



Hold the Double Macchiato:

**Proposing and Finding a Meaningful Solution to
Protect Minnesota's Military Voters**

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BACKGROUND

It is now a common story in American elections: two candidates locked in a winner-take-all recount fight over hundreds or thousands of absentee ballots from our men and women in uniform, many of whom are serving in combat zones, and these ballots may decide the outcome of the election. A state election official, trying to invoke every image of patriotism and emphasizing his support for the military, sadly informs the media that while he would like to count the ballots, state law requires the ballots to be rejected because they arrived a few days after the deadline. The election official promises military voting reform. But the reform never comes, often because the military reform is buried in broader, more controversial, election reform legislation. The disenfranchised military voter is quietly forgotten until the next close election when some other state “discovers” how many military voters are disenfranchised by systemic elections practices and the failure to provide these voters with sufficient time to receive and cast their votes.

This year’s version of the story comes from Minnesota. In a razor thin recount for a Senate seat, Secretary of State Mark Ritchie held a news conference in early January 2009, to discuss approximately twelve thousand (12,000) absentee ballots that were rejected by local election officials for a variety of reasons—some due to serious and not-so-serious breaches of Minnesota’s election laws and others due to mistakes by local election officials.¹

¹ Jay Weiner, *Franken-Coleman recount: Secretary of State Ritchie to take elections reform initiative on the road soon*, Minnesota Post, Jan. 5, 2009 (<http://www.minnpost.com/stories/2009/01/05/5570/franken->

Secretary Ritchie's focus in the news conference quickly turned to several overseas military ballots, stating that there were "hundreds [of absentee ballots] that came in one day late, some from soldiers in Baghdad and Kuwait. They break my heart. But by law, they were rejected."² As his eyes reportedly welled up and his voice started to crack, Secretary Ritchie promised to reform the absentee voting process for military voters.³ He promised to make a difference for Minnesota's military voters and to protect their voting rights. These promises, however, are belied by his actions during the recount and his current proposals for election reform.

To the extent that Secretary Ritchie is serious about his concern for these voters, he must take immediate action to ensure that these military voters have their ballots counted in the current election contest and propose reform that will ensure their ballots are counted in the future.

A. Despite the Rhetoric, Military Absentee Ballots Were Conspicuously and Specifically Rejected During the Recount.

Prior to the recount, Secretary Ritchie's stated concern for Minnesota's military voters seemed to be heartfelt. In the last two years, he proposed legislation allowing military and overseas voters to receive (but not return) their blank absentee ballot via facsimile or email. He also partnered with the Overseas Vote Foundation, a non-profit voting rights group, to make it easier for military and overseas voters to fill-in a registration application online and, once completed, to print out and mail it to their local

[coleman recount secretary of state ritchie to take elections reform initiative on the road soon](#)).

² *Id.*

³ *Id.*

election official. While these changes did not resolve many issues facing Minnesota's military and overseas voters, as discussed below, they nevertheless showed willingness on his part to protect these voters.

That willingness to protect military voters quickly disappeared during a politically charged recount.⁴ Take, for example, Secretary Ritchie's decision to reject certain military ballots, known as Federal Absentee Write-in Ballots (FWABs).⁵ In a December 7, 2008, email, his office instructed local election officials to reject all FWABs where the military voter was not registered or did not submit a federal registration application with his ballot. While this instruction appears at first glance to comport with Minnesota law⁶, requiring a voter to be registered or to submit a registration application with his or her ballot, it ignores one critical fact: every FWAB includes a "Voter Declaration/Affirmation" that is substantively identical to the federal registration application,⁷ other than name, and both documents satisfy Minnesota's registration requirements.⁸ Not only is this decision, at best, a hyper-technical reading of Minnesota law, it is perplexing given Secretary Ritchie's stated desire to protect military voters.

⁴ As the Wall Street Journal said of the recount done under Secretary of State Ritchie's direction "[W]e can't recall a similar recount involving optical scanning machines that has changed so many votes, and in which nearly every crucial decision worked to the advantage of the same candidate." Wall Street Journal, November 12, 2008, "Mischief in Minnesota."

⁵ As specified by federal law, FWABs are emergency ballots that can be used by a military or overseas voter when his or her regular ballot does not arrived in time for it to be returned to the local election. The military and overseas voter can print the FWAB from a computer, write-in his or her candidates for federal offices, and return the ballot via mail to the local election official.

⁶ See Minn. Stat. 203B.12, subd. 2

⁷ These forms can be accessed at <http://www.fvap.gov/resources/media/fwab.pdf> and <http://www.fvap.gov/resources/media/fpca.pdf>.

⁸ See Minn. Stat. 203B.04, subd. 4, as referenced by Minn. Stat. 201.054.

To make matters worse (at least for military voters), Secretary Ritchey used the same December 7 email, to direct local election officials to ignore a state law requirement for certain non-military absentee ballots with missing or mismatched signatures. The state law in question—the very same statute that Secretary Ritchie used to reject the military absentee ballots—generally requires election officials to reject absentee ballots with missing or mismatched signatures.⁹ Notwithstanding this law (or his hyper-technical reading as it applied to military absentee voters), Secretary Ritchie instructed local election officials to count any non-military absentee ballot with missing or mismatched signatures, if the absentee ballot had been completed at a local, in-person absentee voting center. Why would Secretary Ritchie ignore one provision of a state law to count certain non-military ballots, but apply a hyper-technical reading of the same statute to reject military ballots? How could he justify his decision in a state that prides itself on Election Day registration and the opportunity it creates for citizens to vote even at the last minute?

Not surprisingly, many observers of the recount have questioned the partisan motivation behind Secretary Ritchie's decisions, especially given Secretary Ritchie's donations of money to the Democrat Party of Minnesota and appearances with Al Franken at campaign events, as well as the perceived historical support military voters have provided to Republican candidates.¹⁰ Whatever his motivation, the fact remains

⁹ See Minn. Stat. 203B.12, subd. 2.

¹⁰ For example, in 2004, a poll conducted by USA Today showed that military voters overwhelmingly supported President Bush by a 4-to-1 margin over Senator John Kerry. Dave Moniz, *Troops in survey back Bush 4-to-1 over Kerry*, USA Today, Oct. 3, 2004 (http://www.usatoday.com/news/politicselections/nation/president/2004-10-03-bush-troops_x.htm). In 2008, nearly 70 percent of military voters supported Senator McCain over

that Secretary Ritchie decided to reject certain military absentee ballots when those ballots should have been counted. Such treatment hardly comports with the vision of a Secretary of State who is trying to protect Minnesota's military voters who are absent for Election Day only because they are overseas serving their country.

At the very least, Secretary Ritchie must ensure that any FWAB, which was wrongly rejected as a result of the December 7, 2008 email, is counted in the current contest for Minnesota's Senate seat. As noted above, the voter certification on a FWAB satisfied Minnesota's registration requirements and, thus, any FWAB with a completed voter certification should not have been rejected in the first instance. Secretary Ritchie has an opportunity to remedy this error before these voters are forever disenfranchised. Not only does he owe such a decision to our men and women in uniform because of their daily sacrifices, he owes it to all Minnesotans as the state's top election official and the person responsible for knowing and following the law. He must take immediate action and inform the Contest Court of his decision to count these FWABs.

B. Despite the Promises, Proposed Election Reforms Provide Little or No Benefit to Military Absentee Voters

Notwithstanding his promises and tears, the prospect of Secretary Ritchie taking any action to protect military voters (in the election contest or future legislation) is bleak, especially after seeing his proposed reforms for the 2009 legislative cycle. While Secretary Ritchie has repeatedly invoked the late arriving military absentee ballots as his rallying cry for reform, his actual proposals provide no relief or protection for

Senator Obama. Brendan McGarry, *Military Times poll: Troops backing McCain*, The Military Times, Oct. 9, 2008 (http://www.armytimes.com/news/2008/10/military_poll_100508w/).

Minnesota's military voters. In fact, one day after his teary-eyed news conference, Secretary Ritchie explained on Minnesota Public Radio that his main theme of election reform is to make "voting more consistent with how Minnesotans are living their lifestyles."¹¹ Secretary Ritchie wants to increase early voting opportunities in places where people live and work, which may include the placement of early voting centers in grocery stores, a shopping mall, or places like that (perhaps like a coffee shop).

To that end, Secretary Ritchie's 2009 election reform proposals focus on easing voter registration requirements for Minnesotans living in the state, eliminating signature verification requirements, allowing no excuse absentee voting, and permitting 30 days of early voting.¹² These reforms are merely a rehash of his 2007 legislative agenda, which was subject to a significant amount of controversy. For example, his proposal for no excuse absentee voting and early voting was ultimately vetoed by the governor because it failed to adequately protect against election fraud.¹³

But, what about the military voting reform? What is Secretary Ritchie's plan for increasing the voting opportunities for places where Minnesota's military members are stationed, like bases in Iraq or Afghanistan, a ship in the Arabian Gulf, or the sands of Kuwait? How will he protect the military absentee ballot that arrives a day late from Iraq and Afghanistan through no fault of the voter?

¹¹ Cathy Wurzer, *Lessons from recount to influence election reform*, Minnesota Public Radio, Jan. 7, 2009 (<http://minnesota.publicradio.org/display/web/2009/01/07/election/>).

¹² See http://www.sos.state.mn.us/docs/2009_legislative_proposal_fact_sheet.pdf.

¹³ Bill Salisbury, *Secretary of state's election-reform ideas include early voting*, The Pioneer Press, Feb. 12, 2009 (http://www.twincities.com/politics/ci_11684326).

Secretary Ritchie’s election reform agenda contains a single bullet for military voters: he wants to clarify existing legislation to make clear that “return postage does not need to be provided to these [military] voters” when the local election officials sends an absentee ballot via email or facsimile.¹⁴ In other words, Secretary Ritchie wants to make sure that the military member—and not the local election jurisdiction—pays for postage when returning the ballot. Unbelievably, Secretary Ritchie found a way to give military members *less* in his 2009 election reform agenda.

Contrary to Secretary Ritchie’s proposals, military voters do not need an early voting center in a coffee shop or supermarket. Nor do they need the increased convenience of shorter lines on Election Day. They do not need to pick up a loaf of bread, and they are willing to pass on the double macchiato when they vote. Minnesota’s military voters simply need more time to receive, cast and return their absentee ballot by the deadline for receiving absentee ballots (*i.e.*, Election Day).

Because of Minnesota’s late primary in September, most local election officials are unable to print and mail absentee ballots until the first week of October—that is, approximately 30 days prior to Election Day. While this time may be sufficient for absentee voters with addresses in the United States, and even for some overseas voters in Canada, Europe and other major cities abroad, it is not sufficient for those military and other voters in remote overseas locations and combat zones.

Every federal agency examining the issue of ballot delivery times to overseas and military members has concluded that ballots should be sent *at least* 45 days before

¹⁴ See http://www.sos.state.mn.us/docs/2009_legislative_proposal_fact_sheet.pdf.

the deadline for receiving such ballots. The United States Election Assistance Commission, in consultation with the Department of Defense (DOD), made this recommendation in 2004.¹⁵ The Department of Justice made and continues to make this recommendation to each state on a yearly basis.¹⁶

And, more recently, regarding military ballot delivery times, the Chief of Operations for the Military Postal Service Agency within DOD determined that states should allow a 60-day time period for an absentee ballot sent to and from a combat zone.¹⁷ Her recommendation appears to be based, in large part, on two critical factors: (1) it takes at least 12 to 18 days for a ballot to make the one-way transit from an election official to a designated combat zone post office box¹⁸; and (2) military exigencies (*i.e.*, fighting the war) further delay the delivery of the ballot from the combat zone mailbox to the actual military voter. As the Chief of Operations noted, military

¹⁵ See Report of the U. S. Election Assistance Commission on Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act, Sept. 2004 (accessed at <http://www.eac.gov/election/practices/uaoc>).

¹⁶ Prior to each federal election, the Department of Justice, Civil Rights Division, DoD, and the Federal Voting Assistance Program send a joint letter to each state's chief election official regarding the mailing requirements under the Uniform and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-1. This year's letter is located at: http://www.usdoj.gov/crt/voting/misc/uocava_2008ltr.pdf.

¹⁷ Jeb Phillips, *Voting can be chore for military*, The Columbus Dispatch, Aug. 3, 2008 (http://www.columbusdispatch.com/live/content/local_news/stories/2008/08/03/GI_VOTERS.ART_ART_08-03-08_A1_5RATUQA.html?sid=101); see <http://hqdainet.army.mil/mpsa/vote.htm> (recommending that members place their ballots in the mail 30 days before the election).

¹⁸ Army Field Manual 12-6, Chap. 6 (accessed at <http://www.globalsecurity.org/military/library/policy/army/fm/12-6/Ch6.htm#top>) (accessed October 27, 2008). Notwithstanding these standards, the Government Accountability Office (GAO) discovered in a 2004 study that a significant amount of mail—nearly twenty-five percent of the test letters sent by the military postal service—took more than eighteen days to deliver in combat zones. See *OPERATION IRAQI FREEDOM: Long-standing Problems Hampering Mail Delivery Need to Be Resolved*, GAO Report 04-484, at 13 (April 14, 2004) (“GAO Report”).

commanders—not the military postal service—determine when mail is actually picked up and delivered to a service member in a combat zone.¹⁹

Given these time frames, as well as combat zone exigencies, it takes little math to figure out that Minnesota’s annual, approximate 30-day window for military and overseas voting is not sufficient for military voters in a combat zone, or even many overseas and non-war zone military voters. The mail delivery times alone (at least 24 to 36 days for the round trip transit of a ballot) will cause a fair number of military voters overseas to be disenfranchised. And this number of disenfranchised voters only increases when military exigencies are factored into the equation.

When Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)²⁰ in 1986, it did so to alleviate chronic difficulties experienced by members of the Nation’s military overseas, “where mail is slow and sporadic,” and who—even in peacetime, let alone in theatres of active war—“may be away for days or weeks at a time on temporary duty or maneuvers.”²¹ Congress intended UOCAVA to serve a broad purpose—namely, “ensuring that all overseas voters have, at a minimum, the opportunity to vote for President and Vice President, and for those who represent them in the House and Senate,” and “that voters are not disenfranchised because of poor mail service.”²² At its core, UOCAVA prohibits the States from sending absentee

¹⁹ Jeb Phillips, *Voting can be chore for military*, The Columbus Dispatch, Aug. 3, 2008 (http://www.columbusdispatch.com/live/content/local_news/stories/2008/08/03/GI_VOTERS.ART_ART_08-03-08_A1_5RATUQA.html?sid=101).

²⁰ 42 U.S.C. § 1973ff-1.

²¹ 132 Cong. Rec. H5973-03 (Aug. 12, 1986).

²² *Id.*

ballots to absent military voters at a date so close to Election Day that the voters “fail to receive their absentee ballots in time to vote and return them[.]”²³

In this context, there should be no doubt that Minnesota owes military voters additional time to ensure that they have time to receive, cast and return their ballots. To the extent that Secretary Ritchie wants to protect these voters—like the soldiers he spoke about in his January news conference—he must propose legislation that will provide military and overseas voters with at least 45 days to receive and return their absentee ballots.

In addition, as the state’s top election official and the one responsible for complying with UOCAVA, Secretary Ritchie has an obligation to determine whether the Minnesota violated UOCAVA in 2008 by sending out overseas military ballots less than 45 days before the election. Once he finds such a violation, which the evidence appears to support, Secretary Ritchie again must inform the Contest Court of his decision and propose a remedy that will ensure these ballots are counted. In other cases where a violation of UOCAVA has been found, courts have ordered states to count ballots that arrive within reasonable time period after the election.²⁴ These ballots were rejected solely because of the state’s (and not the voter’s) systematic failure to mail military and overseas ballots with sufficient time for them to be received and returned by Election Day. The state (*i.e.*, Secretary Ritchie and the Contest Court) must

²³ H.R. Rep. 99-765 at 12, 1986 U.S.C.C.A.N. at 2016.

²⁴ These orders can be found at the Department of Justice, Civil Rights Division, Voting Section’s web page (http://www.usdoj.gov/crt/voting/litigation/recent_uocava.php#pa_uocava2). See, e.g., *United States v. Connecticut*, No. 3:06-cv-1192 (D. Conn.); *United States v. Pennsylvania*, No. 1:cv-04-830 (M.D. Pa.); *United States v. North Carolina*, No. 5:06-cv-00118 (E.D.N.C.).

find a way to remedy this systemic violation and count these ballots for the November election.

C. True Reform for Military Voters: Address the Time Constraints and Provide These Voters with More Time

Again, to give credit where credit is due, Minnesota's legislature started to address the "lack of time" issue in 2008 by passing legislation that allowed local election officials to send absentee ballots to military and overseas voters via email or facsimile.²⁵ This legislation, no doubt, is a significant improvement over a mail-only process for sending ballots and, for the military and overseas voters with access to such technology, will help reduce ballot delivery times. It must be emphasized, however, that not all military and overseas voters have the luxury of a facsimile machine or computer with a printer, especially if the military or overseas voter is serving in a remote location or a combat zone. These voters have to rely on the mail process to cast and receive their votes. They should not be disenfranchised because the state of Minnesota has failed to mail absentee ballots in a timely manner.

One simple solution, in use in several other states, including some which have September primaries like Minnesota, is to address the timing issue by adding 10 to 15 days after the election for military and overseas voters to return their ballots. It is entirely appropriate to set an Election Day deadline for receipt of absentee ballots sent to locations within the United States and its territories, as these ballots are not subject to the same mail delivery delays as the ballots sent to military and overseas voters. Military and overseas voters need additional time, not because they have failed to act

²⁵ See Minn. Stat. 203B.225.

diligently, but because the process for delivering their ballot takes additional time; it is caused by systemic problems which need a systemic solution—such as allowing 10 to 15 additional days for a ballot to be returned from an overseas location.

This systemic legislative solution going forward for military and overseas voters can be implemented in Minnesota, as it has been implemented in Wisconsin, New York, Florida, Illinois and Pennsylvania. While the ballot must be cast and mailed prior to the election, the additional time helps the faultless military and overseas voter, and helps these states to satisfy the 45-day standard for sending and receiving absentee ballots from military and overseas voters. This straight forward, common sense solution is the reform that Minnesota's military and overseas voters need. To the extent that Secretary Ritchie wants to help these voters, he should push for immediate reform of Minnesota's Election Day deadline for receiving military and overseas ballots, and should do so free and clear of his more controversial election reform.

Conclusion

Given their daily sacrifices, it only seems appropriate that Minnesota first address the systemic problems facing military voters, especially those serving in combat zones, prior to creating additional opportunities for Minnesotans to vote at coffee shops and supermarkets. Secretary Ritchie and the Contest Court must first address this failure in the current election contest and ensure that military absentee ballots cast in the 2008 election, which were received after the election, are counted. Thereafter, Secretary Ritchie must propose and find a long-term solution to the state's systematic failure to provide military voters with sufficient time to receive, cast, and return their absentee

ballots. Providing sufficient time for these voters to vote is the least that Secretary Ritchie and Minnesota can do for people who put their lives on the line to protect the voting rights of all.

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