

Testimony of Daniel P. Tokaji
House Elections and Ethics Committee
Sub H.B. 3
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My name is Daniel P. Tokaji. I am an Assistant Professor of Law at the Ohio State University's Moritz College of Law, and Associate Director of the Election Law at Moritz project. Thank you for allowing me to speak before you today regarding Sub H.B. 3.

Let me start by commending this committee for taking on the hard task of improving Ohio's election system. The 2004 election revealed that, despite the considerable efforts made over the past four years, election reform remains very much a work in progress. In Ohio, this past election raised a number of serious issues relating to voting technology, provisional voting, registration, identification requirements, challenges to voter eligibility, long lines at the polling place, recounts, contests, and the nonpartisan administration of elections. I share the committee's view that these issues warrant legislative attention.

As I shall explain, the current bill includes some good features, some questionable ones, and some that would be affirmatively harmful. Given the considerable length of this bill and the short timeframe available to review it, I will not attempt to discuss all or even most of it here today. I will instead focus on a few of those areas that I think present some special problems, specifically: 1) challenges to voter eligibility, 2) provisional voting, 3) absentee voting, 4) recounts and contests, and 5) voter identification.

Provisional Voting

No area provoked greater controversy during the 2004 election season than provisional ballots. One of the most hotly contested issues was whether provisional ballots should be counted, if cast in the wrong precinct. Under HAVA, provisional ballots should be counted if cast by voters eligible and registered to vote in the "jurisdiction." Ohio's existing statutes do not define this term.

Sub HB 3 would amend Ohio law to define "jurisdiction" as "the precinct in which a person is a legally qualified elector." Thus, a voter who mistakenly appeared at the wrong precinct wouldn't have her provisional ballot counted. That is true even if that voter had been mistakenly directed to the wrong precinct by state or county officials. It's important to remember that some polling places have multiple precincts in them – sometimes all voting in the same room. It appears that a provisional ballot would not be counted if the voter appeared at the right polling place, but voted at the wrong precinct within that polling place.

This is clearly not what was intended by the bipartisan commission that originally proposed a federal provisional voting requirement. After the 2000 election, former Presidents Jimmy Carter and Gerald Ford chaired a national blue ribbon commission. Among their most important recommendations was that all states implement provisional voting, which was already in place in 19 states. It cited the example of California, in which the provisional ballot is counted if cast in the correct county.

In recommending provisional voting in all states, the Commission suggested building on the pre-existing requirements of the National Voter Registration Act (commonly known as "Motor Voter") which defined "registrar's jurisdiction" as the entity maintaining voting lists. 42 U.S.C. § 1973gg-6(j). This is ordinarily the county, city, or town in which the voter resides.

The Carter-Ford Commission explicitly linked its provisional voting recommendation to another key recommendation that became part of HAVA: the implementation of statewide voter registration databases. With more reliable databases maintained at the state level, the Commission reasoned, it ought to be easier to realize the goal of making sure that “[n]o American qualified to vote anywhere in her or his state should be turned away from a polling place in that state.” The Commission therefore recommended that provisional ballots be counted if the “provisional voter is eligible and qualified to vote *within the state*” (emphasis added).

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. Rather, the provisional ballot would be counted “only for the offices for which the voter is qualified to vote.” In effect, the Commission explained, the voter who appeared at the wrong precinct would only be permitted to cast a “limited ballot.”

The current version of Sub HB 3 departs from the bipartisan Carter-Ford Commission’s vision. Given that Ohio is required by HAVA to have its statewide registration database in place by 2006, there is no good reason for failing to count provisional ballots of those eligible to vote anywhere in the state. Once that database is in place, it should be a simple matter to determine after the election whether that voter is really eligible and registered to vote. At the very least, provisional ballots should be counted if cast in the correct *county* – but again, only for those contests in which the individual was eligible to vote.

In addition to the definition of jurisdiction, two other points on the subject of provisional voting stand out. First, the present bill states that election officials “may inform” voters appearing in the wrong place of where they should vote. This should be changed to “shall inform.” It is incumbent on poll workers to inform voters of where they are supposed to vote, if they show up at the wrong place.

Second, it does not appear that Sub HB 3 fully resolves the equal protection problem arising from the Secretary of State’s failure to specify a uniform standard and process for counting provisional ballots. For example, what are county election officials to do in the event that a provisional ballot is cast because the voter’s name doesn’t appear on the list at her precinct? Should the county refuse to count the provisional ballot unless the voter’s name appears on the list? Should it conduct a diligent search of its own records? Should it make a request to the local Bureau of Motor Vehicles office, where a plurality of voters now register? Or should the vote be counted if the voter affirms under oath that he or she was registered and eligible to vote and there is no contrary evidence? SB 3 does not, on my reading, provide a clear answer to these questions.

Challenges to Voter Eligibility

Another prominent issue in the weeks leading up to the 2004 election was the parties’ use of challenges to voter eligibility. Presently, Ohio law allows challenges to be made either before the election or on Election Day.

Sub HB 3 would prevent party representatives from making challenges to voter eligibility *on* Election Day. Party representatives would still be allowed in the polling place, but would be designated “observers” rather than challengers. This is an improvement over existing law, which raises the specter of party representatives making meritless challenges that might slow down the voting process and intimidate voters.

Pre-Election Day challenges would still be allowed, if filed at least twenty days before the election, rather than eleven days as is the case under current law. This too is an improvement, since it gives more time to resolve challenges before Election Day.

Boards of election would be allowed to grant or deny challenges based solely on the board records. While it makes sense to allow election boards to *deny* challenges without any notice to the voter, it is perilous to *grant* them without providing the voter notice and the opportunity to rebut the challengers' case. Although the voter would still be able to vote provisionally, the absence of pre-election notice and a hearing increases the possibility of erroneous exclusion. This is a change from existing law, which requires notice and the chance for a hearing before sustaining a challenge to voter eligibility.

In cases where the board is not able to determine whether the challenge should be sustained based on its records, an in-person hearing would have to be scheduled. But problems could still arise in circumstances where the board can't conclusively rule on late-filed challenges before the election. In cases where a challenge is filed less than 30 days before the election, the board would have the option of setting the hearing *after* Election Day. In those circumstances, the voter would cast a provisional ballot rather than a regular ballot at the polls, which would then be counted only if the voter is later determined eligible.

The danger is that this scheme may present an incentive to file numerous challenges within 30 days of the election. In the event that the election board cannot conclusively determine whether the challenges should be granted, voters would be left to cast provisional ballots, which might or might not be counted after the election. It is difficult to predict how this will play out in a close election, but it creates the possibility of more voters casting provisional rather than regular ballots on Election Day, with the parties left to fight over those ballots afterwards – as occurred in Florida after the 2000 election and in Washington State in the most recent election. These are scenarios we should endeavor to avoid.

Absentee Voting

One area in which Sub HB 3 would liberalize voting rules is in absentee voting. Under current Ohio law, absentee voting is only allowed for those who meet one of certain specified qualifications – for example, service in the military, hospitalization, observance of a religious holiday, disability, or absence from the country. Sub HB 3 would eliminate these requirements, allowing anyone to vote by mail-in absentee ballot.

Absentee voting is one area in which liberalization doesn't make sense. Mail-in absentee voting is the part of our voting system where there's the greatest opportunity for fraud and other forms of mischief. That is because the anonymity and privacy of the ballot – crucial ingredients of the election system's integrity – are most easily compromised when voters cast absentee ballots. For example, if an absentee ballot is sent to a married couple, it would be possible for one spouse to vote the other's ballot, and then have him or her sign the outer envelope. The possibility for coercion – by spouses, caretakers, or even one's children – exists in a way that it does not in the privacy of the voting booth.

Worse still, no-fault absentee voting raises the possibility of vote-buying schemes. The privacy and anonymity of the ballot is, in our present system, a strong check on such schemes succeeding. If someone tries to pay me \$10 to vote for a particular candidate, they cannot verify whether I've actually done so – if I've voted at a precinct – given the secrecy of the ballot. The same is not true with mail-in absentee ballots. A would-be vote buyer can watch me vote and sign the envelope, and then pay me \$10 for selecting certain

candidates. That vote buyer can even deposit the absentee ballots in the mail himself.

The motivations behind no-fault absentee voting are undoubtedly admirable. It is presumably designed to encourage voters to vote early, and thereby reduce the lengthy lines that many Ohioans faced on November 2, 2004. But there's a better way to accomplish this objective. Rather than adopting no-fault absentee, Ohio should consider in-person early voting. As with absentee voting, voters would make their choices prior to Election Day. The difference is that, with in-person early voting, voters to make their choices *in the secrecy of a voting booth*, set up at a central location such as the registrar's office or a public library. This safeguards the anonymity of the ballot in a way that mail-in voting does not.

Recounts and Contests

Sub HB 3 would also make significant changes to the statutes regarding recounts and contests. It would raise the base deposit for recount applications from \$10 to \$50 for each precinct in which a recount is requested. It would also provide for this amount to be adjusted in future years, to keep pace with inflation as measured by the Consumer Price Index. While one might quibble with the exact dollar amount, it is reasonable for the state to increase the deposit for recounts to more closely approximate costs, and to provide that this amount should keep pace with inflation.

One of the biggest problems that Ohio would have faced in 2004, had the final vote tally been closer, is that the recount and contest process would not have been completed in time for the "safe harbor" date – leading to the possibility of the election being thrown to either the Ohio legislature or to Congress. In a nutshell, the problem is that Ohio's present laws does not allow for recounts and contests to be completed by the "safe harbor" date which, by federal statute, is 35 days after the election. In fact, it's very unlikely that this process could be completed by the date the Electoral College meets, which is 41 days after the election.

Included in Sub HB 3 are two provisions that seek to deal with this problem. One would require that "any recount of votes conducted ... for the election of presidential electors shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors." In other words, recounts must be completed by the "safe harbor" date. The other provision eliminates Ohio's contest process for all federal elections, including both presidential and congressional contests. Sub HB 3 provides that such contests shall "be conducted with the applicable provisions of federal law."

It is not clear what law this is referring to, as there is no analogous federal statute providing for contests. Perhaps "federal law" refers to the timetable for electoral ballot counting. Yet federal law contains no contest provision, but instead requires Congress to defer to the states, in cases where there's been a "final determination" of any election contests or controversies by the safe harbor date.

The bill's proposed reform of the recount and contest timetable, moreover, may not be solve the "safe harbor" problem. Saying that the recount must conclude by the safe harbor date is a good idea – but this alone doesn't mean it will happen. The big question is whether there will be enough time, under Ohio law, to complete the recount process and any attendant litigation within 35 days after the presidential election.

Sub HB 3 would amend state law to provide that election boards shall complete their canvass within 21 days after the election. (There is no set date under current law.) A recount may be requested within five days of when the Secretary of State "declare[s]" the election results. RC 3515.02. Even assuming that the

Secretary of State declares the election on the earliest possible date, 21 days after the election – and it is unclear that this will actually happen – that would only leave two weeks before the safe harbor date, for recounts and any attendant litigation to be completed.

In the event that the recount *is* completed by this date, the elimination of the contest process would appear to prevent the election from being contested on any other basis. Under present Ohio law, an election may be contested where irregularities in the election affected enough votes to change or make uncertain the results. There may be cases in which such irregularities occur, but wouldn't be resolved by a recount. Some examples include cases where 1) ineligible voters were found to have voted improperly, 2) provisional ballots were erroneously mixed in with regular ballots and counted, or 3) voters were improperly prevented from voting. If such problems occurred in a presidential election, Sub HB 3 would appear to prevent any remedy – so long as any disputes over the state's recount were completed by the safe harbor date. In the worst-case scenario, this could mean the wrong person sitting in the Oval Office, even though we know that grievous mistakes were made during the course of an election.

How one feels about the elimination of the contest provision for federal elections may well depend on how one balances the sometimes competing values of finality and accuracy. Those who favor finality may welcome such a change, even if it increases the possibility of the “wrong person” being elected President in some future election. On the other hand, those who favor accuracy above all else may balk at such a solution, even if the chances of such a nightmare scenario developing are remote.

Identification Requirements

The final point I wish to make about Sub HB 3 pertains to something that I hope will *not* be changed: its provisions regarding identification for voters. The Help America Vote Act of 2002 is the first federal law to impose an identification requirement on voters. In particular, HAVA requires voters who registered by mail to present documentation of their identity and address the first time they appear at the polls, unless they provided identifying information with their registration. The law does not, however, apply to those who registered in person, at a county registrar's office or another public agency such as the registry of motor vehicles. In addition, HAVA doesn't require *photo* ID. Those who don't have a driver's license, for example, can show a utility bill or government document that includes their name and address.

Sub HB 3 adopts HAVA's ID requirement. In particular, it would apply the ID requirement to those who are subject to that requirement under federal law. It would also require precisely the means of voter identification that HAVA authorizes. In my view, this is a wise choice, one that is consistent with federal law and the requirements of the U.S. Constitution.

Bills introduced in Ohio and some other states would go significantly further. SB 36, for example, would extend the ID requirement would extend to those who registered in person, and not just those who registered by mail. In addition, it would require photographic proof of identification. Thus, voters who lack a driver's license would have to obtain some form of photo ID, or lose their right to vote. In my judgment, this is bad policy and is very likely unconstitutional.

The debate over voter ID has by far been the most bitterly partisan fight witnessed since the 2004 election. One of the most striking features of the debate has been the factual vacuum in which it's conducted. What is absent is any solid evidence of how many fraudulent votes would actually be stopped by an ID requirement. We don't know, for example, how many voters actually show up at the polls

pretending to be someone they're not – much less of how many fraudulent votes would be prevented by imposition of an ID requirement.

It is essential to keep in mind that, for the individual voter, voting fraud is a high risk/low reward strategy. A voter who pretends to be someone else risks prosecution if he or she is caught, and the state should aggressively prosecute those who engage in such fraud. On the other hand, the rewards for the individual who engages in fraud are meager. The anonymity of the ballot – the fact that outsiders can't confirm who someone voted for at the polls – makes it very difficult to mount any successful scheme of widespread fraud, without bearing an enormous risk.

It's therefore questionable at best whether an ID requirement is really necessary to combat voting fraud. Supporters of the ID requirement have yet to make a convincing case that existing methods of discouraging and punishing fraud are insufficient.

What we do know is that imposition of an ID requirement would impose a severe burden on many voters, particularly those of low income. One study showed that 6 to 10 percent of voters lack any form of state ID. Seniors, disabled voters, and poor voters are more likely to lack ID.

Worse still, the ID proposal presently being proposed is likely unconstitutional. The Supreme Court has long held that election practices discriminating against poor voters violate the principle of equal protection. In *Harper v. State of Virginia*, the Court struck down a \$1.50 state poll tax for precisely this reason. "The principle that denies the State the right to dilute a citizen's vote on account of his economic status," the *Harper* Court held, "bars a system which excludes those unable to pay a fee to vote or who fail to pay."

The effect of an ID requirement is the same. Even if ID is provided free of charge, requiring those who don't have it still imposes a tax on the voter's time – and would be particularly burdensome to the elderly or disabled. Even a nondisabled voter who lacks a driver's license would have to wait in line once to get a photo ID card – only to face the prospect of waiting in another line when Election Day arrives. It would thus increase the burden on those who wish to vote, at a time when our government should be doing everything in its power to lessen those burdens.

If the State of Ohio is really serious about combating fraud, imposing an ID requirement is precisely the wrong way to go about it. It will impede access while doing little to promote integrity. Instead, the should crack down on those who actually engage in such activities. It should also maintain limits on "no fault" mail-in absentee voting – the place in the system that is most vulnerable to fraud.

Conclusion

Some of the changes contained in the current version of Sub HB 3 are commendable. The limits on partisan challengers, the requirement that recounts conclude by the "safe harbor" date, and the incorporation of HAVA's ID requirement are particularly worthy of inclusion. But it would be a bad idea for the legislature to act too hastily in enacting the bill as a whole. Some of Sub HB 3's provisions could do more harm than good in future elections. Particularly given the length of this bill, the legislature would be well advised to err on the side of doing election reform right, rather than doing it quickly.

Thank you for your consideration of these views.