

2. PROVISIONAL BALLOTS

BACKGROUND

The 2002 election reforms under HAVA included an important new protection: the right to cast a “provisional” ballot that would be counted once elections officials could confirm its validity. This fail-safe measure was designed to avoid a repeat of 2000 in which many eligible voters were turned out of polling sites because their names did not appear on the rolls.

However, because the federal law was vague on certain aspects of provisional balloting, such ballots were treated differently not only from state to state but from county to county. This lack of clarity led to numerous lawsuits disputing when provisional ballots should be used—for example, if a voter was flagged for needing to present identification—and under what circumstances they should be counted, such as if cast in the wrong polling place or if the voter had requested an absentee ballot.

This level of uncertainty around a key election procedure must be remedied. States should create clearly defined, uniform rules for the casting and counting of provisional ballots, or else litigation over these matters is bound to confront us again and again. In the ongoing pursuit of balancing the right to cast a ballot and have it be counted and maintaining the integrity of the process by avoiding postelection clashes—for which provisional ballots inherently create the potential—clarification on how this process ought to work should be at the forefront of the states’ agendas.

In 2004, more than 1.6 million provisional ballots were cast, and nearly 1.1 million, or 68 percent, were counted. In twenty-eight

states, a provisional ballot cast in the wrong precinct was not counted. In seventeen states, a ballot cast in the wrong precinct but correct registrar's jurisdiction (usually the county) was counted.⁹

Moreover, despite predictions that statewide registration databases would greatly ameliorate the problems associated with provisional ballots, when comparing all seventeen states that had statewide voter registration databases during the November election with those that did not, there is little difference in the percentage of ballots counted. In states with databases, 65 percent of provisional ballots were counted. In states without databases, 68 percent of these ballots were counted. In states with databases, provisional ballots constituted 0.85 percent of the total ballots cast, whereas in states without databases, provisional ballots made up 1.76 percent of the total ballots cast.¹⁰

Elected officials, election administrators, campaigns, parties, and organizations should make every effort to minimize the use of provisional ballots. Voters cannot be confident they will be counted; further, they add to the postelection burden of vote counting and introduce uncertainty into the election process. New measures such as the implementation of statewide voter registration databases, if they do more to verify and properly process voters ahead of time, ought to go a long way to achieving this goal.

The earlier suggestion that states consider two separate deadlines for submitting new registration forms may help to avoid the need to rely on the provisional voting process to rectify problems arising in the registration process. If registrations received by the early deadline could be handled in a way that all problems associated with them would be cleared up by election day, so that these voters could vote on regular ballots, then provisional ballots would be needed only for problems associated with registration forms submitted by the later deadline.

However, the most important lesson learned in 2004 was that, no matter what rule is chosen, in fairness to the voters and elections administrators, states need to make the rule early and make it clear. In no area was this more evident than that of provisional ballots. Ohio provided the perfect example, where the secretary of state promulgated last-minute directives regarding such matters as which voters should receive a provisional ballot and what ballots ought to be counted, causing much confusion. Voting rights advocates filed litigation concerning the terms by which provisional ballots would be offered and counted in Missouri, Colorado, Michigan, Arizona, and Florida as well.

States need to establish, announce, and publicize statewide standards for every aspect of the provisional ballot process, from who is entitled to receive one to which ones are counted, well in advance of the election. We suggest some of those standards below. However, we wish to emphasize that no matter what the standards, they should be statutorily mandated to be implemented uniformly throughout the state.

RECOMMENDATIONS

- 2.1 HAVA requires that voters who registered by mail and did not provide identification when doing so bring identification with them to the polls. HAVA also requires that voters receive provisional ballots if they fail to bring identification to the polls. HAVA provides that states must count these provisional ballots as valid votes if “the appropriate State or local election official” subsequently determines that the individuals casting these provisional ballots are “eligible” voters under state law. The only question left open here by HAVA is the procedure that the state should use for determining that the voter who showed up at the polls without the necessary identification is really the same voter who registered by mail without identification. We recommend that election administrators make every effort to verify that voter’s eligibility through available databases. Since HAVA requires identification at the polls only from voters who registered by mail and did not provide identification when doing so, presumably all those who cast a provisional ballot solely because HAVA requires it are not missing from the state’s voter rolls. Thus, the poll workers should have no problem finding the voter’s name in their poll books. If such verification is made, the provisional ballot should be counted. This is because, were it not for HAVA’s identification requirement, the poll worker would otherwise let the voter cast a conventional ballot.
- 2.2 Additionally, since this situation would arise only in a state that would not have required an identification without the mandate of HAVA, it is reasonable to assume that it is consistent with the state’s policy to permit the voter in this situation to provide the requisite identification subsequent to casting the provisional

ballot. Consequently, we recommend that states give voters in this situation up to three days to provide either the HAVA-specified forms of identification or other documentation that will facilitate the state's ability to verify that the person casting the provisional ballot is the same one who registered by mail. Whatever procedures the states choose for making this determination, however, the paramount consideration—as with all others concerning provisional voting—is that they be clear and thus not susceptible to postelection manipulation and litigation.

- 2.3 One of the most heavily litigated issues in the 2004 election was whether a provisional ballot would count if cast in the wrong precinct, at least for statewide races. Although the litigation indicated that HAVA itself may not require the counting of these so-called wrong precinct ballots in presidential or other federal elections, it is the recommendation of this report that, as long as a voter appears at any precinct within the county in which he or she resides, the provisional ballot cast be counted for all county-wide, statewide, and presidential races.¹¹ Otherwise, a state is likely to face litigation over whether its election officials provided adequate notice to voters regarding their particular precincts.

There also is already some evidence that narrower definitions of jurisdiction for the purposes of provisional ballots resulted in disenfranchisement in 2004. In the eighteen states where ballots were counted or partially counted if they were cast in the wrong precinct but correct jurisdiction, 70 percent of provisional ballots cast were counted. Eleven of these states counted more than 50 percent of these ballots. In the twenty-five states that did not count provisional ballots cast in the wrong precinct (two other such states did not provide data), 60 percent of the ballots were counted. Sixteen of those states counted fewer than 50 percent of these ballots.¹² Moreover, provisional ballots are not sorted and counted at the precinct; that happens at the board of elections or elections office.

There are many legitimate reasons why a voter might appear in the wrong polling location, especially in an election like that of 2004 with its millions of first-time voters: voters who have moved recently may show up at their old site; polling locations change, and voters are not notified; or a voter's registration is filed in the wrong place through administrative error.

Just one of the many national voter hotlines set up during the weeks before election day, 1-866-myvote1, received one hundred thousand phone calls from people trying to find out where they were supposed to vote.¹³ Sometimes poll workers will misdirect voters to the wrong location.

- 2.4 If a state nonetheless chooses to require voters to appear at their assigned precinct, then it is the strong position of this report that, where the same polling site serves more than one precinct (a single school gym containing three precincts, for example), a voter's provisional ballot should count as long as the voter appears at the correct polling site. States should mirror the recent ruling of the New York State Court of Appeals when it made the following finding:

When a ballot is contested in a judicial proceeding, the court must, after determining that the person who cast the ballot was entitled to vote, order the ballot to be counted "if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face." . . . We can reasonably infer that casting an affidavit ballot at the correct polling site but at the wrong election district is the result of ministerial error on the part of a poll worker in failing to direct the voter to the correct table, and instead providing the voter with an affidavit without first properly verifying such voter's right to vote in the election district.¹⁴

Elections officials have expressed concern that polling places are selected, staffed, and provided with supplies and machines based on the registered voters for that location. As a result, if voters were not required to vote at their correct precinct, officials would not have any idea how many voters might show up at a certain polling place. Long lines and running out of ballots could, as a consequence, become problems. Moreover, for such voters, votes for offices below the county level on the ballot might not count.

These are legitimate concerns. However, we are optimistic that the continued efforts of elections administrators and organizations involved to ensure voters know where to vote, along

with the advent of new technology—especially new voter registration databases—will reduce the number of misdirected voters and thus alleviate problems associated with voters appearing to vote at the wrong polling place.

- 2.5 As indicated in the registration section above, one of the important areas for reform concerns the relationship between a state's registration system and its rules for provisional voting. Under HAVA, all properly registered voters must receive a provisional ballot that eventually gets counted as a valid vote if, for some reason, the poll workers are unable to locate the name of a registered voter on the election day rolls. To comply with this mandate, states need to adopt publicly transparent procedures that enable them to verify the official registration records even though poll workers were unable to identify the voter as registered.
- 2.6 In addition, states need to adopt clear rules and procedures regarding provisional ballots cast by citizens who submitted new registration forms prior to the state's deadline for doing so but whom the state has never recognized as properly registered—thus, they do not appear on the state's official master list of registered voters. As a general matter, if some kind of administrative error on the state's part is the reason why a timely new registration form did not result in the entry of this voter on the state's official list of registered voters, the provisional voting process should hold this voter harmless from this administrative error and count the provisional ballot as a valid vote. An administrative error should be determined by examining the original voter registration form, not just the ultimate voter list. Michigan, which is held as the national model in the area of statewide voter registration databases, follows the practice of going back to the original voter registration records if a voter claims to have registered and is not on the list. However, it would be preferable if the state could adopt preelection procedures to rectify this administrative error so that the voter could cast a conventional rather than provisional ballot.
- 2.7 Conversely, if some kind of material error or omission on the voter's part is the reason why the state was unable to process the new registration form successfully, then (again, as a general

principle) states are entitled to declare a provisional ballot cast by this voter invalid on the ground that the voter never successfully completed the registration process and thus is not properly registered. If it is a case in which the voter failed to receive notice of the need to correct or amend a registration application, the presumption should be that failure was attributable to administrative error.

Here, too, states should adopt a preelection procedure whereby citizens submitting registration forms with material errors or omissions would receive notice of the problem, with the opportunity to rectify the situation in time to vote with a conventional rather than provisional ballot. Moreover, if a state puts in place the kind of tracking number system mentioned above, this would serve as another way for voters to correct material errors or omissions with new registrations in time to avoid the need to cast a provisional rather than regular ballot.

- 2.8 It is possible to imagine circumstances whereby the failure of a submitted registration form to be recorded on the state's official list of registered voters is the result of neither administrative nor voter error. A registration form lost in the mail would be one example. With respect to these and other cases in which it might be debatable who is responsible for the problem, it is most important that a state—in advance of the election—make clear whether or not the voter bears the risk that the problem will prevent a provisional ballot from being counted. It would be desirable as well that states adopt a mechanism, like the suggested tracking number system, that enables voters to minimize this risk.
- 2.9 With respect to voter registration forms handed in person to agents of a state's Department of Motor Vehicles or other state agency, an error in the transmission of those forms from the agency to the appropriate election officials should be considered administrative error for the purpose of provisional voting, with the consequence that a provisional ballot cast by a voter in this situation should count as if that voter had been properly registered. Related to the tracking number suggestion, states should consider providing new registrants with receipts when they submit their registration forms to a DMV agent or other

government official, the receipt serving as proof of the voter's timely submission of a registration form in the event the voter needs to cast a provisional ballot. A provisional ballot cast by any voter able to produce such a receipt should count as a valid vote (assuming such a voter is substantively qualified to be a registered voter), as the receipt would demonstrate that the failure of the voter to appear on the state's official registration list was the result of administrative error.

There is ample evidence of administrative error in the steps between receiving a voter registration form and appearing on the registration list. Such errors, made by government employees, should not mean the voter is disenfranchised. This is not to suggest that elections workers are anything less than honest, hard-working, and competent individuals but simply that human error is inevitable.

Indeed, election administrators across the country have conceded that some voters were left off the registration rolls owing to administrative error in the processing of forms and the compiling of voter lists. A coalition of good-government groups testified before the New York City Council that, in September 2004, the New York City Board of Elections reported that it sent approximately fifteen thousand records of voters who would be subject to identification checks to the State Board of Elections in an attempt to verify their DMV numbers (and thereby exempt them from the law's identification provisions). The state board "flagged" 2,959 of those records, about 20 percent, as not having DMV numbers that matched those in the DMV's database. The city's Board of Elections then went back and took a look at the scanned originals of the voter registration applications of those 2,959 voters. Incredibly, 2,951 of them—99.7 percent—appeared to be due to City Board clerks entering incorrect information from the forms into the system, often transposing or wrongly entering a single digit or two.¹⁵

A recent report by Demos found that "twenty percent of the cases [of provisional ballot problems] derived from a botched voter list created before Election Day—in other words, from a previous error in elections administration." In further discussion of a survey of calls received during the 2004 election by the Election Protection Coalition, the report states,

Some callers discovered that their names had been left off the rolls because they had been classified as "inactive" voters, or had

mistakenly been purged as ineligible felons. In many other instances, the nature of the mistake was unclear. Voters may have been omitted because of erroneous list purges, flawed or delayed data-entry of registration forms, or the failure of state voter registration agencies to submit voter registration applications to elections boards in a timely manner. . . . Counties lose valid registrations or delay the processing of registration applications such that eligible voters are deprived of their right to cast ballots.¹⁶

News reports provide numerous further examples of the problem.¹⁷

- 2.10 If a poll worker challenges a voter signature, and the voter must therefore vote by provisional ballot, the voter should be given the opportunity to present HAVA-defined identification within at least three days of the election to rebut the poll-worker challenge. If the voter does not do so, the elections office should be required to find cause to believe the voter is not who he or she claimed to be in order to disqualify the vote. Poll workers should be trained to challenge signatures only in the rare case where they have specific and compelling reason to believe that a discrepancy is the result of fraud.
- 2.11 When a voter goes to the polls on election day, and the record shows that voter previously requested an absentee ballot, that voter should be entitled to vote by provisional ballot. That ballot should be counted unless it is clear that the voter did in fact already vote by absentee ballot.
- 2.12 In the case where a voter is not registered, a provisional ballot should serve as a voter registration form even if it is not ultimately counted, as is the case, for example, in Colorado.¹⁸

