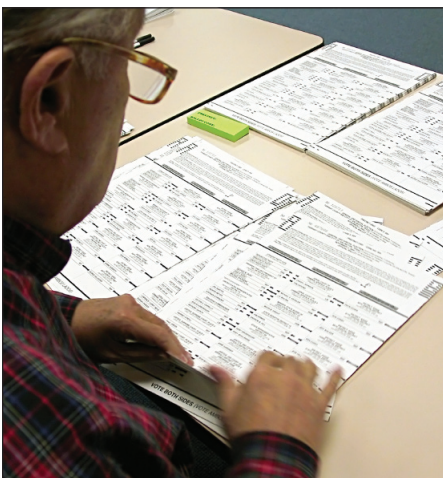


*2010 Issues in Election Administration***January 2010**

Ensuring that Provisional Ballots are Counted

Americans may find it surprising to learn that many eligible citizens in the United States are denied the right to cast ballots and have them counted on Election Day. The sad reality is that many voters are turned away from polls because their names do not appear on a list of registered voters, for a host of different reasons that may or may not be the responsibility of the individual voter.



To correct this problem, Congress enacted “fail-safe” provisional voting requirements in the Help America Vote Act of 2002 (HAVA), 42 U.S.C. § 15301, *et seq.* Under Section 302 of HAVA, election officials are required to provide provisional ballots to individuals who are not listed on the official list of registered voters but believe themselves to be properly registered and eligible to vote. Once the appropriate election officials determine that the individual is indeed eligible to vote, the ballot is counted.

The results of this HAVA mandate have been mixed. In some situations, poll workers have failed to offer provisional ballots to voters at all. In cases where poll workers have actually offered ballots to voters, states have applied such varying methodologies for counting provisional ballots that the “fail-safe” mechanism under HAVA has been frustrated. Most recently, in the 2008 general election, only 67.3% of provisional ballots were counted in whole or in part. According to the Election Assistance Commission, more than 600,000, or 28.2% were rejected. Acceptance rates vary widely among states. In 2008, Maine fully counted 100% provisional ballots cast and Alaska fully or partially counted 98.7% of provisional ballots cast, while Delaware counted only 15.7%

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and Oklahoma only 16.6% of provisional ballots cast.ⁱ This trend is consistent with prior years. In the 2004 general election, 96% of provisional ballots were counted in Alaska, while only 6% were counted in Delaware.ⁱⁱ

Similar disparities occurred in the 2006 general election: while Maine counted 100% of its provisional ballots, Kentucky counted less than 7%. Fifteen states rejected over 50% of their provisional ballots, and 20% of provisional ballots were rejected nationwide.ⁱⁱⁱ

This legislative brief outlines the reasons why thousands of provisional ballots have not been counted since the passage of HAVA, and why the use of provisional ballots should be limited. It also provides policy recommendations which, if implemented by all states, would increase the likelihood that a voter's provisional ballot would count.

Why are Provisional Ballots not Being Counted?

Despite the efforts of Congress to provide a “fail-safe” mechanism to enable registered citizens to vote, the prerogative of states to impose restrictions on provisional ballots prevents thousands of these ballots from being counted. Based on state surveys completed in the two general elections following the passage of HAVA, and reports addressing the implementation of the provisional ballot

requirements of HAVA in different states, Project Vote has identified four principal reasons why provisional ballots are not being counted:

1. Individuals are not actually registered to vote.
2. Individuals are not casting their provisional ballots in the correct precinct or jurisdiction.
3. Individuals are submitting incomplete or unsigned provisional ballots.
4. Individuals are failing to provide sufficient identification.^{iv}

Although states report each year that provisional ballots are rejected because individuals are not actually registered to vote, this simplistic explanation does not address the reason the voter does not appear on the list, which may be beyond the voter's control. For example, individuals may be omitted from the registration rolls because their applications are not processed in a timely manner, the Board of Elections fails to notify the voter that additional information is needed to complete the application, voters are inappropriately purged from the rolls, or because of no-match, no-vote policies.^v Also, in some situations where individuals cast their provisional ballots in the wrong precinct, poll workers fail to notify voters that they must be in a different precinct to cast ballots that will be counted.

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Project Vote has also determined that some potential voters were not able to cast provisional ballots because polling places ran out of ballots^{vi}, or, worse, poll workers discouraged voters from casting provisional ballots. In some cases where provisional ballots were cast, poll workers failed to review the provisional ballot envelopes to confirm that they were signed.

Provisional Ballots Should be Used on a Limited Basis

Due to the problems with ensuring that provisional ballots are counted, it is always better to minimize the use of provisional ballots and allow eligible voters to cast regular ballots. The easiest way to enable the largest number of potential voters to cast regular ballots is to allow Election Day Registration.

If an individual meets registration requirements, there is no valid reason why she should not be allowed to register and vote. Ten states currently allow Election Day Registration, or have no voter registration requirements.^{vii} In fact, in the 2006 election, voter turnout in states that permitted same day registration was 13% higher than in states that did not offer the option.^{viii} In the 2008 election, almost 1 million new voters and a total of more than 3.6 million voters made use of Election Day Registration.^{ix}

The procedure is easy to implement. In Iowa, for

example, a citizen can register to vote on Election Day in the precinct where he lives by showing proper identification and demonstrating residency with a utility bill or other supporting document. If unable to show proof of residency, another registered voter from the precinct can attest to the applicant's residency.^x Such measures ensure that voters who are eligible can cast a regular ballot.

Recommendations to Increase the Likelihood that Provisional Ballots will be Counted

Once all avenues for casting a regular ballot have been exhausted, states must ensure that provisional ballots are offered and make every effort to count them. Reasonably simple solutions can be implemented to maximize the opportunity for provisional voters to be enfranchised. Project Vote has developed several policy recommendations based upon surveys conducted across the country, a review of state statutes and existing literature, and experiences with recent federal elections.

I. Allow Provisional Ballots to Be Counted on a Statewide or Countywide Basis.

One of the top two reasons provisional ballots were not counted in the 2004, 2006, and 2008

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elections was that the provisional ballots were cast in the wrong precinct.^{xi} Thus, thousands of eligible voters were disenfranchised merely because they cast an otherwise valid ballot at the wrong place. Unfortunately, many of these voters either were not directed to the correct precinct, were not informed of the consequences of casting a ballot in the incorrect location, or were never offered a provisional ballot at all.^{xii}

Many Americans move often, and precinct boundaries and polling locations change frequently. By counting provisional ballots at either the county or statewide level, many more voters will be enfranchised: ballots cast in the wrong precinct would be counted for any statewide or countywide elective office or issue. It seems especially absurd that a vote cast for President by an eligible voter would not be counted just because it was cast in the wrong precinct. In the 2006 general election, states allowing broader jurisdiction-wide acceptance of provisional ballots had significantly higher rates of counting provisional ballots: 84.96 percent compared to 71.82 percent in other jurisdictions.^{xiii} Also, in some jurisdictions where early voting is offered, a voter may cast his or her ballot at any early voting site, which decreases the likelihood that a provisional ballot will be needed. In 2008, 13% of all voters cast their ballots before Election Day.^{xiv}

2. Provisional Ballots Should Be Designed to be Distinguishable from Regular Ballots, Easy to Read, and Should Serve as Voter Registration Applications

To inform both the poll worker and the voter that a provisional ballot is being cast in lieu of a regular ballot, provisional ballots should be easy to read and visually distinct. For example, Washington State prints provisional ballots in different colors from regular ballots and designs them in a manner that will not allow poll-based machines to count them.

The provisional ballot envelope should also serve as a voter registration application. Because the lack of registration was identified as one of the top two reasons provisional ballots were not counted in the 2004, 2006, and 2008 elections, it serves everyone's interests to allow the potential voter to apply for registration for the next election by completing a provisional ballot envelope that includes all of the information required for a registration application. At least 12 states have implemented procedures that allow the act of provisionally voting to also serve as registering to vote.^{xv}

3. States Should Give Voters Who Submit Provisional Ballots Additional Time to Correct or Supply Necessary Information

Provisional ballots are routinely excluded for several reasons: because a signature or other information is missing from the ballots; because

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the voter is unable to provide identification or proof of residency at the polling place; or, because the voter submitted an incomplete application before the close of registration but was not properly notified as to how to complete it. In addition, voters who are not listed on the roll may have valid voter registration cards or polling place notifications from local election authorities, but are not in possession of them on Election Day.

If a voter is not registered because his application is incomplete, election authorities should use the information contained in the provisional ballot to supplement or cure any flaws in the registration application so the provisional ballot can be counted.^{xvi} If a voter needs to sign a ballot or submit other evidence proving that they are eligible to vote, the voter should be permitted to do so within a reasonable time following the election, and should be notified of this right when they receive the provisional ballot. Several states currently allow provisional voters to return after casting a provisional ballot to provide supplemental or missing information to have their ballots counted.^{xvii}

In order for many of these reform measures to work, states must provide adequate time for the provisional ballot canvass. The time frame currently varies widely, from 24 hours in Rhode Island to 21 days in Washington. Because the opportunity to remedy a ballot is dependent upon the provisional ballot canvass, which typically turns on the date by which the election must be certified, states need to allow a reason-

able time for counting ballots to ensure the accuracy of the tally.

4. Poll Workers Must Be Properly Trained to Administer Provisional Voting

None of these recommendations will work if poll workers are not adequately trained on when to offer provisional ballots versus regular ballots and how to communicate the information necessary to guarantee a provisional ballot is counted. Poll workers should make every effort to determine why the individual is not on the polling list. If it appears that the voter is simply in the wrong precinct, the poll worker should be required to direct the voter to the correct one and explain the consequences of voting in the wrong one; if the voter nonetheless decides to cast a provisional ballot in the wrong precinct, the poll worker should instruct the individual to sign a form indicating that the poll worker instructed the individual that his vote would not be counted but that he chose to submit a ballot regardless. Alternatively, the poll worker should provide the voter with a signed letter that explains that the voter was instructed to go to a particular polling location but refused to do so.^{xviii}

It must be stressed that the poll worker is *required* to offer a provisional ballot if, for any reason, the voter believes herself to be registered but does not appear on the roll. After a provisional ballot is cast, the poll worker should maximize the likelihood that the ballot will be counted by ensuring the ballot envelope is

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signed; by notifying the voter that he can submit any relevant documents to the board of elections within a specific time frame designated by the state;^{xix} and by providing the provisional voter with a toll-free number to call to confirm whether the ballot was counted.

Furthermore, poll workers must be provided with sufficient data to be able to inform voters as to what they need to do to cast a ballot that will be counted. For example, every polling place must have a statewide list of registered voters, inactive or deleted voters, and voters with incomplete voter registration forms, so as to notify individuals why their names are not listed on the roll and what steps the voters need to take to complete the registration or provisional ballot process.

Election officials should also provide polling centers with sufficient provisional ballots so that every voter who is entitled to cast a provisional ballot is able to do so. Based on a survey, Project Vote found that a majority of states reported having no minimum number of provisional ballots required at each polling place, nor a rule that local jurisdictions establish such a minimum. Based on research for states that do provide guidelines, Project Vote recommends that each polling center have on hand a quantity of provisional ballots equal to at least 5% of all registered voters assigned to that polling place. In addition, adequate telephone lines must be provided on Election Day to ensure that poll workers can contact the Board of Elections promptly when necessary.

Conclusion

It is clear that the states have broad discretion in determining methodologies for counting provisional ballots, resulting in disparate experiences for voters. But it is also clear that states have the authority to adopt best practices that will significantly increase the likelihood that eligible voters' provisional ballots are counted. Also, by collecting more data on provisional voting and making it available to the public, election officials will be in a better position to improve their practices, educate their voters, and increase the fairness and integrity of elections.

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Notes

- ⁱ Election Data Services, *The 2008 Election Administration and Voting Survey, A Summary of Key Findings*, November 2008, at 47 and 48, http://www.eac.gov/program-areas/research-resources-and-reports/completed-research-and-reports/program-areas/research-resources-and-reports/copy_of_docs/2008_electionadministrationvotingurvey_508/attachment_download/file.
- ⁱⁱ Kimball W. Brace & Dr. Michael P. McDonald, *Final Report of the 2004 Election Day Survey*, Election Data Services, Sept. 27, 2005 at 6-7, <http://www.eac.gov/program-areas/research-resources-and-reports/completed-research-and-reports/election-day-survey-results>.
- ⁱⁱⁱ Election Data Services, *The 2006 Election Administration and Voting Survey, A Summary of Key Findings*, December 2007, at 19-20, <http://www.eac.gov/program-areas/research-resources-and-reports/completed-research-and-reports/election-day-survey-results>.
- ^{iv} Election Data Services, *supra*, note 1, at 13.
- ^v Margaret Chen & Wendy Weiser, *Voter Suppression Incidents 2008*, Brennan Center for Justice, Nov. 3, 2008, http://www.brennancenter.org/content/resource/voter_suppression_incidents/.
- ^{vi} John Gideon, *Train Wreck in Maryland Primary*, VoteTrustUSA, Sept. 12, 2006, http://www.votetrustusa.org/index.php?option=com_content&task=view&id=1768&Itemid=66.
- ^{vii} Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming have Election Day Registration, while South Carolina permits same day registration at early voting sites up to three days before the election. North Dakota, however, does not have voter registration requirements at all.
- ^{viii} Election Day Registration, Nonprofit Voter Engagement Network, <http://www.nonprofitvote.org/Election-Day-Registration.html> (last visited Jan. 2, 2009).
- ^{ix} Election Data Services, *supra*, note 1, at 8.
- ^x Election Day Registration Guide, Iowa Secretary of State, <http://publications.iowa.gov/6367/1/EDRbrochure.pdf> (last visited Jan. 2, 2009).
- ^{xi} Brace & McDonald, *supra* note 2, at 6-6; Election Data Services, *supra* note 3, at 21; Election Data Services, *supra* note 1, at 13.
- ^{xii} The Century Foundation, *Issues: Provisional Ballots*, 2008, <http://www.reformelections.org/feature.asp?menuid={FC7544CD-4531-4C5B-A5EA-911E1ACD2FED}#4> (last visited Jan. 11, 2010).
- ^{xiii} Election Data Services, *supra* note 3, at 20.
- ^{xiv} Election Data Services, *supra* note 1, at 9.
- ^{xv} Kristen Clarke, *Public Meeting and Workshop Regarding Empowering Voters*, Sep. 18, 2008, at 3, http://www.eac.gov/News/docs/9-18-08-meeting-eac-statement-re-provisional-ballots-kristen-clarke.doc/attachment_download/file.
- ^{xvi} See Project Vote's discussion of deficient applications at http://projectvote.org/administrator/images/publications/Policy%20Briefs/Project_Vote_Policy_Brief_7_Correcting_Deficient_Applications.pdf
- ^{xvii} For example, in Colorado, provisional voters who fail to sign their provisional ballots have eight days to go to the county clerk's office and sign their ballots. Iowa permits provisional voters to supplement their ballots with documentation supporting their eligibility claims. Michigan also accepts additional documentation up to six days after an election.
- ^{xviii} A poll worker's failure to document their explanation should serve as prima facie evidence that the voter was not instructed to travel to the appropriate polling location and should therefore have the provisional ballot counted.
- ^{xix} The poll worker would only have to notify the voter to provide supporting documentation in states where providing such information is currently allowed, or in states that adopt the preceding policy recommendations.

Project Vote is a national nonpartisan, nonprofit organization that promotes voting in historically underrepresented communities. Project Vote takes a leadership role in nationwide voting rights and election administration issues, working through research, legal services, and advocacy to ensure that our constituencies are not prevented from registering and voting.

Disclaimer

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January 2010

