TESTIMONY

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RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

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Statement of
Mr. Samuel F. Wright
Co-Chair, Uniformed Services Voting Rights Committee
Reserve Officers Association of the United States
for the
Senate Committee on Governmental Affairs
concerning
Uniformed Services' Voting Rights
May 9, 2001

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Statement of Mr. Samuel F. Wright, Co-Chair of the Uniformed Services Voting Rights Committee,

Reserve Officers Association of the United States, for the Senate Committee on Governmental Affairs, regarding uniformed services' voting rights--May 9, 2001.

Mister Chairman and Members of the Subcommittee:

We are here today, and this issue is on our national radar screen, because of the November 2000 controversy about uncounted military absentee ballots in Florida. However, this problem is not limited to Florida, and it did not begin in the

year 2000. Uniformed services personnel and their family members have had difficulty in voting for as long as they have been permitted to vote at all. (The first efforts to provide absentee ballots for citizens serving in the uniformed services came during World War II.)

As you can appreciate, there are three time-consuming steps in absentee voting. First, the absentee ballot request must travel from the voter to the local election official in his or her home town. Second, the unmarked ballot must travel from the election official to the voter. Finally, the marked ballot must travel from the voter to the election official. Each of these steps can take weeks if the mails must be used. If secure electronic means were authorized, each of these steps could be accomplished at the speed of light.

On June 26, 1952 (49 years ago next month), the Subcommittee on Elections, Committee on House Administration, U.S. House of Representatives conducted hearings on military absentee voting.1 The hearings established that the young men and women fighting the Korean War were in most cases being disenfranchised. I have provided a copy of the 1952 hearings report to your committee staff.

The 1952 report includes a letter to Congress from President Harry S. Truman.2 In his letter, he called upon the states to fix this problem. He also called upon Congress to enact temporary legislation for the 1952 Presidential election. President Truman wrote, "Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954."3

Today, almost half a century later, this problem has not been solved at the state level, as testimony before this committee has established today. In the same paragraph, President Truman wrote, "I agree with the committee that ... the Congress should not shrink from accepting its responsibility and exercising its constitutional powers to give soldiers the right to vote where the States fail to do so."4

We (the Reserve Officers Association of the United States) respectfully suggest that 49 years is long enough to wait for the states to solve this problem. The brave young men and women who are away from home and prepared to lay down their lives in defense of our country should not have to wait another half century to enjoy a basic civil right that the rest of us take for

granted.

The Constitution grants to the Congress the power to "raise and support Armies" and to "provide and maintain a Navy."5 The founders clearly intended that national defense would be at the very core of the responsibility of our central government, not the states.

The military voting problem cries out for a Federal solution. In 1940, when Congress enacted our nation's first peacetime conscription statute, it also enacted the first law requiring civilian employers to reemploy persons who left their civilian jobs for military service.6 During the congressional debate, Representative R. Ewing Thomason of Texas forcefully asserted that, "This is Uncle Sam's law, this is Uncle Sam who is drafting these men, and he ought to be fair enough to see that the [veterans' reemployment] law is enforced."7 What is true of the statutory right to reemployment in one's civilian job should, we respectfully submit, be even more true of the constitutional right to vote.

In 1973, Congress amended the Veterans' Reemployment Rights (VRR) law to make it applicable to the states, as employers.8 The constitutionality of requiring the states to comply was upheld.9 The constitutional right to vote is at least as precious as the statutory rights conferred by the VRR law. Whether we as a nation are conscripting young people into the Armed Forces, or whether we are relying on volunteers (as we have done since 1973), the Congress clearly has the authority and the responsibility to ensure that those who serve in our nation's uniformed services do not lose valuable rights because of their service to our country.

I invite the Committee's attention to the most eloquent opening paragraph of President Truman's 1952 letter to Congress:

About 2,500,000 men and women in the Armed Forces are of voting age at the
present time. Many of those in uniform are serving overseas, or in parts of the
country distant from their homes. They are unable to return to their States
either to register or to vote. Yet these men and women, who are serving their
country and in many cases risking their lives, deserve above all

others to exercise
the right to vote in this election year. At a time when these young people are
defending our country and its free institutions, the least we at home can do is to
make sure that they are able to enjoy the rights they are being asked to fight
to preserve.10

I respectfully suggest that President Truman's words are as true today as they were in 1952, and that those words are addressed to you, as members of the 107th Congress. With your help, America's sons and daughters who serve in our nation's uniformed services will not have to wait another half century to enjoy a basic civil right that the rest of us take for granted. I have attached a list of specific legislative provisions.

1. *H.R. 7571 and S. 3061: Bills to permit and assist Federal personnel, including members of the Armed Forces, and their families, to exercise their voting franchise,* 82d Cong., 2d Sess. (June 26 and July 1, 1952) (hereinafter "1952 Hearings").
2. 1952 Hearings, pages 35-37. Our association, the Reserve Officers Association of the United States, was associated with Harry S. Truman for most of the 20th Century. In 1922, he was one of our founders, and he was a member from that date until his death in 1973. In 1950, as President, he signed our Congressional charter.
3. 1952 Hearings, page 37.
4. Id.
5. U.S. Const., art. I, section 8, clauses 12 and 13.
6. Pub. L. 76-783, 54 Stat. 885.
7. Cong. Rec., 76th Cong., 3d Sess., page 11699 (Sept. 7, 1940).
8. Vietnam Era Veterans' Readjustment Assistance Act, 88 Stat. 1594.
9. See Peel v. Florida Department of Transportation, 600 F.2d 1070 (5th Cir. 1979); Jennings v. Illinois Office of Education, 97 LRRM 3027 (S.D. Ill. 1978), aff'd, 589 F.2d 935 (7th Cir. 1979). See also Cantwell v. County of San Mateo, 631 F.2d 631 (9th Cir.), cert. denied, 450 U.S. 998 (1980) (striking down a California law that conflicted with Federal law on retirement benefits for Reserve Component members).
10. 1952 Hearings, page 35.

APPENDIX TO TESTIMONY OF SAMUEL F. WRIGHT

CO-CHAIRMAN, UNIFORMED SERVICES VOTING RIGHTS COMMITTEE
RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

The Reserve Officers Association of the United States (ROA) supports the enactment of the proposed "Military Overseas Voter Empowerment Act of 2001" (H.R. 1377). That bill was introduced on April 3, 2001, by Representatives William M. Thornberry (Texas), Randy Cunningham (California), Sam Johnson (Texas), and Ellen Tauscher (California).

We support the entire bill, but I will limit my specific comments to sections 3 ("Guaranty of Residence for Military Personnel"), 6 ("Coverage of Recently Separated Uniformed Services Voters"), and 7 ("Electronic Voting Demonstration Project").

GUARANTEE OF RESIDENCY

As a Navy judge advocate, I have had many occasions to advise military clients about domicile questions, for voting and taxation purposes. Almost a decade ago, I was one of two authors of an article entitled "Domicile of Military Personnel for Voting and Taxation."1 The article was published in the September 1992 issue of The Army Lawyer, an official Army publication for military judge advocates. I have provided the committee staff a copy of that article.

The co-author of the 1992 domicile article was Major (then Captain) Albert Veldhuyzen, USAR. Today, Major Veldhuyzen is a member of ROA, and he serves with me on ROA's Uniformed Services Voting Rights Committee.

In our 1992 article, we explain the legal basis for the advice that military judge advocates have been giving their clients for decades. An individual entering active duty starts out with a "domicile of origin" at his or her "home of record" (the place where he or she lived before entering active duty). "A service member may maintain domicile in his or her home of record throughout his or her military career if he or she never demonstrates an intent to establish a new domicile elsewhere."2

A member of the uniformed services on active duty can establish a new domicile, called a "domicile of choice," while

on active duty. To do so, he or she must simultaneously have a physical presence in the place to which he or she wishes to change and the intent to make that place his or her home. Neither intent alone nor physical presence alone nor intent alone is sufficient to effect a change in the service member's domicile.

Once established, a domicile (either of origin or choice) should be entitled to permanence. Only the creation of a new domicile should effect the destruction or relinquishment of the service member's prior domicile. Because intent alone is not sufficient to create a new domicile, a change in the member's intent about where to live after leaving active duty should not destroy the member's pre-existing domicile. Otherwise, the member is left without a domicile (or the right to vote) anywhere.

The typical career service member (one who serves on full-time active duty for 20 years or more) probably changes his or her mind many times about where to live after leaving active duty. The final decision about relocation is often made based on the availability of post-service civilian employment. The member cannot anticipate years in advance where he or she will find a job upon retirement from active service.

We candidly acknowledge that states without a state income tax (like Florida and Texas) are overrepresented among the active duty force. "Taxation often will be a service member's prime consideration in choosing domicile."3 We see no reason to apologize for this disparity. Comparing tax rates when choosing where to live is hardly limited to members of the uniformed services. Every day, tens of thousands of individuals and businesses consider tax rates when deciding whether or where to relocate.

A dispute about this issue arose in the immediate aftermath of the 1996 general election in Val Verde County, Texas. The outcome of two local elections (for Sheriff and County Commissioner) was decided by exactly 800 military absentee ballots. When those absentee ballots were added to the count, a different pair of candidates won for those two offices.

Immediately after the election, a supporter of the two unsuccessful candidates filed suit in the United States District Court for the Western District of Texas (Judge Fred Biery presiding). The plaintiff sought to have the court discount the 800 military absentee ballots and thereby change the result of

the election.

With the permission of the court, the plaintiff sent a 24-page deposition on written interrogatories to each of the 800 military absentee voters. The deposition amounted to a detailed residency questionnaire. Each recipient of the deposition was required to complete it under oath and return it to the court.

The deposition asked many detailed questions about sleeping arrangements, bank accounts, association memberships, etc. However, the bottom-line question was, "Where do you intend to live after leaving active duty in the Armed Forces?" Judge Biery relied upon the depositions in finding a "likelihood of success on the merits" and enjoining the seating of the two successful candidates.

Judge Biery's discussion of one particular voter (representative of most of the 800) is particularly instructive. The voter is an active duty Air Force officer. At the time of the 1996 general election, and at the time he completed the residency questionnaire, he was stationed in Colorado.

In his written deposition, the voter stated that he will probably return to Texas upon retiring from the Air Force, in 2010 or later. He stated that he will probably retire in Austin or San Antonio, not Val Verde County. Judge Biery stated that this individual's absentee vote in Val Verde County is invalid because he lacks the present intent to return to that specific county.4

If this officer cannot vote in Val Verde County, by absentee ballot, he cannot vote anywhere. He gave up his domicile of origin, at his home of record, when he established a domicile of choice in Val Verde County while stationed there in the early 1990s. He cannot reestablish his domicile of origin without moving back to his original home town. Of course, he cannot do that while serving on active duty in the Air Force. He cannot establish a new domicile of choice in Colorado, his current duty station, because he has already decided (and stated in his deposition) that he does not intend to remain in Colorado after leaving active duty. He cannot establish a new domicile of choice in Austin or San Antonio based solely on an intent to move there many years into the future. It is Val Verde County or nowhere. His situation is typical among career members of the uniformed services.

In each of the last four years (1997-2000), the Senate (but not the House) has passed language to counteract this harmful 1997 precedent. This language has been included in the Senate version of the National Defense Authorization Act, but the House has refused to go along. This year, we need to get such language through both houses of Congress and signed by President Bush. Section 3 of H.R. 1377 contains the language that we need.

COVERAGE OF RECENTLY SEPARATED VOTERS

In the 1996 Presidential election, 64% of the active duty force voted or at least attempted to vote.5 Almost 90% of that 64% voted (or attempted to vote) by absentee ballot.6

So long as he or she is on active duty, a member of the uniformed services is permitted to use the Federal Post Card Application (FPCA) form as a simultaneous temporary voter registration application and absentee ballot request. In most states, using the FPCA to request an absentee ballot does not get the voter onto the permanent voter registration list. Very few members of the uniformed services are registered to vote in the traditional sense.

Upon leaving active duty, by retirement or otherwise, the member must register to vote in the traditional way, as a condition precedent to voting. In most states, the deadline for doing so is about 30 days before the election. If the member leaves active duty shortly before the election, he or she will almost certainly be disenfranchised. He or she is no longer entitled to use the FPCA, because he or she is no longer on active duty. He or she cannot vote in person because he or she is not registered. He or she did not have the opportunity to register because he or she did not leave active duty and move to or return to the jurisdiction until after the voter registration deadline had already passed. Each month, more than 20,000 members of the uniformed services leave active duty.7

Section 6 of H.R. 1377 would enfranchise persons who leave active duty during the last 60 days before an election, as well as their voting-age family members. ROA strongly favors this accommodation for persons who have only very recently completed their active duty service to our country.

ELECTRONIC VOTING DEMONSTRATION PROJECT

As we enter the 21st Century, we (as a nation) still conduct absentee voting essentially as we did in the 19th Century, by "snail mail." As you can appreciate, there are three time-consuming steps in absentee voting. First, the absentee ballot request (FPCA) must travel from the voter to the election official. Second, the unmarked ballot must travel from the election official to the voter. Finally, the marked ballot must travel from the voter to the election official. Each of these steps can take weeks if the mails must be used. If secure electronic means were authorized, each of these steps could be accomplished at the speed of light.

I personally have had a bad experience with the United States Postal Service while trying to vote by absentee ballot. During my most recent extended active duty period (October 1999 through March 2000), I completed an FPCA and mailed it to the Honorable Charlotte Cleary, General Registrar of Arlington County, Virginia. (This pertained to Virginia's Presidential Primary, conducted on February 29, 2000.) Although I used the correct address, as contained in DoD's Voting Assistance Guide, the Postal Service returned the form to me marked "Attempted not known" more than ten days after I mailed it. I have provided the committee staff a copy of my completed FPCA.

Even before the Postal Service returned my form, I sent an e-mail to Charlotte Cleary, inquiring about the whereabouts of my absentee ballot. She responded that she had not received my request. At my request (by e-mail), she faxed me a Virginia absentee ballot request form. I completed it and faxed it back to her. She then mailed me a ballot, which I received, marked, and returned by mail. I believe that my ballot was counted, but I cannot be sure.

We (ROA) believe that the technology already exists which will enable members of the uniformed services and others to cast secure and private electronic absentee ballots. Section 7 of H.R. 1377 would require DoD to conduct an electronic voting demonstration project in the 2002 general election and to report to Congress by June 2003. We hope that the demonstration project will work well and that Congress will then enact an electronic voting entitlement in time for the 2004 Presidential election.

We believe that Congress should mandate electronic voting as

an option for uniformed services voters, including their family members. Congress should not wait on the states to enact such legislation. DoD can administer a single national electronic voting system, but DoD cannot administer 50 different state systems. Only the enactment of Federal legislation will result in a system that will really work.

1. Veldhuyzen & Wright, "Domicile of Military Personnel for Voting and Taxation," The Army Lawyer, September 1992 (hereinafter "domicile article").
2. Domicile article, page 15.
3. Domicile article, page 17.
4. Casarez v. Val Verde County, 957 F. Supp. 847, 860 (W.D. Tex. 1997).
5. Department of Defense (Federal Voting Assistance Program) press release dated June 17, 1997.
6. Id.
7. Mr. John Godley of the Federal Voting Assistance Program, Office of the Secretary of Defense, obtained this figure for me by contacting the central personnel offices of each branch of the service.

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