which was about 800 KB, while election administrators had to combat problems associated with illegible or incorrect email addresses. The other issue, of course, was low participation, which Virginia officials ascribed largely to a lack of competitive races on the ballot—incumbent Republican Senator John Warner ran unopposed—voters' unawareness of the pilot initiative.

So while email ballot delivery is potentially promising, it has yet to be tested on a large scale and its potential therefore remains uncertain. Some states used email balloting in the 2006 election cycle, as we were conducting the research for this Article.<sup>90</sup> Furthermore, while some methods of email ballot delivery suffer from many of the problems associated with fax ballot delivery (especially privacy and security), technologies for securing email and documents delivered via email are rapidly advancing (certainly for members of the Armed Forces).

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88. See Press Release, 2002.

89. See Va. Bd., Report, 2002. The exception was Loudoun County, which prepared its own documents.

90. As of May 2006, ten states (North Dakota, South Carolina, Montana, Mississippi, Florida, Virginia, Wisconsin, Washington, Illinois, and Missouri) allowed some form of email balloting, according to information provided by the Federal Voting Assistance Program. See *States that Allow Emailing of Ballots*, Voting Information News (Fed. Voting Assistance Program, U.S. Dep't of Def., Washington, D.C.), May 2006. In August 2006, Iowa announced that it would also allow email ballot delivery and return. See Ellen Nakashima, *E-Mail Voting Comes with Risks*, Wash. Post, Oct. 31, 2006, at A19 (noting that it is difficult to tell how many soldiers use email for voting but that “[a]necdotaly, the number of military personnel voting by email appears limited”).