

To be published as a chapter in:

***Voting in America: American Voting Systems in Flux:
Debacles, Dangers and Brave New Designs***

Edited by Morgan E. Felchner

(Praeger Publishers estimated publishing date Spring 2008)

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DRAFT: October 30, 2007.

Uncertain Insurance: The Ambiguities and Complexities of Provisional Voting

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Provisional voting is a kind of insurance policy for elections. Its insurance works two ways, protecting against different kinds of risks. First, it protects voters from being disenfranchised when administrative error has caused their names to be missing from the registration lists used by poll workers to verify a voter's eligibility. Second, it protects the integrity of the election itself by requiring a voter whose eligibility is questionable to cast a ballot that is set aside until eligibility is later confirmed, rather than casting a conventional ballot that is immediately commingled with all others to be counted.

Because provisional voting serves both these insurance functions, it offers something of a compromise between those who would emphasize policies to protect voters from disenfranchisement and those who advocate more measures to protect elections from votes cast by ineligible individuals. As a compromise position, provisional voting was a central element of the Help American Vote Act of 2002 (HAVA), which was itself a piece of compromise legislation enacted in the wake of the problems that occurred during the presidential election of 2000. Although provisional

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voting had already existed in several states before then (sometimes called “affidavit” voting, or another name indicating its conditional nature), it became a prominent feature of U.S. elections nationally as a result of HAVA’s requirement that all states adopt a form of it.

HAVA’s Sketchy Requirements

HAVA requires provisional voting in four circumstances. First, if an individual’s name “does not appear the official list of eligible voters for the polling place” but the individual “declares” that he or she is *both eligible and registered* in the “jurisdiction” where he or she wishes to vote, then the state must permit that individual to cast a provisional ballot. Second, if for whatever reason a poll worker (or other election official) challenges an individual’s eligibility to vote, but that individual continues to assert that he or she is eligible and registered to vote in that jurisdiction, then that individual must be permitted to cast a provisional ballot. Third, if an individual is unable to satisfy the voter identification requirements set forth in HAVA for first-time voters, then that individual may cast a provisional ballot. Fourth, in a federal election where a court (or other official) orders polling places to stay open longer than their scheduled closing time, all ballots cast as a result of that order must be set aside as a distinctly separate category of provisional ballots. (States that have Election Day Registration or no voter registration at all are exempt from the some, or perhaps all, of these four requirements. The way in which the exemption clause interrelates with the rest of the clauses makes unclear the precise scope of the exemption.)

HAVA leaves the details of implementing these new requirements for the states to fill out according to their own laws. Indeed, in a rather unusual provision of federal law, section 305 of HAVA explicitly states: “The specific choices on the methods of complying with the requirements of this [statute] shall be left to the discretion of the State.” Most significantly, HAVA lets state law determine the criteria of voter eligibility that will decide whether a provisional ballot will count. The language that HAVA uses to give the states this authority is somewhat convoluted: “If the appropriate State or local election official . . . determines that the individual is eligible under State law to vote, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.” This language appears designed to require states to count provisional ballots when their processes for evaluating these ballots shows the voter to be eligible—states cannot simply choose to discard provisional ballots in this circumstance (or refuse any effort to verify them)—but simultaneously seeks to give states free rein in setting the standards for what makes a voter eligible to cast a ballot that counts.

Questions Left Open By HAVA’s Wording

The consequence of HAVA’s sparse but rather confusing language has been uncertainty—and litigation. Most prominently, in the 2004 presidential election disputes arose in several battleground states over the so-called “wrong precinct” issue: does HAVA require states to count provisional ballots when voters cast them at the wrong precinct within the county in which they are properly registered? This real-world problem arises quite often because several precincts often vote at the same polling location, and it is an easy mistake for a voter to stand in the wrong line within the same school gymnasium in an effort to cast a ballot. Likewise, state and local governments

change precinct boundaries with considerable frequency, and so it is understandable that some voters may appear at an old polling location that has since been changed.

Activists in 2004 argued that the distinct uses of the terms “jurisdiction,” “polling place,” “eligible,” and “registered” in HAVA means that the new federal statute requires states to count these “wrong precinct” ballots if the provisional voter is “registered” in the “jurisdiction”—that is, the county or comparable unit of local government that administers elections within a state—and is “eligible” to be a registered voter within that jurisdiction. Eligibility, according to this argument, concerns the few substantive qualifications a voter must possess: citizenship, adulthood, minimal mental capacity, non-felon status (where applicable). The states with rules refusing to count these “wrong precinct” ballots responded by contending that HAVA’s specific permission that states may count provisional ballots “in accordance with State law,” with a voter’s eligibility to be determined “under State law,” means that state law may make casting the ballot in the correct precinct a condition of eligibility. The only federal court of appeals to rule on the issue, the one covering Michigan and Ohio (where litigation was especially active in 2004), embraced the states’ position. But given the possibility that a different federal appeals court might adopt the opposite position, as did district-level federal courts in 2004, the issue has not yet been entirely resolved.

Similar disputes have occurred—and may recur—over provisional ballots cast because of a voter’s disputed registration status or lack of HAVA-required identification. For example, suppose that some individuals submitted registration forms on time and believe themselves to be registered, but their registrations were rejected because they failed to fill out the forms properly. (Perhaps a signature is missing, or a box confirming

citizenship is left unchecked.) This kind of situation can also arise in relatively large numbers, as it allegedly did in both Florida and Ohio in 2004, potentially affecting tens of thousands of new would-be voters in a high-turnout election. According to HAVA's requirements, must a state count provisional ballots cast by individuals who submitted the incomplete registration forms if these individuals are substantively "eligible"—in the sense there would be no doubt about their eligibility had they completed the form correctly? (When election officials examine these provisional ballots after Election Day, they can easily determine that the individuals who cast them are substantively eligible in this sense—perhaps because the signature on the provisional ballot envelope matches a signature on file with the Department of Motor Vehicles, or because the voter's citizenship is quickly confirmed by an available birth certificate, despite the failure to check a box on the registration form.) Or does HAVA permit a state to reject the provisional ballots cast by these substantively eligible citizens because of their procedural failure to fill out their registration forms correctly and thus "under state law" are not "registered"? In other words, does HAVA permit states to make successful completion of the registration process a condition of "eligibility" for the purposes of deciding whether to count a provisional ballot? Although this issue was raised in litigation in 2004, those lawsuits petered out once it became clear that they would make no difference to the outcome of that year's presidential election. Therefore, no federal appellate court has yet to rule on this issue.

In considering this issue, does it make a difference under HAVA why a citizen who attempted to register failed to do so successfully from the perspective of state law? Suppose the problem is not missing information on the form, which the citizen should

have supplied. Suppose, instead, the Department of Motor Vehicles failed to deliver registration forms, which were timely submitted to it (pursuant to its obligation to serve as a recipient of registration forms), to the appropriate election officials? Does HAVA permit a state's law to say that this citizen is not "registered" and therefore that his or her provisional ballot will not count? Or instead does the bare and murky language of HAVA contain some kind of implicit constraint on a state's laws definition of registration, so that an unduly restrictive state law does not defeat the basic insurance function that provisional voting is designed to provide?

But if HAVA does constrain state law to this extent, what about intermediate situations, as when registration forms are delivered late to the negligence of the Postal Service (or perhaps a third-party group conducting a voter registration campaign), rather than the fault of the state's own Department of Motor Vehicles? Again, there may be no doubt at all about substantive eligibility of the provisional voters affected by this negligence, which was neither theirs nor the state's. Does HAVA nullify the operation of state's registration deadline by requiring the counting of these provisional ballots? The words of HAVA alone do not resolve this question, but instead must be interpreted in light of the conflicting policies HAVA was designed to serve: insurance against disenfranchisement for the qualified citizen, yet wide latitude to the states in operating their electoral processes.

Likewise, what of the situation in which provisional ballots are cast because first-time voters appear at the polls without HAVA-required identification? Once more, election officials may have no difficulty ascertaining the substantive eligibility of these provisional voters, and indeed there may also be no dispute whatsoever that these voters

are “registered” under state law. (Their signatures on their provisional ballot envelopes may match perfectly both their signatures on their registration forms and in other state databases, which also may confirm the correctness of their addresses.) Nonetheless, may a state reject these provisional ballots on the ground that the failure to show the required identification is itself a disqualification of a registered voter’s “eligibility” under state law? What if these provisional voters attempt to provide the missing identification after Election Day, during the period of time under state law that the officials have to evaluate provisional ballots to decide whether or not they should be counted? Does HAVA implicitly require states to accept the missing identification during this time period, or may states insist that it be provided at the time of casting the ballot? If the latter were true, there would be no point to casting a provisional ballot because one lacked the required ID. Provisional voting, in other words, could never serve an insurance function in this circumstance. Yet HAVA’s poorly drafted compromise language could be interpreted to permit this hoax, which is why some have called provisional ballots “placebo ballots” instead.

Variation Among States in the Administration of Provisional Voting

In the absence of clarity and uniformity from HAVA, states have diverged dramatically in their approaches to provisional voting. In addition to differing on whether to count provisional ballots when they are cast in the wrong precinct (15 states will count them in this situation,¹ while 30 will not²), states have adopted a wide variety

¹ AK, CA, CO, GA, KS, LA, MD, NJ, NM, NC, OR, PA, RI, VT, WA. (Source: www.electionline.org.)

² AL, AZ, AR, CT, DE, FL, HI, IL, IN, IA, KY, MA, MI, MS, MO, MT, NE, NV, NY, OH, OK, SC, SD, TN, TX, UT, VA, WV, WI, WY. Five states—ID, ME, MN, ND, NH—lack provisional

of rules and procedures concerning the casting and counting of provisional ballots. States vary on the circumstances that will trigger an obligation to cast a provisional rather than regular ballot. In particular, states having more stringent voter identification requirements, or states that more readily permit polling place challenges to a voter's eligibility, will tend to cause states to rely more heavily on provisional voting. States also differ in the procedures used for casting provisional ballots. For example, Washington State adopted a requirement that its provisional ballots be colored differently from its regular ballots, after a clerical error in the state's 2004 gubernatorial election caused 437 provisional ballots to be irretrievably commingled with regular ballots before they could be verified. This problem was especially acute given the 129-vote margin of victory. Most other states, however, have yet to learn from Washington's mistake.

States vary even more widely on the procedures they use to verify provisional ballots. Some states allot an extremely short period of time for this verification process, as little as two days—Iowa, Tennessee, and Vermont—while other states take two weeks or longer or even up to a month: California, New Jersey, Rhode Island, and West Virginia.³ A study of provisional voting in the 2004 election found, perhaps not surprisingly, a correlation between the length of time a state provided for this verification process and the percentage of provisional ballots that were counted: states allowing more than two weeks counting 60.8% of provisional ballots, whereas states allowing between one and two weeks counted 47.1%, and states allowing less than a week counted only

voting pursuant to the exemption in HAVA for those states that either have Election Day Registration or no registration at all. (Source: www.electionline.org.)

³ *Report to U.S. Election Assistance Commission on Best Practices to Improve Provisional Voting*, prepared by the Eagleton Institute of Politics, Rutgers University, and the Moritz College of Law, The Ohio State University (2006) [hereinafter "Eagleton-Moritz Report"]. See Appendix B, pp. 12-13.

35.4%.⁴ On a related point, states differ sharply in the amount of time after casting a provisional ballot to submit identification that may be necessary for the ballot to count. For example, New Mexico requires this identification to be submitted by 7pm on Election Day itself, whereas Indiana (which used to have a requirement as stringent as New Mexico's) gives provisional voters 13 days to supply the missing identification.⁵ States differ, too, in the methods by which voters are permitted to supply this information: while most states require it to be delivered in person to the local board of elections, at least one state (Kansas) permit voters to submit it electronically.

States also diverge on the degree to which their process for verifying provisional ballots is publicly transparent. Some states permit representatives of candidates or the media or members of the public to observe the verification process. Others do not. Many states, moreover, in practice leave this important matter to local election boards, as state law is silent on the point.

Indeed, perhaps the most important respect in which states differ regarding provisional ballots is the extent to which they have endeavored to anticipate questions that might arise in the verification process and to answer those questions before they could become the subject of an ugly dispute over which candidate really won in a close race. For example, most states require local officials to ascertain that a provisional voter is in fact "registered" in order for the provisional ballot to count. But few states specify either exactly what qualifies as being "registered" or the specific steps that local officials must take to make this determination. Returning to the problems identified already with respect to HAVA's ambiguous language, we would also find upon examining the laws of

⁴ See Eagleton-Moritz Report at 15.

⁵ See *id.* at 23.

most states that they do not specify whether an individual is “registered” if (a) the Department of Motor Vehicles fails to deliver the registration form as required; or (b) the Postal Service or a third-party group fails to deliver the form; or (c) the individual omits certain required information from the form (or which omissions are critical in this respect and which are not). Likewise, for the most part, state laws do not spell out whether local officials must contact the Department of Motor Vehicles to look for registration forms that may remain undelivered, or even whether local officials search their own records for original registration forms, rather than relying solely on information contained in the state’s centralized voter registration database. This latter point is hardly immaterial, as the outcome of Washington State’s 2004 gubernatorial election was reversed when, during a second recount, several hundred registration forms were found that (because of another clerical error) had never been entered into the state’s registration database. These ballots had been rejected during the initial count and first recount—on the ground that these voters were not “registered”—but they were included as valid votes in the second recount after litigation led to the discovery of the timely but unprocessed registration forms. In the wake of the 2004 election, some states (including, most notably, Colorado) have attempted to pin down more precisely the rules and procedures for verifying provisional ballots, but most states could do much more in this regard (and even Colorado could go further).

All in all, the variation among state laws concerning provisional voting reflects underlying policy differences concerning the dual insurance functions that provisional voting serves. Given the wide latitude afforded by HAVA, some states have chosen to emphasize the protection of citizens from disenfranchisement, while others prefer to

protect the integrity of elections from ineligible individuals. Michigan, for instance, is a state in the former camp: it has a form of provisional voting (which it calls “affidavit” voting) whereby individuals who attest that they attempted to register can cast a ballot that counts even if the state can find no evidence of this attempt (as long as the individual can show their substantive eligibility to vote). This version of provisional voting in Michigan functions as a conditional kind of Election Day Registration, limited to those voters who assert that they attempted to register by the conventional deadline.

Ohio, Michigan’s southern neighbor, reflects the opposite philosophy. Since 2004, Ohio has amended its provisional voting laws in ways that make the state appear as if it is endeavoring to increase the number of provisional ballots cast relative to regular ballots. In addition to imposing more rigorous voter identification requirements, Ohio’s post-2004 amendments specify *fourteen* (!) different circumstances that require a voter to cast a provisional rather than regular ballot. The philosophy seems to be: “Let’s not give a voter a regular ballot if there is any doubt about the voter’s eligibility; we can protect against the risk of a voter’s ineligibility by requiring a provisional ballot, which will be counted if subsequently we are able to determine that the voter is in fact eligible.” If this philosophy indeed animated the amendments to Ohio’s law, it worked. From 2004 to 2006, the state increased the rate at which its voters cast provisional ballots by 11.6%, from an already high rate of 2.7 (measured as a percent of total ballots) to an even higher rate of 3.1.⁶

Numerical Evidence of Variability in Provisional Voting among the States

⁶ These figures are derived from statistics available at “Election Returns” pages of the Ohio Secretary of State’s website.

As suggested by the immediately preceding example of Ohio, differences in a state's law concerning provisional voting seem to correlate with differences in the rates at which provisional ballots are cast and/or counted in a state. In any event, the states themselves are reporting wide disparities in these casting and counting rates, and these disparities cry out for further investigation and some sort of explanation.

Rates of Casting Provisional Ballots

In the November 2004 general election, 16 states reported that over 1% of all ballots cast were provisional. Six of these had over 3% of their ballots cast as provisional, and three had over 5%.⁷ (Alaska's was a whopping 7.5%.) Think of the implications: for those states with more than 5% of their total ballots being of questionable validity, it means that in a head-to-head race where the margin of victory is 0.5%—the winning candidate received 50.25% of the vote, with the losing candidate getting 49.75% (hardly a landslide, but not an unprecedented squeaker either)—there are over *10 times* the number of questionable ballots to review than the margin of victory. In addition to the uncertainty to the outcome that these questionable ballots will cause, their questionable status provides an obvious basis for disputing the result of the relatively close election.

When the margin of victory among conventional ballots is slim, the losing candidate will want to “harvest” (convert into valid votes) as many provisional ballots as possible in precincts favorable to the candidate. The winning candidate, conversely, will want to maximize the number of these provisional ballots that are rejected. The stage is set for a ballot-by-ballot brawl over the reason why each one was cast as provisional and

⁷ These figures concerning the 2004 election come from Eagleton-Moritz Report.

whether the initial doubt about the voter's right to cast a countable ballot should be resolved for or against the voter.

Even when the rate of provisional ballots is not as high as 5% of total ballots, losing candidates may be tempted to litigate over the disqualification of provisional ballots. For any state where the rate of provisional ballots is over 1%, the margin of victory need only be as small as 0.1% for the same factor to exist where the number of questionable ballots is ten times the margin of victory. For a state with 1 million total ballots cast, in other words, if over 10,000 of those ballots are provisional, then a margin of victory of 1000 votes would present this same scenario. While margins this close in statewide races are rare, they are hardly unheard of, and thus any state with provisional ballots cast at a rate of over 1% faces a significant threat that an intensely competitive statewide race will end up mired in intractable litigation over the validity of provisional ballots.

Preliminary evidence from the November 2006 general election indicates that more than a handful of states still face this threat.⁸ While the number of states in this category dropped from sixteen in 2004 to twelve in 2006, that number still amounts to more than a fifth of the nation and includes Ohio, which again might prove pivotal in a close presidential election. (The other states that remain in this category are: Alaska, Arizona, California, Colorado, Kansas, Maryland, Nebraska, New Jersey, North Carolina, and Utah. The states that moved out of this category are: Iowa, New Mexico, New York, West Virginia, and Washington. Mississippi, which did not report provisional voting data in 2004, entered this category in 2006.) Moreover, because 2006 was not a

⁸ The numbers discussed here concerning the 2006 election come from an initial report of the *2006 Election Day Survey* compiled on behalf of the U.S. Election Assistance Commission.

presidential year, it is difficult to predict whether this drop-off will sustain itself into 2008, or instead whether there will be a jump back up in the number of states with rates of provisional voting greater than 1%.

It is worth observing also that the majority of states reporting rates of provisional voting less than 1% are hardly monolithic in this respect. On the contrary, some states come very close to this 1% benchmark. In 2004 both Illinois and Pennsylvania reported rates at or above 0.8%, as did Washington and West Virginia in 2006. By contrast, other states report rates of provisional voting at or less than 0.1% (or one-tenth of the benchmark): in 2004, only Connecticut, Delaware, Hawaii, Kentucky, and Vermont; in 2006, these states plus Arkansas, Indiana, Louisiana, Michigan, Nevada, Oklahoma, Oregon, South Dakota, Texas, and Virginia, for a total of 15. There remains a group of states that fall in the middle. In 2004, 19 states reported rates between 0.8% and 0.1%, while in 2006 only 11 states had rates in this range.

While the general decline in the rate of provisional voting from 2004 to 2006 might result from an improvement in the accuracy of voter registration lists—spurred by HAVA’s separate requirement that states maintain centralized registration databases—this general trend, if it is one, cannot explain the wide variation that remains among states in these rates.

Rates of Counting Provisional Ballots

States also vary tremendously in the rates at which they count the provisional ballots that are cast. They can be grouped into four quartiles: (1) those that count more than 75% of their provisional ballots; (2) those that count between 50% and 75%; (3) those that count between 25% and 50%; and (4) those that count less than 25%.

In 2004,⁹ 6 states were in the first quartile, 14 in the second, 13 in the third, and 8 in the fourth:

| <u>> 75%</u> | <u>50%-75%</u> | <u>25%-50%</u> | <u>< 25%</u> |
|-----------------|----------------|----------------|-----------------|
| Alaska | Arizona | Alabama | Delaware |
| Colorado | California | Arkansas | Hawaii |
| Nebraska | Illinois | Connecticut | Indiana |
| Ohio | Iowa | Florida | Kentucky |
| Oregon | Kansas | Georgia | Massachusetts |
| Washington | Maryland | Louisiana | Oklahoma |
| | Michigan | Missouri | Texas |
| | Montana | Nevada | Virginia |
| | New Jersey | New York | |
| | New Mexico | Pennsylvania | |
| | North Carolina | Rhode Island | |
| | South Carolina | Tennessee | |
| | Utah | Vermont | |
| | West Virginia | | |

Alaska had the high of counting 97% of all its provisional ballots, whereas Delaware had the low of 6.25%. States with higher rates of provisional ballots *cast* tended also to have high rates of provisional ballots *counted* (with Alaska topping both charts), and similarly states with fewer provisional ballots as part of their total ballots cast tended to count a smaller percentage of their provisional ballots. But the correspondence did not always hold up: Michigan was a state with a very low rate of provisional ballots *cast* (0.12%) yet a relatively high rate of provisional ballots *counted* (58.4%). These numbers may reflect Michigan's distinctive willingness to count provisional ballots cast by apparently unregistered voters, even as Michigan's registration database (which historically has been a national standard) contains relatively few errors that would trigger the need for a provisional ballot. By contrast, nearby Pennsylvania had a fairly high rate of provisional ballots *cast* (0.93%, almost the 1% benchmark), while a relatively low rate of counting

⁹ Again, numbers from 2004 come from the Eagleton-Moritz Report.

these provisional ballots (48.6%). This combination might have left Pennsylvania vulnerable to a challenge over the many provisional ballots (over 25,000) it left uncounted.

In 2006,¹⁰ preliminary evidence suggests that there was a noticeable shift towards counting a greater percentage of provisional ballots. This time, 15 states reported being in the first quartile, 10 in the second, 9 in the third, and 6 in the fourth:

| <u>> 75%</u> | <u>50%-75%</u> | <u>25%-50%</u> | <u>< 25%</u> |
|-----------------|----------------|----------------|-----------------|
| Alaska | Arizona | Alabama | Delaware |
| Arkansas | Florida | Illinois | Hawaii |
| California | Georgia | Indiana | Kentucky |
| Colorado | Iowa | Louisiana | Massachusetts |
| Kansas | Mississippi | Missouri | Michigan |
| Maryland | Nevada | New Mexico | Oklahoma |
| Montana | New York | South Dakota | |
| Nebraska | North Carolina | Texas | |
| New Jersey | Pennsylvania | Virginia | |
| Ohio | Vermont | | |
| Oregon | | | |
| South Carolina | | | |
| Utah | | | |
| Washington | | | |
| West Virginia | | | |

Generally speaking, even as fewer were cast, more were counted—although it is unclear what might explain this pattern. In any event, this general trend cannot mask the great variation that remains. Each of the fourth quartiles is still well represented in 2006. Thus, despite (or perhaps because of) HAVA, the chances of a voter’s provisional ballot being counted differs sharply depending upon which state in the nation the voter happens to reside.

To illustrate this point, consider four states that for 2006 report the same rate of provisional ballots cast: a middle-range rate of 0.5%. These states are Iowa, Montana,

¹⁰ As before, 2006 information is derived from the U.S. EAC’s 2006 Election Day Survey.

New Mexico, and New York. Yet these states vary remarkably in the rate at which they count their provisional ballots. Montana is the highest, at an astounding 95%; followed by New York, at 68% (or over two-thirds); then Iowa at 55%; with New Mexico the lowest, at 47% (or under half). What accounts for this kind of discrepancy? It remains a mystery, in need of much greater scrutiny than the topic previously has received.

County-level variation in the administration of provisional voting

In addition to the variation in provisional voting *among* states, it appears that there is equally significant—if not even more significant—variation in provisional voting *within* states. Variation within states is potentially more troublesome than variation across states because, in addition to whatever policy concerns it may raise, it also presents the possibility of an Equal Protection challenge. After the U.S. Supreme Court’s decision in *Bush v. Gore*, it is at least arguable that variability in the casting and counting of provisional ballots within a single state violates the Equal Protection Clause of the U.S. Constitution if it can be shown that the variability is caused by different local election officials applying different standards to comparable ballots and that these local differences result from inadequate specificity in the state’s law concerning how local officials should treat these ballots.¹¹

As we have already discussed, many states provide only minimal guidance to local election officials on the casting and counting of provisional ballots. (The archetypical example, again, is the bare directive that local officials must count a provisional ballot if the voter is “registered” without specifying precisely what this means or what steps a local official should take to make this determination.) As we shall now

¹¹ For an extensive analysis of this point, see Edward B. Foley, *The Future of Bush v. Gore?*, 68 Ohio State Law Journal ____ (forthcoming 2007).

examine briefly, in some states the provisional voting process operates very differently in different localities within each state. If a causal connection could be made between the vague state law and the local variations that occur, the upshot might be an Equal Protection violation under the authority of *Bush v. Gore*.

Consider Ohio as an example. The state has 88 counties, each with its own board of elections that has the authority to administer elections for its locality. In 2006, these counties varied dramatically in their own local rates at which provisional votes were both cast and counted.¹² The “cast” rate ranged from 8.5% (Athens) to 0.4% (Harrison). Seventeen counties had rates of provisional voting at or above 3%. (Recall that the statewide average was 3.1%.) Forty-two counties had rates between 2% and 3%. Twenty-six counties had rates between 1% and 2%. The remaining three counties had rates lower than 1%.

There was similar variability among Ohio counties in 2006 in the rates at which they counted the provisional ballots that were cast in each county, from a high of 99.6% (Highland)—only 2 of its 470 provisional ballots were not counted—to a low of 60.9% (Putnam). Twenty-eight counties counted more than 90% of their provisional ballots. Forty-one counted between 80% and 90%. Twelve counted between 70% and 80%, and seven counted between 60% and 70%.

¹² This Ohio-specific analysis is, again, derived from data available on the “Election Results” pages of the Ohio Secretary of State’s website. To calculate the rate at which provisional ballots were cast, it was necessary to use a figure from the website called “total votes cast.” It is unclear from the website whether this figure includes all provisional ballots cast, as implied, or only those that were counted. Either way, it would not affect the basic conclusion concerning the wide variation among Ohio counties concerning provisional voting.

This variability in provisional voting among Ohio counties is perhaps even more striking if one focuses on the state's largest counties, those with state's major cities:

| <u>County</u> | <u>City</u> | <u>PB Cast Rate</u> | <u>PB Counted Rate</u> |
|---------------|-------------|---------------------|------------------------|
| Cuyahoga | Cleveland | 3.76 | 66.17 |
| Franklin | Columbus | 5.08 | 86.54 |
| Hamilton | Cincinnati | 4.24 | 82.19 |
| Lucas | Toledo | 3.33 | 72.34 |
| Montgomery | Dayton | 2.99 | 80.93 |
| Summit | Akron | 2.63 | 70.68 |

Although all share the demographic characteristic of being urban counties, they hardly present a uniform picture with respect to provisional voting. Voters in Franklin County were almost twice as likely to cast a provisional ballot as voters in Summit County. Only two-thirds of provisional voters in Cuyahoga County had their ballots counted, whereas over four-fifths of provisional voters in three of these counties (Franklin, Hamilton, and Dayton) did. And counties with fairly similar rates of casting provisional ballots—Dayton and Lucas—diverged considerably in their rates for counting them.

Similar observations about the variability of provisional voting could be made by focusing on either Ohio's rural counties or its suburban ones. Basic demographics, in other words, does not appear to explain the variations, but it remains unclear what does. It is conceivable, although hardly yet proved, that these variations are best explained by differences in administrative practices among county boards of elections in light of insufficiently specific directives from state law.

The Future of Provisional Voting in the United States

It is understandable—indeed desirable—that HAVA obligated states to permit voters whose eligibility is unclear to cast provisional ballots, rather than being turned away from the polls without any ability to cast a ballot at all. HAVA’s requirement of provisional voting, in other words, was a necessary response to the erroneous purging of registration rolls that disenfranchised many in the presidential election of 2000, when no recourse was available to correct this wrongful disenfranchisement. But the nation’s experience with provisional voting in both 2004 and 2006 suggests that this reform is yet complete.

Ultimately, it is likely that Congress will need to amend HAVA to provide greater clarity and uniformity. Even if Congress still will wish to leave the states with considerable flexibility in implementing HAVA’s provisional voting requirement, Congress should clarify what exactly is the scope of this flexibility. As we have seen, too many questions exist about where (a) the extent of the federal “insurance policy” to protect the right to vote ends and (b) the freedom of states to define a valid vote begins.

It is unlikely, however, that Congress will revisit the provisional voting requirements in HAVA in the near future. In any event, it probably would be best for Congress to wait, before attempting to give HAVA greater precision, until one or more presidential elections have occurred to see how provisional voting develops in the United States. The practices of provisional voting are very much still evolving in light of HAVA. 2006 differed from 2004, and 2008 is likely to differ from both, although in ways we do not yet know. It may even take until 2012 or beyond for provisional voting

to become relatively stable, to a point at which it makes sense for Congress to fine-tune (or perhaps even overhaul) HAVA's approach to provisional voting.

Indeed, there are large gaps to our knowledge of provisional voting even as it occurred in 2004 and 2006. Those who work in the field frequently comment that the available data is questionable in its accuracy yet unquestionable in its incompleteness. If Congress were to do anything before undertaking a reexamination of HAVA, it would be advisable for Congress either to require states to collect and report better and more extensive information concerning the practice of provisional voting or else to give states an incentive to improve their gathering and dissemination of relevant data.

In the meantime, the states themselves can do much more to clarify their own rules for provisional voting, in an effort to avoid the uncertainty and disunity that plagues the implementation of provisional voting at the local level. Recognizing that provisional voting is a necessary form of insurance against administrative errors concerning voter registration, states can consider experimenting with alternative means of providing equivalent insurance. One idea, for example, is to give new registrants "tracking numbers" (like Fed Ex does), which when presented to poll workers will automatically verify that these voters are registered. Any form of "voter insurance" that reduces the rate at which provisional ballots need to be cast, or reduces the likelihood of fighting over whether a provisional ballot should be counted, will diminish the risk that an important election will become mired in lengthy litigation over provisional votes.

States also need to devote more attention to determining how much time is needed for the process of verifying provisional ballots. While the process should not be so quick that local election officials fail to take the steps necessary for provisional ballots to

perform their insurance function—like checking whether registration forms failed to arrive from the Department of Motor Vehicles—the process cannot be so lengthy that in close presidential races it prevents the identification of winning candidates before key Electoral College deadlines set by Congress. As readers may recall from *Bush v. Gore*, the U.S. Supreme Court strongly disfavors (and will not readily permit) disputes over presidential ballots that remain unresolved past the so-called “Safe Harbor Deadline,” which is five weeks after Election Day. Therefore, it is prudent for states to complete not only the evaluation of provisional ballots within this five-week period, but all other post-voting processes that guarantee the accuracy of the count and thus the integrity of the election—including any recounts, audits, and judicial review procedures.

Few states have begun to think systematically about how best to structure their post-voting procedures within this five-week timeframe. But provisional voting cannot perform either of its dual insurance functions if it consumes so much of this period that the state’s review of the election shuts down with substantial questions unresolved. If by this “Safe Harbor Deadline,” there are still enough doubts about either voter disenfranchisement or ineligible voting to cloud the outcome of the presidential election, then the effort to insure against the risk of “electoral hurricanes” will have failed.

Thus, the idea of electoral insurance that underlies provisional voting is a welcome one, but the system currently in place is not yet a full realization of this idea.

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