



CUYAHOGA COUNTY BOARD OF ELECTIONS

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ONE VOTE MAKES A DIFFERENCE

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CUYAHOGA COUNTY BOARD OF ELECTIONS**

**UNITED STATES ELECTION ASSISTANCE COMMISSION
PROVISIONAL VOTING TESTIMONY**

OHIO STATE UNIVERSITY - MORITZ SCHOOL OF LAW

February 23, 2005

INTRODUCTION

Madame Chair Hillman, Commissioner DeGregorio, Commissioner Martinez, and Commissioner Soaries welcome to the Buckeye State. Thank you for the opportunity to participate in the first on-the-road public hearing since the 2004 Presidential Election and allowing me to be part of a distinguished panel to discuss the topic and importance of provisional voting, specifically from a local election official's vantage point.

Having conducted elections in another state, I have realized and learned that Ohio's local election officials have a long standing tradition of conducting well-run, well-planned and professional elections. This is true of the 2004 Presidential Election.

Provisional voting for Ohio election officials is not new. In fact, Ohio had instituted a form of provisional voting in 1992, which was known as "237's", named after the title of the state bill. In this form of provisional voting, unlisted voters were directed to the Board of Elections office to cast their ballot. In 1995, the State implemented the provisional balloting laws as we see today.

In 2004 many election jurisdictions across the nation were implementing provisional voting laws for the first time. Ohio was ahead of the learning curve in this aspect. So why did states who had pre-HAVA provisional voting laws, like Ohio, have such a difficult time handling provisional ballots in the 2004 Presidential Election? To answer this question we need to explore the chain of events that transpired prior to the election.

As the Director of Cuyahoga County many of our processes, including the absentee ballot process, the registration process and the provisional voting process were again tested during the 2004 Election. Although the various election processes had been tested from previous elections prior to 2004, the 2004 Election, where Ohio was considered "The Key Battleground State", presented a whole new set of scrutiny and challenges that had

never been seen before which came from citizen activists, political parties, interested organizations and election officials. This was true of the provisional voting process.

THE CUYAHOGA COUNTY EXPERIENCE

To give you a brief background, Cuyahoga County is the 15th largest election jurisdiction in the country with over 1,011,000 registered voters, Cleveland being the city more commonly known throughout the country. We have 1,436 voting precincts and 584 polling locations.

In Cuyahoga County 25,309 provisional ballots were cast of which 16,757 were deemed valid and 8,552 were considered invalid. A 66.3% acceptance rate. In comparison to the 2000 Presidential Election the number of voters going to the polls in 2004 increased by nearly 100,000 voters, yet the percentage of individuals having to cast a provisional ballot proportionately decreased.

Before discussing the contributing factors that led to the decrease in the percentage of voters having to cast a provisional ballot, there were a number of factors that could easily have contributed to its increase.

Coming into the 2004 Election, Cuyahoga County knew the November Election was the first presidential election since reapportionment. We knew that there would be a massive effort to register people to vote from local and national voter registration organizations. We also knew and anticipated that this would be the largest turnout the county would realize. Finally, we knew that there would be external variables that would impact the way the Board of Elections would handle the election.

All four points that I listed were factors in which we took proactive and preemptive steps to decrease the number of provisional ballots that would be issued and thus increasing the number of regular ballots that were offered. We sent an Official Voter Information Guide, which listed each voter's specific voting location and voting precinct, to all active registered voters. We developed, a year in advance, an interactive polling location finder so voters would go to the correct voting location. We worked with local colleges, went to senior citizen centers, and had a public forum called the "Roadmap to Election 2004" to address election issues that may arise, including provisional ballots.

Although we had anticipated as many external factors as possible, we were surprised by a number of directives that were issued. This ultimately created confusion throughout the State on how provisional ballots were to be issued at the voting locations.

On September 16, 2004 all Ohio Boards of Elections received Secretary of State Directive 2004-33. Believing that the Directive was in the normal course of conducting the election, it became apparent that one paragraph seemed contrary to the way provisional ballots were issued in the past. This paragraph read:

Only after the precinct pollworkers have confirmed that the person is eligible to vote in that precinct shall the pollworkers issue a provisional ballot to that person. Under no circumstances shall precinct pollworkers issue a

provisional ballot to a person whose address is not located in the precinct, or portion of the precinct, in which the person desires to vote. However, no provisional ballot will be disallowed because of pollworker error in a split precinct.

This generated a number of questions and concerns from interested organizations, political parties, citizen activists and local election officials, including Cuyahoga County.

Cuyahoga County believed that the Directive was contrary to the way provisional ballots were issued in the past. We believed in the same practice of issuing provisional ballots as was implemented in previous elections including the 2004 March Presidential Primary Election. So it came as a surprise that issuing provisional ballots had changed and pollworkers were directed not to issue any provisional ballot even though there may have been administrative oversight or that the pollworkers inadvertently did not find the voter's name.

In short, this was ultimately decided in Third District Court which was then reversed by the Appellate Court. In summary, the Appellate Court ruled and gave an opinion which was in line with what the Cuyahoga County Board of Elections had originally believed - voters who believed and insisted that they live within the precinct should be offered a provisional ballot. However, a new Home Balloting Affirmation Statement was now in place, which affected the administrative handling of the provisional ballot and created additional and unnecessary confusion at the polls. In the end, pollworkers were instructed that there were three categories of voting a provisional ballot and one of three affirmations that was to be filled out. Confusion.

LOST OPPORTUNITY

State and local election officials across the nation had the opportunity to address potential issues relative to the provisional voting laws. This was an opportunity for states that did not have existing provisional voting laws to enact such laws. Other states, like Ohio, had the opportunity to review and set out a reasonable course of action that would cure and unify the differences between state law and the Help America Vote Act.

The provisional balloting law in Ohio, although tested and mature, in comparison to other states, was equally untested and crude in light of the passage of the Help America Vote Act. Ohio's provisional voting laws did not parallel the requirements of the Help America Vote Act. Since 2002, states, like Ohio, should have reviewed and conformed their provisional balloting laws to meet HAVA's requirements and pass state legislation. This did not occur and it was our lost opportunity to implement provisional ballots more effectively. Instead we were engrossed with the "big ticket" items – creating a statewide voter registration database and converting the state to a different voting system. A grand picture was painted, however, like any local election official knows in conducting elections, "the devil is in the details" and Ohio missed those details.

While there was an enormous amount of time and energy spent on the statewide voter registration database and voting system conversion, an equal amount of time and energy was not focused on the other important aspects of HAVA. No one was leading the

charge on how HAVA would impact Ohio law and vice-versa - case in point the issuance of provisional ballots in the state. This was simply not done and as a result, a number of decisions and mandates were made in an untimely fashion.

CLOSING REMARKS

Without taking anything away from a good election, the 2004 Ohio provisional voting experience was not the model for election agencies across the nation to follow. There were too many issues that were not resolved within statute and left to interpretation.

Let me provide several practical solutions and issues that all states should address when considering their respective provisional voting laws and items that the Election Assistance Commission should contemplate before issuing recommendations.

First, there should be a comparison between state law and the Help America Vote Act. Do they parallel one another?

Second, there must be clear and concise guidelines on issuing and verifying provisional ballots.

Third, there is a concern of the uniformity between federal and non-federal election years and how to handle provisional ballots.

Fourth, there must be consistent and continuous open communication and dialogue between local and state elections officials, so that we curb the voting issues that potentially hurt our citizens on election day.

Finally, we need to memorialize what is a valid provisional ballot. Similar to the Help America Vote Act's provision on creating uniform standards for what constitutes a vote, states should memorialize what constitutes a valid or invalid provisional ballot.

Although we did not anticipate the number of provisional ballot issues for the election, to Ohio's credit, legislation is currently being proposed to address these issues.