

Are HAVA's Provisional Ballots Working?

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I. Introduction

Provisional balloting was one of the centerpieces of the election reform package Congress passed in response to the widespread problems reported in the 2000 presidential election.¹ In 2000, millions of eligible voters were turned away from the polls because administrative errors caused their names to be omitted from the registration rolls.² The Caltech/MIT Voting Technology Project estimated that 1.5 million rejected votes of eligible voters could have been saved by use of provisional ballots.³ The National Commission on Election Reform, chaired by former Presidents Gerald Ford and Jimmy Carter, also recommended provisional ballots to advance the goal that “[n]o American qualified to vote anywhere in her or his state should be turned away from a polling place in that state.”⁴ Congress agreed, and required provisional balloting as part of the Help America Vote Act of 2002 (“HAVA”). On the night of the final vote in the House on HAVA, Representative Ney, the House sponsor of the bill, explained:

When this legislation goes into effect, the voting citizens in this country will have the right to a provisional ballot, so no voter will be turned away from a polling place, no voter will be disenfranchised, just because their name does not appear on a registration list.⁵

Although provisional ballots had previously been used in some form in about half the states,⁶ before HAVA, at least eighteen states had no provisional voting procedures, nor any safeguard whatsoever for voters whose names were left off the rolls.⁷ And a number of states that had provisional ballots did not offer them to *all* prospective voters not on the rolls.

The November 2004 federal election was the first election in which all states were required by federal law to allow every person who showed up at the polls and claimed to be

¹ Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. § 15482.

² See, e.g., National Commission on Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 34 (2001); Caltech/MIT Voting Technology Project, *Voting: What Is, Could Be*, at 30 (2001).

³ *Id.* at 30.

⁴ *Id.* at 35.

⁵ 148 Cong. Rec. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

⁶ As electionline.org has documented, before HAVA, seventeen (17) states allowed voters to cast provisional ballots similar to HAVA's; an additional seven (7) allowed for election day registration; five (5) allowed for affidavit ballots which would count as regular ballots; four (4) provided for limited provisional ballots in certain circumstances; and North Dakota had no need for provisional ballots because it does not require registration to vote. Electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006*, at 32-34 (Feb. 2006).

⁷ *Id.*

eligible and registered to vote to cast a provisional ballot. HAVA requires provisional ballots not only for voters whose names cannot be found on the “official list of eligible voters for a polling place,” but also for those whom “an election official asserts,” for any reason, are “not eligible to vote.”⁸ Voters who cannot meet HAVA’s identification requirements for first-time voters who register by mail are also entitled to cast provisional ballots.⁹

Provisional ballots thus provide a backup voting mechanism for any voter whose eligibility cannot be determined at the polling place—whether because her name is not on the list, her eligibility is challenged pursuant to state law, poll workers believe she already voted or is in the wrong polling place, or she cannot provide the ID required by federal or state law. After the polls close, election officials can take the time to research a voter’s eligibility—using the information on the provisional ballot envelope, voter registration records, and any other available sources—and to determine whether her vote will count. In theory, this “second look” should save the votes of most eligible voters who otherwise would be erroneously deprived of the franchise.

II. Are Provisional Ballots Working?

Are HAVA’s provisional ballot provisions working? In terms of whether provisional ballots served as a real safeguard for many voters who would previously have been turned away from the polls, the answer is yes.

According to the Election Assistance Commission’s 2004 survey of the states, approximately 1.9 million voters nationwide cast provisional ballots in the 2004 election. Of those, approximately 1.2 million—or 64.5%—were counted.¹⁰ A significant portion of those 1.2 million voters would have been turned away from the polls were there no provisional balloting mechanism. So, in the most basic sense, provisional ballots worked as what the Carter-Baker Commission deemed a “crucial safety net”¹¹ for hundreds of thousands of eligible voters.

But that is not the whole story. There are a number of ways in which provisional balloting failed in 2004. For one thing, more than half a million provisional ballots were *not* counted, even though many of those were cast by eligible voters. Moreover, the national totals obscure significant differences among (and within) the states. The percentage of provisional ballots cast and counted varied widely across the country. According to the EAC survey, the incidence of provisional ballots cast as a percentage of voter registrations ranged from 4.93% in Alaska to 0.3% in Vermont and Wyoming. Washington State reported that provisional ballots made up 11.29% of the votes cast at polling places, compared to the low of 0.5% in Vermont and Wyoming. The percent counted ranged from 100% in Maine and 96.6% in Alaska to 0% in

⁸ 42 U.S.C. § 15482(a).

⁹ 42 U.S.C. § 15483(b).

¹⁰ Election Data Services, *Election Day Survey*, conducted for the U.S. Election Assistance Commission, at 6-5 (Sept. 27 2005).

¹¹ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, at 16 (Sept. 2005); People for the American Way et al., *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, at 8 (December 2004).

Idaho and 6.3% in Delaware. Although the total percentage of provisional ballots counted was 64.5%, the state average was 47.9%.¹²

In many jurisdictions, provisional ballots created significant confusion and problems at the polls and afterward, and may have led to the disenfranchisement of many voters in 2004. The problems states experienced with provisional ballots can be divided into problems of administration and problems of rules or conception.

III. Administrative Failures

A. Problems Administering Provisional Ballots

In part because of their novelty, in many states, provisional ballots generated confusion before, during, and after the 2004 election. A number of states did not plan for provisional balloting until shortly before the election, and the rules kept changing up until the last minute. Not surprisingly, this led to widespread problems at the polls and afterward.

A report of the Election Protection Coalition found that provisional ballot problems were among the top five complaints registered on its 1-866-Our-Vote hotline.¹³ Most of the reported incidents consisted of complaints that provisional ballots were not available at polling sites, that poll workers did not offer or refused to allow voters to cast provisional ballots, and that poll workers were confused about provisional balloting procedures and rules.¹⁴

Problems in administering provisional ballots may have disenfranchised many eligible voters. For example, where provisional ballots were not available or not offered, eligible voters were turned away from the polls as before HAVA. And provisional ballots also created problems that did not exist before. For example, reports from poll sites across the country suggest that many voters who should have been entitled to cast regular ballots were given provisional ballots—which had a lower chance of being counted—instead. In addition, in part because of cumbersome procedures, provisional ballots led to delays at many polling places; the resulting long lines peeled off a not insubstantial number of voters.

Inadequate poll worker training was among biggest causes of provisional balloting failures. Many poll workers failed to inform voters of their right to cast a provisional ballot; many gave voters incorrect ballots; and many misinformed voters about how to use provisional ballots or whether and under what circumstances their provisional ballots would count.¹⁵ The

¹² *Election Day Survey*, at 6-9.

¹³ *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, at 8.

¹⁴ *Id.* As the report found:

There was widespread confusion over the proper use of provisional ballots, and widely different regulations from state to state—even from one polling place to the next—as to the use and ultimate recording of these ballots. Many voters reported that poll workers were either refusing to give out provisional ballots or simply unaware of the federal requirements to distribute provisional ballots. Notably, many voters who complained of not being listed on the voter registration list subsequently complained either about not being offered provisional ballots or of not knowing whether they would ultimately be counted. *Id.*

¹⁵ See, e.g., Demos, *Continuing Failures in “Fail-Safe” Voting*, at 3 (Dec. 2005), available at http://www.demos-usa.org/pubs/continuing_failures_small.pdf.

problem of inadequate poll worker training is not unique to the provisional ballot context, but it is perhaps most salient in that context given the relatively complicated rules and procedures associated with provisional ballots. Unfortunately, the improvement of poll worker performance is made more difficult by the incentive structure created by provisional ballots. Specifically, where poll workers have the option to give voters provisional ballots, their incentives to try to resolve problems at the polls are reduced. It is impossible to gauge the impact of this side effect, but efforts should be made to minimize it.

The good news is that, unlike the more controversial rules-based problems, most of these administrative problems can be resolved through improvements in planning, administration, and most importantly, poll worker training. There is no reason why election administrators should not be able to prevent there from being insufficient supplies of provisional and regular ballots or misinformed poll workers.

B. Provisional Ballots as Indicators of Other Election Administration Problems

The even better news is that provisional ballots can help states identify and rectify other election administration problems that might otherwise go unnoticed. For example, before provisional ballots, states had no convenient way of determining how many voters did not receive adequate notice of the location of their polling places or where the notification problems occurred. Now, states have records—in the form of provisional ballot envelopes—of each vote cast in the wrong polling place, and hence a better sense of where better procedures are needed. Indeed, as discussed further below, the 2004 provisional balloting records revealed widespread problems of voters not being sufficiently informed of the location of their polling places.

Provisional ballot records can also help states identify which election administration practices are least likely to disenfranchise eligible voters. For example, reports of provisional voting in 2004 confirmed the benefits of better voter registration lists in the form of statewide voter registration databases.

The existence of statewide databases generally correlated with a lower incidence of provisional ballots: according to the EAC survey, voters were less than half as likely to cast provisional ballots in states with databases (1.21% of ballots cast in polling places) than in those without (2.86%).¹⁶ Although correlation does not imply causation, it is reasonable to assume that statewide databases may have significantly reduced the incidence of provisional ballots. The surveyors concluded that the data “suggest[s] that better administration of voter registration rolls might be associated with fewer instances where voters would be required to cast a provisional ballot due to a problem with their voter registration.”¹⁷ Thus, as the Carter-Baker Commission noted, if statewide voter registration lists are improved, “the need for provisional ballots will be reduced.”¹⁸

On the other hand, statewide databases did not affect the percentage of provisional ballots counted in 2004: on average, states with databases counted the same percentage of provisional

¹⁶ *Election Day Survey*, at 6-12.

¹⁷ *Id.* at 6-6.

¹⁸ Commission on Federal Election Reform, at 16.

ballots as those without.¹⁹ That makes sense: while better lists may reduce errors that create the need for provisional ballots, it is the quality of the counting rules and procedures, not the quality of the lists, that determine whether the ballots of eligible voters left off the lists will be counted.

IV. Rules Failures

The more difficult problems states experienced with provisional ballots are those resulting from state rules and policies concerning the casting, and especially the counting, of provisional ballots.

A. Inconsistent and Unclear Rules

Most notable was the lack of clear and uniform standards for casting or counting provisional ballots. As many election observers reported, provisional balloting practices varied dramatically from state to state,²⁰ from county to county within each state,²¹ and even from precinct to precinct.²² A number of states had no clearly articulated rules for provisional ballots; others announced partial rules only weeks, or days, before the election; and most left at least some aspects of the provisional balloting process to the discretion of county or local officials.

All commentators agree that states should adopt and apply uniform rules and procedures for handling provisional ballots. Indeed, this was the top provisional balloting recommendation of the Carter-Baker Commission,²³ as well as of the election administrators who formed the National Task on Election Reform²⁴ and of the Century Foundation Working Group on State Implementation of Election Reform.²⁵

Despite the apparent unanimity of opinion on this, many states still do not have clear, transparent, uniform rules for all aspects of provisional balloting—especially for which provisional ballots will count. The resulting differing treatment of voters is unfair, fosters the impression of unfairness, creates opportunities for partisanship in tallying ballots, contributes to poll worker and voter confusion, and invites repeated litigation over the outcomes of elections. For voters to have confidence in the provisional balloting process and the fairness of elections, states must clearly and publicly articulate uniform provisional ballot rules—including rules for which provisional ballots will count—well in advance of any election.

¹⁹ *Election Day Survey*, at 6-12.

²⁰ See, e.g., electionline.org, *Solution or Problem, Provisional Ballots in 2004* (Mar. 2005).

²¹ For example, the Chicago Tribune reported large disparities in the counting of provisional ballots in Illinois, with 61% counted in Chicago compared to only 26% in DuPage County. The difference reflected differing rules for when provisional ballots would count; for example, some counties decided to count those cast out of precinct while others did not. New York similarly had varying rules for counting provisional ballots; for example, Westchester County did not count provisional ballots cast in the wrong polling place while Nassau County did.

²² See, e.g., *Solution or Problem? Provisional Ballots in 2004*, at 1-2.

²³ Commission on Federal Election Reform, at 17, Recommendation 2.3.1.

²⁴ National Task Force on Election Reform, *Election 2004: Review and Recommendations by the Nation's Election Administrators*, at 6, Recommendation 13 (May 2005).

²⁵ Century Foundation Working Group on State Implementation of Election Reform, *Balancing Access and Integrity*, at 31, 33 (2005).

B. Not a True Fail-Safe for All Eligible Voters

What should those rules be? Under an optimally-functioning provisional ballot system, all citizens who are eligible to vote and who submitted timely voter registration forms but whose names do not appear on a polling place's voter list should have their provisional ballots counted. Since provisional ballots are intended primarily to compensate for errors in election administration, the rules for counting provisional ballots should ensure that voters are held harmless for those errors. Unfortunately, the counting rules adopted in many jurisdictions undermine this "fail-safe" function for eligible voters.

1. Replicating Administrative Errors in the Counting Process

First, provisional ballots cannot serve their intended purposes if states replicate in their counting processes the administrative errors that created the need for provisional ballots. For example, it is not sufficient for a state to rely solely on the same list of registered voters used at its polling places to determine whether a provisional voter was registered and whether her ballot will count; such counting practices merely carry forward the same administrative errors that left the provisional voter off the rolls in the first place. And yet that is what many jurisdictions do. The EAC survey reported that the most commonly cited reason that provisional ballots were not counted in 2004 was that the voters were not registered.²⁶

A better practice would be for states to use an independent source to determine whether a provisional voter registered and is entitled to have her ballot counted. Many states rely on a voter's affirmation for this purpose. Other states examine original paper records of voter registration forms. Either method is preferable to one which offers little chance of curing the administrative defect that caused the voter to cast a provisional ballot.

2. Provisional Ballots Cast in the Wrong Precinct

The most controversial and contentious aspect of provisional voting has been whether or not to count provisional ballots cast outside a voter's assigned precinct. This issue generated substantial litigation before the 2004 elections,²⁷ and it was the greatest source of inconsistent rules across and within states. Electionline.org reported that 27 states did not count provisional ballots cast in the wrong precinct, while 17 states counted those ballots if they were cast in the correct jurisdiction (usually county).²⁸ And there were differences within states too. In New York, for example, some counties counted provisional ballots cast in the wrong polling place; others counted only those cast in the right polling place, including those cast in the wrong precinct within a polling place; and still others counted only those cast in the right precinct.²⁹

²⁶ *Election Day Survey*, at 6-5. Although there is no data on how many of these voters in fact registered, anecdotal evidence suggests that a significant number of them did.

²⁷ For a summary of litigation concerning provisional ballots in 2004, see http://www.brennancenter.org/programs/downloads/HAVA/provisional_ballot_litigation_list_v6.pdf.

²⁸ Electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006*, at 32, 35.

²⁹ In *Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (2005), the state's highest court held, in a contest after the election, that state law requires election officials to count provisional ballots cast in the wrong precinct but in the correct polling place and does not require the counting of provisional ballots cast in the wrong polling place. Nonetheless, counties are still permitted to count the latter category of provisional ballots.

The choice of whether or not to count provisional ballots cast in the wrong precinct had a meaningful impact on voters. States reported that the second most common reason they rejected provisional ballots in 2004 was that the ballots were cast in the wrong precinct.³⁰ Those jurisdictions that accepted provisional ballots cast in the wrong precinct counted a much higher percentage of their provisional ballots – 71.7%, compared to 52.5% in jurisdictions that did not.³¹

There are two primary reasons to count a provisional ballot cast in the wrong precinct for all races for which a voter is eligible to vote. The first is that there is no reason good enough to refuse to count valid votes cast by eligible voters. Precinct requirements are merely rules of administrative convenience, while the right of a citizen to cast a vote that will be counted is fundamental.

The second reason stems from the main purpose of provisional ballots—to prevent eligible voters from being disenfranchised because of administrative mistakes. Unfortunately, all too often, election officials fail to inform voters of the location of their polling places, and notices get lost in the mail or are late. One voter hotline, 1-866-myvote1, reported that it received one hundred thousand phone calls from voters trying to determine where they should vote.³² The *New York Post* reported that the New York City Board of Elections responded to voter inquiries about where to vote five months *after* the 2004 election.³³ Voters who do not receive notice may find it difficult or impossible to locate their polling places, no matter how hard they try: board of elections information lines get overloaded on Election Day; polling place locations change, sometimes at the last minute; and poll workers frequently are unable to inform voters of their correct polling places. What is more, election officials sometimes provide voters with incorrect information about their polling places. Litigation in Westchester County after the 2004 elections revealed that many polling places had outdated district maps that caused voters to cast ballots in the wrong precincts. Even if precinct notification systems work most of the time, a voter should not be disenfranchised because of these bureaucratic errors outside her control.

On the other hand, legitimate concerns have been raised about counting provisional ballots cast in the wrong precinct. Many officials worry that such a system would make it difficult to predict where voters would cast their ballots and hence to allocate sufficient resources to each polling place. Others worry that local candidates would lose voters since provisional ballots cast in the wrong precinct would only count for top-of-the-ticket or jurisdiction-wide races. Both concerns rest on the assumption that, given permissive out-of-precinct counting rules, voters will abandon their assigned precincts and will vote at the location most convenient for them. But there is no evidence that this occurs in the jurisdictions that count out-of-precinct provisional ballots. For example, in New Jersey, which counted out-of-precinct provisional ballots, provisional ballots made up 1.88% of all ballots cast at polling places and 1.28% of all registrations, compared to 4.88% and 1.66% in Colorado, which did not count those ballots.³⁴

³⁰ *Election Day Survey*, at 6-5.

³¹ *Id.* at 6-12.

³² Common Cause, *Report from the Voters: A First Look at 2004 Election Data*, at 3 (Dec. 2004).

³³ Stephanie Gaskell, *Elect Panel Dazed*, N.Y. POST, Mar. 24, 2005, at 13.

³⁴ *Election Day Survey*, at ch. 6, appx. p. 1.

In any event, states can address these concerns without disenfranchising eligible voters who, through not fault of their own, cast provisional ballots in the wrong precinct. There are a variety of ways to enforce precinct requirements short of disenfranchisement. Some states make it a criminal offense to knowingly seek to vote at the wrong precinct. In addition, the provisional ballot envelope can be modified to include evidence as to whether the voter went to the wrong precinct purposefully or because of administrative error. For example, voters can be asked to sign an affirmation, under penalty of perjury, that they believe they are in the correct precinct. Moreover, it is not difficult for a poll worker to note the precinct listed on a voter's registration card or whether or not she was able to direct the voter to the correct precinct. Regardless of the method chosen, it should provide a true fail-safe for voters who in good faith show up at the polling place where they cast their ballots and who have no reasonable way of determining their correct precinct.

3. Provisional Ballots Cast By First-Time Voters Without ID

HAVA requires first-time voters who register by mail and whose information is not matched against state motor vehicle or Social Security Administration databases to present identification before casting regular ballots.³⁵ Nonetheless, the statute expressly entitles voters who do not meet those ID requirements to vote by provisional ballot.³⁶ Voters who cannot meet additional state ID requirements are similarly entitled to cast provisional ballots. For voters without accepted ID, provisional ballots were intended not as a safeguard against administrative errors, but rather as an alternative means of verifying their eligibility. Ideally, provisional ballots should ensure that voters without ID are not deprived of their fundamental right to vote, while preserving the state's ability to verify their eligibility by other means.

The 2004 election revealed problems with state rules for counting provisional ballots cast by voters who could not meet federal or state ID requirements at the polls. The lack of proper ID was the third most common reason provisional ballots were not counted in 2004.³⁷ Here too, states varied dramatically as to whether and when they counted those ballots. Many states (such as California) counted all such ballots so long as the voter affirmed her identity in writing at the polls;³⁸ others (such as Florida) counted them if the signature on the provisional ballot envelope matched that on the registration form;³⁹ still others (such as Michigan) counted them only if the voter showed ID to election officials within a set period after the election; and still others (such as Virginia) refused to count them at all.

In jurisdictions that refused to count provisional ballots cast by voters without ID, the provisional balloting mechanism failed; there was simply no way those voters could cast ballots that would be counted. In fact, the provisional ballots offered to those voters were nothing more

³⁵ 42 U.S.C. § 15483(b).

³⁶ *Id.*

³⁷ *Election Day Survey*, at 6-5.

³⁸ In those states, election officials verify the voter's eligibility using the information provided on the affidavit ballot envelope. Each provisional ballot envelope contains a space for the voter to sign, in the presence of an election official at the polling place, an oath or affirmation attesting to her eligibility to vote. That oath or affirmation should be sufficient to confirm the voter's eligibility under state law and for her votes to therefore be counted.

³⁹ Signature matching is widely acknowledged to be a reliable method of verifying identity, especially when done by trained experts.

than sham ballots, void at the moment they were handed out, since the state officials had no plans to take any steps to verify those ballots and since there were no circumstances under which those ballots would count. The refusal to count provisional ballots cast by voters without ID renders HAVA's "fail-safe voting" provisions meaningless.⁴⁰ If all such individuals were presumptively ineligible to have their votes counted, there would be no reason to allow them to cast provisional ballots in the first place. Worse yet, many voters who might have been able to obtain ID were deprived of their ability to cast a vote that would count because once they cast meaningless provisional ballots, they could not return and vote a regular ballot.

The better practice is for states to adopt one of the other available procedures for verifying the identities of voters who do not meet federal or state ID requirements. Provisional ballots create opportunities for verification after the election that did not exist before. Moreover, the burdens of verification will be significantly reduced once states fully implement matching procedures associated with statewide voter registration databases.⁴¹

C. The Placebo Ballot Problem

Each of the three problematic provisional ballot counting rules discussed above—the rejection of provisional ballots cast by voters not on the registration rolls, in the wrong precinct, or without ID—creates a "placebo ballot" problem. In each case, eligible voters showed up at polling places where they believed they are registered and eligible to vote; they were given provisional ballots by election officials; they believed they were casting meaningful ballots; but there were no circumstances under which their ballots would count. In other words, in each case, the provisional ballots tendered were meaningless placebo ballots, the fate of which was determined before they were cast. What is more, in each case, even the most determined and diligent voters had no means of casting ballots that would count.

It should go without saying that election administrations should avoid procedures that result in placebo ballots that will not be counted under any circumstances. Not only does this undermine provisional ballots as a "fail-safe," but it also misleads voters into believing they have actually voted when they have not. What provisional ballots offer is a way of verifying the eligibility of those voters who fall through the cracks after the election, not a way of hiding decisions made before the ballots were cast.

V. Conclusion

Despite the significant problems with provisional ballot administration and certain state counting rules, on balance, provisional voting has been a positive innovation. For many voters who would previously have been turned away from the polls, it has provided a true fail-safe. Where it has not worked, it has at least created a public record of election administration problems that can be used to improve elections in the future. Nonetheless, there is still a danger

⁴⁰ This violates of accepted principles of statutory interpretation. *See Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218 (6th Cir. 1992) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

⁴¹ *See generally* 42 U.S.C. § 15483(a).

that states will not rectify the problems—especially the placebo ballot problems—discussed in this paper before the next election. If states do not do so, voter confidence will suffer.