

**TESTIMONY TO ELECTION ASSISTANCE COMMISSION
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Thank you for allowing me to present testimony before you on the subject of provisional voting, one of the most significant requirements of the Help America Vote Act of 2002. The purpose of provisional voting is to ensure that every eligible citizen who appears at the polls may vote and have that vote counted. Yet in practice, there have been grave concerns about the manner in which provisional voting has been implemented, leading some to refer to provisional ballots as “placebo ballots” or even the “hanging chad” of Election 2004.

In the comments that follow, I first provide a few words of background on provisional voting. I then focus on three aspects of its implementation that proved especially problematic during Election 2004: (1) whether voters who do not appear at the correct precinct, due to their own mistake or administrative errors, should be allowed to cast a provisional ballot and have their ballots counted, (2) whether voters who have requested an absentee ballot, but have not received or cast that ballot, should be permitted to vote provisionally, (3) what standards and procedures should govern the process of determining whether provisional ballots are counted. Each of these issues generated controversy and litigation during the 2004 election season, and it is imperative that they be addressed before the next round of federal elections. Because all three came to the fore in Ohio’s hotly contested presidential race, I use this state’s experience for illustrative purposes.

Provisional Voting and Why It's Important

A provisional ballot is a conditional ballot that enables eligible voters to participate in an election when, due to an administrative error or for some other reason, their names are not on the voting rolls when they appear at the polls. During the 2000 election, registered voters were turned away from the polls, some because they were erroneously taken off the voter rolls. The U.S.

Commission on Civil Rights found that "countless unknown eligible voters" were wrongly denied the opportunity to vote or purged from registration lists, due to errors on the part of state and local election officials in Florida. The Commission also found that such practices had a disparate racial impact:

Florida's overzealous efforts to purge voters from the rolls, conducted under the guise of an anti-fraud campaign, resulted in the inexcusable and patently unjust removal of disproportionate numbers of African American voters from Florida's voter registration rolls for the November 2000 election.

Provisional voting is one way of dealing with the problems with voter registration lists. While voting rolls have received less public attention than voting equipment — such as the problems that occurred with the now-infamous "hanging chad" punch card — registration problems are probably a more significant source of lost votes. The 2001 report of the Caltech/MIT Voting Technology Project estimated that, while 1.5 million votes were lost due to faulty voting equipment, approximately *3 million* votes were lost as the result of problems in voter registration systems in 2000.

Provisional voting was one of the central recommendations of the bipartisan National Commission on Federal Election Reform, commonly known as the "Carter-Ford Commission." That commission's report observed that one of the most "infuriating" barriers to democratic participation was the fact that many eligible voters who show up to vote were turned away, because their names could not be found on registration lists. Sometimes this was due to an oversight on the part of the voter — for example a failure to re-register after moving — but in many cases it was due to administrative errors on the part of poll workers or election administrators. One of the key problems noted by the Carter-Ford Commission is the mishandling of registration applications

received by state motor vehicle or social services offices pursuant to the National Voter Registration Act (“NVRA”). Citizens who register to vote through these agencies, which in effect serve as deputy registrars, will sometimes appear at the polls only to find their missing from the list.

The commission stated the goal of provisional voting as follows: “No American qualified to vote anywhere in her or his state should be turned away from a polling place in that state.” The Carter-Ford Commission pointed out that nineteen states have adopted provisional voting as a way of meeting the NVRA’s “fail-safe” voting requirement, for citizens who have moved or who are believed to have moved by election officials. It noted with approval the experience of two state, Washington and California, which had implemented provisional voting as a way of satisfying the NVRA. The commission expressly supported “county-wide provisional voting procedures” and further recommended that, once statewide registration databases were in place, voters be allowed to cast provisional ballots anywhere in the state.

That is not to say that voters could appear at any precinct they desired with impunity. If a voter turned up in the wrong precinct, election officials would not be required to give them a ballot tailored to their home precinct. Instead, their votes would only be counted for those races in which they were eligible to vote – possibly only the presidential and U.S. Senate races. In effect, then, the voter who appeared at the wrong precinct would only be permitted to cast a “limited ballot,” under the commission’s recommendations.

In the congressional debate over election reform, the need to implement provisional voting was one of the relatively few items on which there was broad bipartisan agreement. Section 302 of HAVA requires that people who declare that they are registered voters in a jurisdiction, but whose names do not appear on the list of eligible voters, be permitted to cast a provisional ballot. These votes must then be counted, if the voter is later determined eligible. But as simple as provisional

voting might seem to be on paper, it has proven to be an enormous implementation challenge in practice. With this background in mind, I now turn to three provisional voting issues that generated confusion and controversy in 2004.

The “Wrong Precinct” Issue

The issue that provoked the most controversy in Election 2004 is whether provisional ballots may be cast or counted if the voter appears in the wrong precinct. In at least seven states (Ohio, Michigan, Missouri, Colorado, Florida, North Carolina, and Arizona), this issue has resulted in litigation.

While the details of the controversies differed somewhat from state to state, Ohio’s experience provides an example of the opposing interpretations of HAVA that generated this dispute. Secretary of State Ken Blackwell issued a directive on September 16, 2004, providing that voters would not be issued a provisional ballot, unless the pollworkers were able to confirm that the voter was eligible to vote at the precinct at which he or she appeared. Civil rights advocates were concerned that this order would result in voters being turned away from the polls or votes being discarded. In Ohio, both the League of Women Voters and the Sandusky County Democratic Party filed suit on the “wrong precinct” issue.

U.S. District Judge James Carr issued a preliminary injunction against Blackwell’s directive, concluding that HAVA’s provisional voting standards were more expansive than those applicable under pre-existing state law. As an initial matter, he noted, provisional voting was not limited to those who moved but applied to anyone who appeared at the polling place and found his or her name not on the registration list. On the “wrong precinct” issue, Judge Carr relied on the provision of HAVA requiring that voters be allowed to cast a provisional ballot if they affirm that they are registered “in the jurisdiction in which the individual desires to vote.”

The dispute centered on whether the term “jurisdiction” referred to the *county* or the *precinct* within which the individual sought to vote. If jurisdiction meant county, as plaintiffs contended, then voters appearing at the wrong precinct within their home precinct should be allowed to cast a provisional vote. If on the other hand jurisdiction meant precinct, then election officials would not be required to allow a provisional ballot to be cast by voters appearing at the wrong precinct. Judge Carr sided with plaintiffs, concluding that the term “jurisdiction” should be interpreted in the same way as the term “registrar’s jurisdiction” as used in the NVRA – that is, to mean the entity responsible for maintaining the voter registration rolls. Based upon this reading of HAVA, Judge Carr concluded that voters appearing at the wrong precinct should be allowed to cast provisional ballots and have their votes counted, at least for those federal offices for which they were eligible to vote.

The Sixth Circuit reversed in part and affirmed it part. It agreed with Judge Carr with respect to that portion of Blackwell’s directive requiring pollworkers to determine “on the spot” whether a voter resided within the precinct and empowering them to deny wrong-precinct voters a provisional ballot altogether. But the Sixth Circuit disagreed with Judge Carr’s conclusion on the meaning of the term “jurisdiction.” The Sixth Circuit further concluded that provisional ballots need not be counted in any election under Ohio law, if cast in the wrong precinct. The upshot of the Sixth Circuit’s ruling, then, was that voters must be allowed to cast a provisional ballot if they sign an affirmation that they reside in the precinct at which they appear to vote; the requirement that pollworkers “confirm” eligibility at the polling place was thus eliminated. Pursuant to the Secretary of State’s interpretation of Ohio law, however, those ballots were not to be counted for any office unless cast in the proper precinct.

Regardless of one’s view as to the merits of the district court’s or the appellate court’s

interpretation of HAVA, it is very clear that each states need to provide clear guidance to local election officials as to whether provisional ballots will be counted if cast in the wrong precinct. In my opinion, it is preferable that this guidance take the form of legislation implementing HAVA. To again use Ohio as an example, the legislature failed to enact legislation clarifying how the state would be implementing HAVA's new provisional voting requirements, which went well beyond the very limited provisional voting that the state previously had in place. The consequence was that the Secretary of State promulgated a rule that many voters, correctly or not, perceived to have been motivated by partisan considerations. It would have been far better for the Ohio legislature to have enacted bipartisan legislation on this subject in advance, than to allow such critical decisions to be made through an administrative directive within weeks of the election.

Absentee and Provisional Voting

A second area that caused problems during Election 2004 was whether voters who had requested absentee ballots, but had not voted them, should be allowed to appear at the polling place and vote provisionally. Here again, Ohio's experience can be used to illustrate the problem.

On the morning of November 2, 2004, a Toledo voter brought a class action lawsuit against Secretary of State Blackwell and the Lucas County Board of Election (*White v. Blackwell*). The complaint alleged that the plaintiff had requested an absentee ballot over a month before the election but never received it. At 3:01 pm on Election Day, U.S. District Judge David Katz issued a temporary restraining order requiring that provisional ballots be issued to voters in Ms. White's position. In support of this order, the court cited HAVA's requirement that any voter affirming his or her eligibility to vote in the jurisdiction be allowed to cast a provisional ballot. The court directed the Lucas County Board of Elections to inform all precincts of this requirement, and for Secretary of State Blackwell to apprise all counties of it. Given the late hour at which the order was issued,

it is unknown how many polling places actually received this notice, and how many voters were denied a provisional ballot before the temporary restraining order issued.

Judge Katz's interpretation of HAVA is clearly correct. HAVA provides that an individual "shall be" allowed to cast a provisional ballot "if the name of the individual does not appear on the official list of eligible voters for the polling place or *an election official asserts that an individual is not eligible to vote.*" The italicized language is broad enough to include situations in which a poll worker claims that an individual is not eligible because he or she has already requested an absentee ballot. Such an interpretation also serves HAVA's core purpose, by allowing people to vote provisionally when – due to an administrative error or post office delays – absentee ballots are not delivered to the voter in time for the election. Obviously, if the voter attempts to vote by both absentee and provisional ballot, then the provisional ballot should not be counted, but this may be easily ascertained after election day.

The critical point is the need to provide guidance to local election officials in advance of the elections, so that voters are not wrongly denied a provisional ballot. The litigation that occurred in Ohio could easily have been avoided if such guidance had been provided. In the future, local election officials should be instructed that provisional ballots are to be issued to voters who claim to have requested absentee ballots but not received them.

Standards and Procedures for Counting

A final area of controversy concerns the process according to which election officials determine whether provisional ballots should be counted. HAVA defers to state law, providing that a provisional ballot shall be counted if state and local election officials "determine that the individual is eligible under State law to vote."

Absent clear guidance from the state, it is possible that counties will employ different

standards for determining whether to count provisional ballots cast by voters who are subject to HAVA's identification requirement, but do not present it at the polling place. In addition, different counties may follow different procedures for determining whether provisional voters were really registered. Some counties may conduct a thorough review of all registration forms, to determine whether a form was received but failed to make its way onto registration lists due to administrative error. Others may simply check provisional ballots against existing registration lists, and refuse to count them if the provisional voter's name does not show up on the list. Still others may take the voters signed affirmation under oath that he was registered as proof that the person was in fact registered and eligible, absent evidence to the contrary. Finally, it is possible that some counties within a state will count provisional ballots, where there is no signature from a witnessing official, while other counties will refuse to do so.

The application of different standards for counting provisional ballots from county to county may give rise to an equal protection claim under *Bush v. Gore*. In that case, the U.S. Supreme Court held that Florida's process for conducting manual recounts violated the Equal Protection Clause of the U.S. Constitution, due to the absence of "specific rules designed to ensure uniform treatment." Following this line of reasoning, it may be argued that a state's failure to have specific rules to ensure the uniform treatment of provisional votes within a state violates equal protection. In fact, an Ohio voter has brought just such a claim, which is currently pending in the U.S. District Court for the Southern District of Ohio (*Schering v. Blackwell*).

Where there are wide discrepancies in the percentage of provisional ballots counted, that would tend to lend support to such an equal protection claim, by suggesting that there is an unconstitutional lack of uniformity among counties. Such discrepancies did in fact occur here in Ohio, where 77% of provisional ballots were counted overall, but the percentage of residual votes

varied dramatically among counties, from a low of 60.5% to a high of 100%.

The bottom line is that it is absolutely critical that states provide clear guidance to local election officials, as to both the standards and procedures for counting provisional ballots. Whenever possible, this guidance should come in the form of legislation rather than administrative directive. Particularly when the legislation is the product of bipartisan action, it will enhance the impression that the rules prescribed were arrived at through a fair process, and diminish the perception that election officials are adopting rules on an ad hoc basis to promote their preferred candidates or issues.

Conclusion

In a perfect world, with perfectly accurate voter registration lists and perfectly knowledgeable voters, provisional ballots would not be necessary. We do not, however, live in that perfect world nor is such a world likely to come any time soon. In the real world, provisional voting is essential to fulfillment of the basic promise that every eligible voter should be allowed to vote with assurance that his or her vote will count. In fact, provisional balloting is likely to become *more* important in the near term, as states that have not yet done so implement their HAVA-required statewide registration databases. While it may be hoped these databases will improve the accuracy of registration lists, any major change to the ecology of the election system inevitably creates problems and glitches when first implemented. Some voters will appear at what they believe to be their proper polling place, only to find their names not on the rolls.

Thus, provisional voting is certain to remain vital to the right to vote, and it is essential that steps be taken to make sure that the process works better in 2006 and 2008 than it did in 2004. In order to ensure that provisional voting is administered fairly, states must provide clear guidance to the counties, preferably in the form of legislation. This commission may play a constructive role

in encouraging states to enact legislation, to make sure that the provisional voting requirement is administered fairly and equitably, in accordance with Congress' intent when it enacted HAVA, so that every eligible citizen's vote is counted.