

## United States Senate

WASHINGTON, DC 20510-4305

July 26, 2010

The Honorable Eric Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Attorney General Holder:

As a co-author of the recently enacted Military and Overseas Voter Empowerment Act ("MOVE Act"), I write to express serious concerns about recent reports on the position and intentions of the Department of Justice (DoJ) regarding specific provisions of this new law.

The MOVE Act was intended to end the historical disenfranchisement of our military service members. Now, as this important law is implemented, these brave citizens need your help and your commitment to protecting their enjoyment of the same civil rights they fight to safeguard for their fellow Americans.

The MOVE Act requires states to mail unmarked absentee ballots to military and overseas voters at least 45 days before an election. This 45-day standard was statutorily mandated based on extensive Congressional evidence that any shorter period of time significantly burdens military and overseas voting rights. The bill allows states to apply for a waiver from the 45-day requirement, but only if at least one of three specific situations arises that renders the state "unable" to comply with that timeframe. The waiver language is very narrow and very clear, just as it was intended to be.

Unfortunately, according to the minutes of the 2010 Winter meeting of the National Association of Secretaries of State ("NASS"), the Deputy Chief of the Voting Section told state election officials that the legislative language regarding waivers is not completely clear, that the provisions of the law are "fairly general," that it is "somewhat of an open question as to what type of information" a state must submit to be granted a waiver, that it is unclear whether waivers, once granted, are valid only for one election or permanently, and that litigation to enforce the provisions of the MOVE Act against the states "is always the last resort." If these are the positions of the DoJ, then they fly in the face of the clear statutory language, undermine the provisions in question, and jeopardize the voting rights of our men and women in uniform.

The MOVE Act's text is clear. A secretary of state may be granted a waiver under 42 U.S.C.S. § 1973ff-1(g) only if the state is "unable" to comply with the law—meaning that the state must literally not be able to comply. If they are able, states must comply with the MOVE Act.

The provisions of the law are specific. There are only three types of “undue hardship” that are an adequate excuse for a state to seek a waiver: (i) The State's primary election date prohibits the State from complying; (ii) The State has suffered a delay in generating ballots due to a legal contest; or (iii) The State Constitution prohibits the State from complying. If none of these situations exists, then the state may not apply for a waiver, and the federal government may not grant one.

There is no question as to what type of information is required in a waiver application. The precise information required is plainly mandated in 42 U.S.C.S. § 1973ff-1(g)(1)(A-D). It is equally clear that a waiver may be sought only “with respect to *an election* for federal office”; meaning that a separate waiver must be sought with respect to each election, and that a blanket or permanent waiver is not contemplated by the statutory text.

The statute does not create any discretion for the Executive Branch to decide whether or not to enforce its legal requirements. To be in compliance, a state must either mail out the unmarked ballots 45 days before an election or else meet the specific and limited requirements for a waiver. If a state is not in compliance with the statute, there is little room for “dialogue” or negotiation, and the Voting Section should take immediate steps to enforce the law and safeguard military and overseas voting rights, including pursuing litigation whenever necessary.

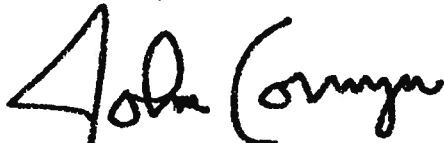
The comments by the DoJ official, as reported in the NASS minutes, appear to ignore Congress’s clear legislative language and could facilitate the disenfranchisement of our men and women in uniform. In order to clarify the law and protect the rights of the men and women who protect all of our rights, I request that you:

- Immediately issue guidance to state elections officials, clarifying that: (a) states must comply with the 45-day deadline for mailing ballots, unless they are granted a waiver due to an inability to comply because of one of the statute’s specific “undue hardships”; (b) to be eligible for a waiver, states must submit a waiver application in strict compliance with the statutory requirements; and (c) that states must seek a waiver with respect to each election for federal office.
- Direct the Voting Section that, if any state is not in compliance with the MOVE Act, the Voting Section shall promptly act to bring that state into compliance, including pursuing litigation whenever necessary.
- Instruct the Voting Section that a state’s “comprehensive plan” to protect voting rights, which is a prerequisite for a state to receive a waiver, should provide military and overseas voters with at least 45 days of roundtrip transit time for the ballot to be received and returned by the voter, so as to provide “sufficient time to vote.”
- Provide me with a state-by-state breakdown regarding compliance with the 45-day requirement for the 2010 general election, including which states are expected to be in full compliance, which states have submitted waiver applications, which states are expected to submit waiver applications, and which states are expected to be in violation of the MOVE Act.

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For far too long in this country, we have failed to adequately protect the right of our troops and their families to participate in our democratic process. The MOVE Act was supposed to end this sad history. The right to participate in democratic elections is fundamental to the American experience. Our men and women in uniform have stepped forward to defend that right, often at great personal cost to them and their loved ones, and they deserve the U.S. Government's very best efforts to promote and protect their voting rights. I look forward to your response committing to enforce the provisions of the MOVE Act and protect those civil rights.

Sincerely,

A handwritten signature in black ink that reads "John Cornyn". The signature is written in a cursive, flowing style.

JOHN CORNYN  
United States Senator

CC:  
Secretary of Defense  
Director, Federal Voting Assistance Program  
Chief, Voting Section, Civil Rights Division, Department of Justice