

PLACEBO BALLOTS:

Will "Fail-safe" Voting Fail?

Chicago Sun-Times

May 10, 2004

Mistakes Cost Thousands Their Votes

Thousands of Cook County voters were disenfranchised after voters were rejected because voters cast them at the wrong location. Nowhere else were so many

New York Times

August 6, 2004

A Rule to Avoid Balloting Woes Adds to Them

CHICAGO - When poll workers could not find voters who had voted regularly since 1989, they counted. But election officials

TheTampaTribune

August 29, 2004

Provisional Ballots in the Spotlight over Errors

TALLAHASSEE - When poll workers were unable to find Mary Barber's name on the voter rolls in 2002, they told her she could still vote using one of the state's new provisional ballots. Her ballot was rejected because it had been cast in the wrong precinct. Poll workers had failed to follow a state requirement to check whether a voter is in the correct precinct. But election officials counted. But election officials whose provisional ballots have been rejected since 2002 because of poll workers' mistakes, a Tampa Tribune examination has found.



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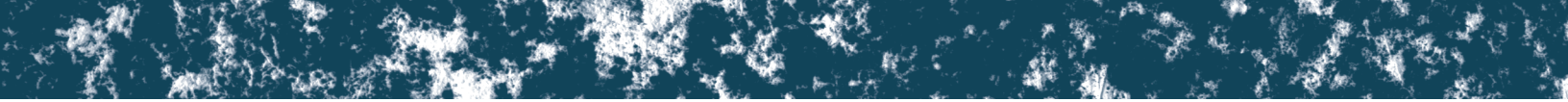
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Millions of citizens were disenfranchised in the 2000 election when they were denied their right to vote. In response, Congress passed the Help America Vote Act of 2002 (HAVA), which purported to correct many of the country's more egregious election problems. One of HAVA's signal promises was its so-called "fail-safe" voting provision. As of the first federal primary election this spring, no registered voter would be turned away from the polls because her name was not found on the voter lists. Similarly, those voters unable to show the identification required under another HAVA provision would also get an opportunity to cast a ballot. These erstwhile frustrated voters would be offered a provisional ballot.

That promise now looks empty for many thousands of new voters this November. States have seized upon the fine print of HAVA's "fail-safe" voting provision to again deny otherwise eligible Americans their right to participate in perhaps the most important choice put before the electorate in a generation. Congress left it to the states to determine how and whether to count these provisional ballots. In a recent national survey, Demos found that over half of the states have subverted the lofty goal of HAVA's provisional ballot requirement. Florida – or one of 31 other states – may again be the poster child for an ailing election system this November. Like patients sent home with a placebo, provisional voters in these states may think they are being given the vote, when in fact they are receiving a false promise.

Early Warning Signs

States have already thrown out tens of thousands of provisional ballots cast in primary elections this year. Half a dozen lawsuits challenging state provisional ballot procedures have been filed. On November 2, 2004, more than one million voters are expected to cast provisional ballots. If states stick with their current plans, more than 200,000 ballots cast by registered voters may end up in the trash.

Distorting the Law: State Provisional Ballot Restrictions

Over four months this summer, Demos surveyed election officials in all 50 states and the District of Columbia to ascertain their plans for administering provisional balloting. Officials were asked the circumstances under which provisional ballots would be offered, which races the ballots would include, and how they would be determined valid and subsequently counted. The responses differed widely among states. At times, different elections officials within the same state offered different answers.¹ Nevertheless, the survey showed a clear cause for alarm.

¹ In order to check the accuracy of election officials' responses, Demos made multiple attempts via email and telephone to corroborate the original information. The information given below is based on multiple sources in most states. When inconsistencies emerged, the higher-ranking official's answers were used.

Disenfranchising Voters Without Identification

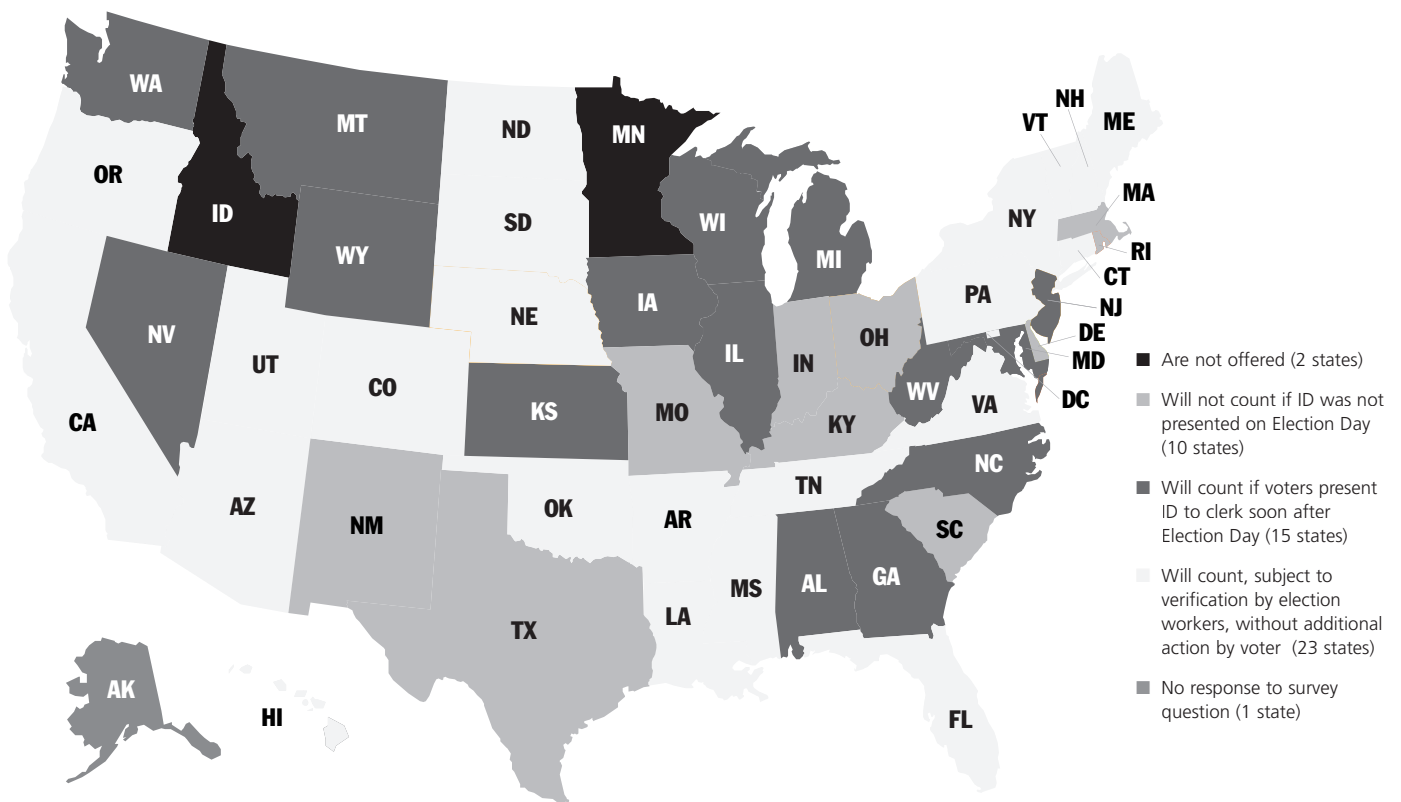
New HAVA identification requirements threaten to disenfranchise many first-time voters unless they are provided with effective fail-safe alternatives. Citizens who registered to vote by mail after January 2003, but whose identity could not be verified in advance of election day, will be required to show identification at the polls on November 2. As noted, these individuals are to be offered a provisional ballot if they can not produce the requisite ID. Demos has found that voters in at least twelve states will be effectively denied that right.

- **Idaho and Minnesota² will not offer provisional ballots to first-time, newly registered voters who can not show identification.**
- Ten other states will provide provisional voters with effectively meaningless ballots. They will not allow these individuals a chance to substantiate their identity after election day or verify their eligibility through other means. Instead, they will automatically invalidate provisional ballots cast by these “voters.”

- At least fifteen other states require these provisional voters to return to the election clerk’s office after election day to present identification — sometimes within one or two days and almost always by the end of the week.
- Twenty-three states provide provisional ballots and verify voters’ eligibility without requiring them to present identification subsequent to election day.³

Given the extreme demands of work and child care that plague most American families, it is unlikely that many of these individuals will return with ID before deadlines pass. This of course assumes that provisional voters will be fully apprised of such state requirements. One of the most common problems in every election, poll worker error, is likely to have a particularly strong effect on these provisional voters.⁴ Many voters will likely leave the polling place without understanding that they must return with identification sometime later for their provisional ballot to count.

Figure 1: Provisional Ballots for First-time Mail Registrants Without ID



² Minnesota, Idaho, and five other states are technically exempt from HAVA’s provisional ballot requirement because they offer Election Day registration or do not require registration. Maine, Wisconsin, and Wyoming have elected to provide provisional or challenge ballots to those who cannot meet voter identification requirements. New Hampshire and North Dakota allow these voters to cast normal ballots after signing affidavits.

³ In summaries of the number of states with a particular practice, the District of Columbia is counted as a state for the sake of simplicity.

⁴ “The New Hanging Chad.” Editorial. *New York Times*, August 19, 2004.

Disenfranchising Voters at the Wrong Polling Location

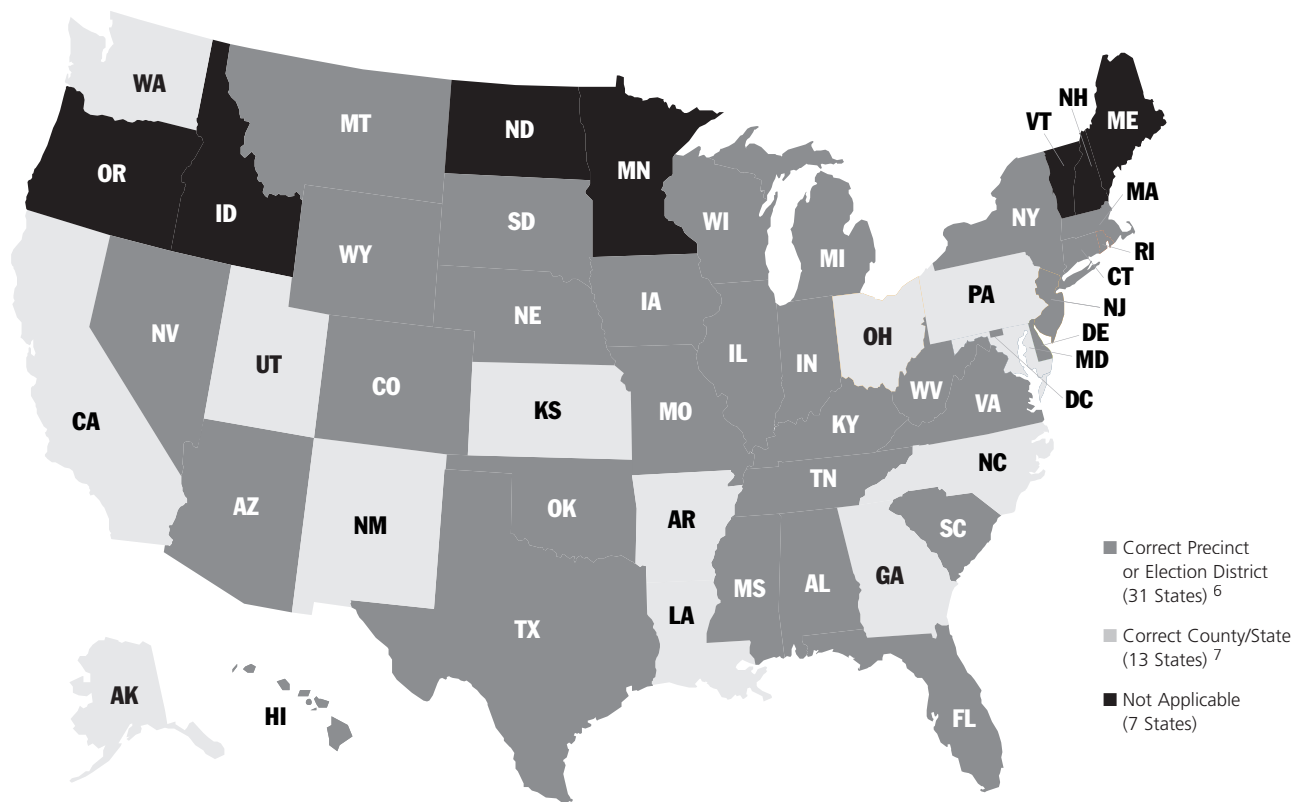
In the typical election, many voters have difficulty finding their correct polling location. This year, as many new voters make their first trip to the polls and others adjust to polling place changes wrought by redrawn election district boundaries, confusion over finding their proper polling places is inevitable. Provisional voters innocently caught in this wrong polling place bind will nevertheless be denied an effective “fail-safe” voting option in many states.

- Thirty-one states will invalidate provisional ballots cast in the wrong precinct – even when voters are selecting candidates for statewide offices like Governor or U.S. Senator,

where the polling place error is immaterial. Collectively, the 120 million eligible voters in these thirty-one states represented 59% of the electorate in 2000.⁵

- Only thirteen states will count a provisional voter’s choices for all races for which she was eligible to vote, even if the provisional ballot was cast in the wrong polling location for all eligible races. In most cases, the ballots will only count if they are cast in the correct county. In Louisiana and Utah, the ballots will only count if they contain the same offices and questions as the ballots used in the voter’s correct precinct.

Figure 2: Where Provisional Ballots Must be Cast to Count



⁵ U.S. Census Bureau; “Voting-Age Population and Citizen Voting-Age Population by Sex, for the United States and States: 2000” published 4 March 2004; <http://www.census.gov/population/www/cen2000/phc-t31.html>

⁶ Some New York and Montana polling places host multiple precincts. Colorado and Rhode Island are planning to count provisional ballots cast in the wrong precincts only for some federal elections, but not for other offices for which the voter was eligible to cast a ballot. Massachusetts will not count provisional ballots cast in the wrong precinct if the voter’s name

appeared on the registration list in the correct precinct, but will count the ballot if the voter was registered in the municipality, but erroneously absent from the registration list in the correct precinct.

⁷ Alaska, Maryland, and Washington will count provisional ballots for eligible races even if they are cast in the wrong county. Louisiana and Utah will only count provisional ballots cast in the wrong precinct if they contain exactly the same races offered in the voter’s correct precinct.

Limiting Provisional Ballots to Federal Elections

In a third move that severely undercuts the promise of the provisional ballot, seven states are applying a crimped, overly technical reading of the Help America Vote Act.⁸ Connecticut, Delaware, Kentucky, Louisiana, Nevada, Vermont and Missouri

will include only federal or federal and statewide offices on provisional ballots. Oklahoma will offer full provisional ballots, but only during federal elections.

Canary in the Mineshaft: Early Signs of a “Fail-safe” Voting Failure

Recent elections provide some indication of how provisional voters will fare in November. The prognosis does not look good. Even facing a much smaller number of voters than they are likely to face in the presidential election, elections officials in many jurisdictions disqualified the majority of provisional ballots cast — often due to poll workers’ failure to direct voters to their proper polling places or assist them in filling out affidavits correctly.

In the March 2004 Illinois primary, more than 9,000 of the 10,287 provisional ballots cast statewide were tossed out.⁹ Provisional ballots in Chicago were disqualified at an even higher rate of 93%, in most cases because they were cast in the wrong precinct or the affidavits were incomplete.

The *Tampa Tribune’s* review of Florida’s three elections since 2002 found similar results, including 1,226 invalidated provisional ballots in Broward County, Florida alone.¹⁰ The *Tampa Tribune* examination revealed that at least 1,657 (44%) of the rejected provisional ballots cast by registered Florida voters were invalidated because of poll workers’ mistakes. If the same limitations invalidate ballots in the general election, many times the 537 certified votes that separated the

Presidential candidates in 2000 will be affected.

Cities and states that count all provisional ballots cast by eligible voters (even if they cast their vote in the wrong precinct or did not show ID) do much better. Philadelphia, for example, counted 70% of the 683 provisional ballots cast in its April primary election.¹¹ Colorado counted 88% of the 27,366 provisional ballots cast in the 2002 midterm elections, but a recently-passed law requiring identification from provisional voters would have halved the percentage of valid ballots counted if it had been in effect at the time.¹²

If heading to the wrong precinct disenfranchises the same proportion of provisional voters this November as lost their vote in Chicago, more than 100,000 ballots in 31 states could be lost due to this rule alone. Poll workers’ failure to help voters complete their affidavits and the absence of a meaningful opportunity for voters without ID to cast valid ballots could disenfranchise thousands more. Clearly, if states do not act soon to honor the spirit of HAVA and ensure real fail-safe voting, many of the predicted one million Americans who will cast provisional ballots on November 2 will have their voices silenced.

Seeking a Remedy in the Courts

While legislative efforts to improve policies for counting provisional ballots are unlikely to succeed in time to affect the upcoming election, the courts provide a more promising avenue for more immediate change. Lawsuits challenging the invalidation of provisional ballots cast in the wrong precinct have been filed in Missouri, Colorado, Ohio, Florida, and Michigan.

After Missouri’s August 2004 primary, the Missouri Democratic Party and three Kansas City residents filed suit in federal court against the Secretary of State and the Kansas City Board of Elections, claiming that the state’s provisional ballot law conflicted with the Help America Vote Act (HAVA). The three Kansas City residents argued that their votes should count even though they were cast in the wrong polling place.

8 Although the principle that voters should have an opportunity to cast a fail-safe ballot applies equally to state and local elections, HAVA’s provisional ballot language technically applies only to federal elections.

9 Steve Patterson, “Mistakes Cost Thousands Their Votes,” *Chicago Sun-Times*, May 10, 2004.

10 Garrett Therolf, “Provisional Ballots in the Spotlight over Errors,” *The Tampa Tribune*, August 29, 2004.

11 Ford Fessenden “A Rule to Avoid Balloting Woes Adds to Them,” *New York Times*, August 6, 2004.

12 Susan Green, “New Rules May Tangle Vote,” *The Denver Post*, September 27, 2004

The Kansas City Board of Elections subsequently agreed to count provisional ballots cast at the wrong polling place in that primary, in effect admitting a technical error in its implementation of state law. Although Missouri disallows provisional ballots cast in the wrong place, it also requires that poll workers direct voters to their correct polling location. The Kansas City Board was unable to differentiate provisional votes cast by individuals who had been advised of their correct precinct from those who had not. U.S. District Judge Richard Dorr has ruled that provisional ballots cast in the wrong polling place on November 2 should not be counted, “provided that the voter first was directed to the right polling place.”¹³

The Brennan Center for Justice at NYU School of Law has filed suits in Michigan and Ohio on behalf of several civic organizations challenging each state’s plan to invalidate provisional ballots cast in the wrong precinct or by voters without iden-

tification, arguing that doing so would make provisional ballots a “meaningless sham, presenting the voter with a decoy ballot while effectively disenfranchising him.”¹⁴ Michigan has already announced that it will allow voters to return and show ID up to six days after the election. On October 14, U.S. District Court Judge James Carr ruled in a related lawsuit filed by the Ohio Democratic Party that Ohio must count provisional ballots cast in the wrong precinct, but has yet to rule on how to handle provisional ballots cast by voters without identification. One lawsuit against the invalidation of provisional ballots cast in the wrong precinct filed in Florida by AFL-CIO, AFSCME, and SEIU¹⁵ is now under consideration by the Florida Supreme Court, while another filed by the Florida Democratic Party in federal court was thrown out. Similar lawsuits filed in Colorado by Common Cause and the Colorado Democratic Party are still pending.¹⁶

States Should Fulfill Congressional Aspirations

The lead sponsors of the Help America Vote Act clearly had something else in mind when they pushed the legislation through Congress two years ago. Representative Bob Ney (R-OH), Chair of the Committee on House Administration and co-author of the House version, promised that with HAVA, “Voting citizens in this country will have the right to a provisional ballot, so no voter will be turned away from a polling place, no voter will be disenfranchised, just because their name does not appear on a registration list.”¹⁷ Representative Steny Hoyer, his Democratic colleague, made similar statements.¹⁸

Legislators were no less clear on the Senate side. In the floor debate on HAVA’s final form, Senator Christopher Bond (R-MO) stated that HAVA would ensure that “no voter will be turned away from the polls because of a mistake or oversight at the administrative level.”¹⁹ Senator Bond, responding to criticisms that identification requirement provisions of the bill might disenfranchise voters, assured the Senate that “voters who do not have the identification required will be given the

opportunity to cast a fail-safe ballot.”²⁰ Senator Christopher Dodd (D-CT) agreed, asserting that “if a challenged voter submits a provisional ballot, the state may still determine that the voter is eligible to vote and so count that ballot, notwithstanding that the first-time mail registrant voter did not provide additional identification.”²¹

In states that have undermined these aspirations, voters may sometimes be worse off than they were in 2000. After initially being turned away, many voters in that election returned to the polls with identification or better knowledge of their voting rights. Flawed provisional ballot procedures threaten to give voters the mistaken impression that they have cast a valid ballot. Many may not learn of additional steps they must take, before or after casting provisional ballots, to ensure that their votes will count. As a result, poor provisional ballot procedures not only limit the effectiveness of “fail-safe” voting, they may turn out to be “placebo ballots” that cause more damage than offering no provisional ballots at all.

13 Jo Mannies, “Judge Spells Out Rules on Provisional Ballots,” *St. Louis Post-Dispatch*, October 12, 2004.

14 The Brennan Center for Justice at NYU School of Law, Press Release, October 1, 2004, “Federal Court Asked to Strike Down Michigan’s Plan For Provisional Ballots On Nov. 2”; www.brennancenter.org/presscenter/releases_2004/pressrelease_2004_1001.html.

15 AFSCME, Press Release, October 12, 2004, “Florida Supreme Court to Hear Provisional Ballots Lawsuit Filed by AFL-CIO, Unions on Oct. 13”; www.afscme.org/press/pr041012.htm.

16 For more information on these lawsuits, contact Florida Democratic Party Communications Director Allie Merzer (850-222-3411), Colorado Common Cause Communications Director Mark Eddy (303-839-4300 x207), or Ohio Democratic Party Communications Director Dan Trevas (614-221-6563 x129).

17 Cong. Rec. 10 Oct. 2002: H7837.

18 Cong. Rec. 10 Oct. 2002: H7841.

19 Cong. Rec. 16 Oct. 2002: S10489.

20 Cong. Rec. 16 Oct. 2002: S10489.

21 Cong. Rec. 16 Oct. 2002: S10504.