

# CHALLENGES to Fair Elections



## Provisional Ballots

The 2000 election will be remembered as a national debacle in which millions of citizens were denied the right to vote and have that vote be properly counted. To remedy the problems of 2000, Congress passed the Help America Vote Act of 2002 (HAVA). One of HAVA's principal provisions required states to adopt a system of "fail-safe" voting in which a person who goes to the polls, but whose name is not on the voter lists or who cannot produce the necessary identification, is allowed to vote on a provisional ballot. These provisional ballots will only be counted if elections officials are able to subsequently determine that the individual was eligible to vote.

While Congress may have scored points with the rhetoric of "fail-safe" voting, many states have taken advantage of HAVA's vague language to manipulate provisional balloting rules and again deny otherwise eligible Americans their right to participate in the democratic process. Much like patients sent home with a placebo, many provisional voters think they are being given the vote, when in fact they are receiving a false promise.

## Where to Watch

### Progress:

The seven states that allow citizens to register and vote on Election Day—Idaho, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming—have a true system of "fail-safe" voting. Would-be voters who are left off the rolls simply re-register on Election Day and cast a ballot that will be counted. North Dakota does not require voters to register in advance of an election. Fifteen states<sup>1</sup> will count a provisional ballot that is cast anywhere within the voter's county of residence.

### Problems:

There are 31 states that will not count a provisional ballot if it is cast in the wrong precinct, even if it is cast in the correct county. Among those states, Alabama, Connecticut, Illinois, Iowa, Michigan, Missouri, Montana, Ohio, Rhode Island, Tennessee, and Virginia have been reported to have competitive or high profile races.



### **The Facts:**

- Over one in three of the nearly 2 million “fail-safe” provisional ballots cast in the 2004 election were not counted.<sup>2</sup>
- Thirteen states<sup>3</sup> each rejected over 10,000 provisional ballots in the 2004 election. Twenty-three states<sup>4</sup> counted less than 50 percent of the provisional ballots cast in that election.
- Thirty-one states and the District of Columbia will not count a provisional ballot cast in the wrong precinct even if the ballot is cast in the correct county.<sup>5</sup> When multiple precincts are located in the same polling place, something as simple as getting in line for the wrong precinct could cost a citizen their vote, such as happened in Lucas County, Ohio in 2004.<sup>6</sup>
- Many voters in 2004 were simply refused the opportunity to even cast a provisional ballot while others were told to vote provisionally even though they were eligible to cast a regular ballot. One Franklin County, Ohio resident—whose name was omitted from the poll list though other members of her household who had registered at the same time were listed—was challenged by a partisan poll watcher, blocked from voting and never offered a provisional ballot. Another voter in Prince George’s County, Maryland was not found on the voter rolls and not provided a provisional ballot because there were “not enough.” Precinct workers at a polling place in Warren County, North Carolina distributed provisional ballots to all voters in line while stating that their votes might not count.<sup>7</sup>
- Provisional ballots are increasingly being cited as a “fail-safe” insurance plan by those advocating for voter suppression tactics such as photo ID. A voter without photo ID will always be permitted to cast a provisional ballot, goes the argument. However, under the recently enjoined photo ID law in Georgia, a provisional ballot cast by a voter without ID will not be counted unless that voter appears at the registrar’s office with the appropriate photo ID within two days of the election.<sup>8</sup> Similarly, Indiana’s photo ID law, which has survived a legal challenge and is in effect for the November election, requires a provisional voter without acceptable ID to appear with before the circuit court clerk or county election board with appropriate ID within ten business days of the election in order for the provisional ballot to be counted.<sup>9</sup>
- Administrative errors complicate provisional ballot problems. For example, in 2006, a computer malfunction directed 150,000 Washington, DC voters to the wrong polling places.<sup>10</sup> Washington, DC does not count provisional ballots cast in the wrong precinct.

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### **Challenging the Placebo Effect—Provisional Ballots Can Work**

If used properly and in conjunction with other electoral reforms, provisional ballots can be a powerful tool in guarding against disfranchisement. To begin, the flaws in voter registration systems must be corrected so that all eligible citizens who complete a voter registration application are included on the voter rolls and able to cast a regular ballot on Election Day. Poll workers must be provided with adequate training on proper provisional balloting procedures so that provisional ballots are not given to voters eligible to vote on a regular ballot. An otherwise eligible voter should be able to cast a provisional ballot in any polling place within her county and have that vote counted. As the challenges and administrative costs of provisional balloting become clearer, states should explore a far superior alternative—Election Day Registration.

## References:

- 1 The fifteen states that will count a provisional ballot anywhere within the voter's county of residence are: Alaska, Arkansas, California, Colorado,\* Georgia, Kansas, Louisiana, Maryland, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, and Washington (SOURCE: "The Nation's Evolving Election System as Reflected in the November 2004 General Election" (June 2006) by the United States Government Accountability Office, available at <http://www.gao.gov/new.items/d06450.pdf>). \*Although not included among this list in the GAO report, Colorado updated its rules in 2005 to allow for the counting of provisional ballots cast outside of the voter's correct precinct.
- 2 This figure was calculated using data from the Election Assistance Commission's 2004 Election Day Survey, available at [http://www.eac.gov/election\\_survey\\_2004/toc.htm](http://www.eac.gov/election_survey_2004/toc.htm).
- 3 The thirteen states which each rejected over 10,000 provisional ballots are: Arizona, California, Colorado, Florida, Illinois, Kansas, Maryland, New Jersey, New York, North Carolina, Ohio, Texas, and Washington (SOURCE: Election Assistance Commission's 2004 Election Day Survey, available at [http://www.eac.gov/election\\_survey\\_2004/toc.htm](http://www.eac.gov/election_survey_2004/toc.htm)).
- 4 The 23 states which counted fewer than 50 percent of the provisional ballots cast are: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Nevada, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wyoming (SOURCE: Election Assistance Commission's 2004 Election Day Survey, available at [http://www.eac.gov/election\\_survey\\_2004/toc.htm](http://www.eac.gov/election_survey_2004/toc.htm)).
- 5 These 31 states are: Alabama, Arizona, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New York, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming, along with the District of Columbia. Six states are not subject to HAVA's provisional voting requirements, but two of these six (Wisconsin and Wyoming) authorize some measure of provisional voting (SOURCE: "The Nation's Evolving Election System as Reflected in the November 2004 General Election" (June 2006) by the United States Government Accountability Office, available at <http://www.gao.gov/new.items/d06450.pdf>). Maine offers its voters "challenge ballots" which under certain circumstances may not be counted if the voter is in the wrong precinct. However, Maine's system of Election Day registration greatly reduces the need for challenge ballots.
- 6 See "Continuing Failures in 'Fail-Safe' Voting" (December 7, 2004) by Demos: A Network for Ideas & Action, available at <http://www.demos.org/pub383.cfm>. The examples mentioned in this briefing paper are drawn from Demos' analysis of actual provisional balloting problems experienced by voters in the 2004 election as reported to the Election Protection Coalition.
- 7 Ibid.
- 8 Ga. Code Ann. § 21-2-419
- 9 Ind. Code § 3-11-7.5-2.5(a)
- 10 Elissa Silverman. "Election Officials Note Few Problems." *Washington Post*, September 13, 2006.



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