

Continuing Failures in “Fail-Safe” Voting

A Preliminary Analysis of Provisional Voting Problems in the 2004 Election

DECEMBER 7, 2004

In this preliminary analysis, Dēmos finds that the right to provisional ballots was violated across the country on November 2, 2004. While all the data on provisional balloting have yet to be collected and assessed, available evidence suggests that Congress and the states must revisit provisional ballot statutes, regulations and procedures if the original “fail-safe” voting mandate is to be fully realized.

There was cause for concern about provisional ballots well before Election Day. The problems with provisional ballots were predicted in a study released by Dēmos shortly before the election, entitled *Placebo Ballots: Will Fail-Safe Voting Fail?* That report, based on an extensive survey of election officials in 50 states and the District of Columbia, showed that most states could be subject to similar uncertainty unless the administration of provisional balloting is fairly and evenly applied. The survey found that responses among states — and within the same state — varied widely, revealing dire information gaps and cause for deep concern. Key findings of that report included:

- 31 states planned to invalidate ballots cast in the wrong precinct — even for statewide races. Some of those states and others required new voters who did not present identification on or before Election Day to return, before the official canvass, to prove their eligibility. As the report predicted, these new voters were often not told that they must return if they wanted their votes counted.
- In 10 states, their votes would be automatically invalidated, even if they returned with ID before the official canvass.

BACKGROUND

One of the primary complaints that arose after Election 2000 concerned voter registration. Eligible voters in twenty-five states went to the polls only to find that their names had either been improperly purged from the rolls or not added in a timely fashion. Upwards of three million votes were lost or not cast because of problems with the registration process and voting lists. Congress enacted the Help America Vote Act of 2002 (HAVA) to remedy many of the problems experienced by voters in the 2000 presidential election.

HAVA mandated provisional balloting as a “fail-safe” remedy for eligible voters who might show up at the polls in 2004 and find that their names were missing from the voter rolls. Instead of being sent home empty handed, these voters — and those first-time voters who could not provide the identification required by the Help America Vote Act — would be offered a provisional ballot. Election authorities would thereafter check the registry of

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voters and count provisional votes cast by individuals who had indeed been registered, or whose right to vote was otherwise validated. But Dēmos’ analysis suggests that for many voters, HAVA’s “fail-safe” voting provision failed.

METHODOLOGY

The Election Protection Coalition, a national collaborative of over one hundred organizations formed to safeguard Americans’ right to vote, staffed a toll-free telephone hotline for voters to report election problems in the period leading up to and including Election Day. Election Protection volunteers used a web-based software application — the Election Incident Reporting System (EIRS) — to categorize and record those incidents. As of December 1, 2004, more than 37,000 incidents had been entered into EIRS. Nineteen hundred have been categorized as relating to provisional ballots. See www.verifiedvoter.org.

Dēmos staff analyzed a random sample of 1,000 reports about provisional ballots. Seven hundred and forty four related to actual problems; the other calls came from voters seeking provisional ballot information from Election Protections volunteers. The findings in this report are drawn from analysis of 744 actual provisional balloting problems experienced by voters in the recent election.

OVERVIEW OF RESULTS

Most of the provisional balloting problems reported by voters during the days leading up to and including November 2 were the result of significant errors by election officials. Many attempts to implement provisional ballot procedures were in violation of the Help America Vote Act.

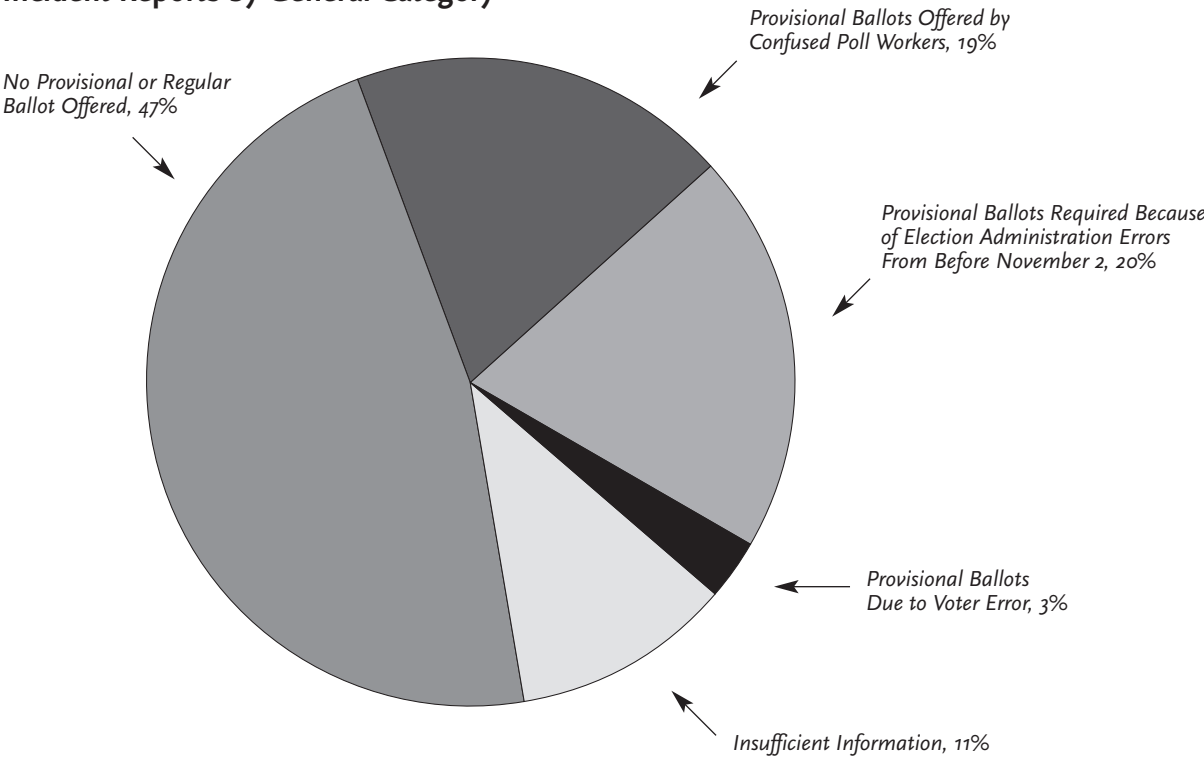
- Half of the problems reported involved eligible voters being denied the right to cast a ballot.
- Twenty percent of reports involved voters being offered provisional ballots when they were entitled to vote using a regular ballot.
- Twenty percent of the cases derived from a botched voter list created before Election Day — in other words, from a previous error in elections administration.
- Many provisional ballot problems affected voters who were eligible to vote and who reported having registered to vote by the deadline in their states, but whose names were nevertheless missing from registration lists.
- Only three percent of voters who called the hotline were required to cast a provisional ballot because of their own mistakes.
- The six states with Election Day Registration — Idaho, Maine, Minnesota, New Hampshire, Wisconsin and Wyoming — had far fewer of the provisional ballot and voter registration problems that plagued most states, and had turnout that exceeded the national average by 14 percent.

Thousands of election incidents have yet to be entered into the EIRS database; many other problems most likely went unreported. Thus the reports from the Election Protection hotline probably represent the proverbial “tip of the iceberg.”

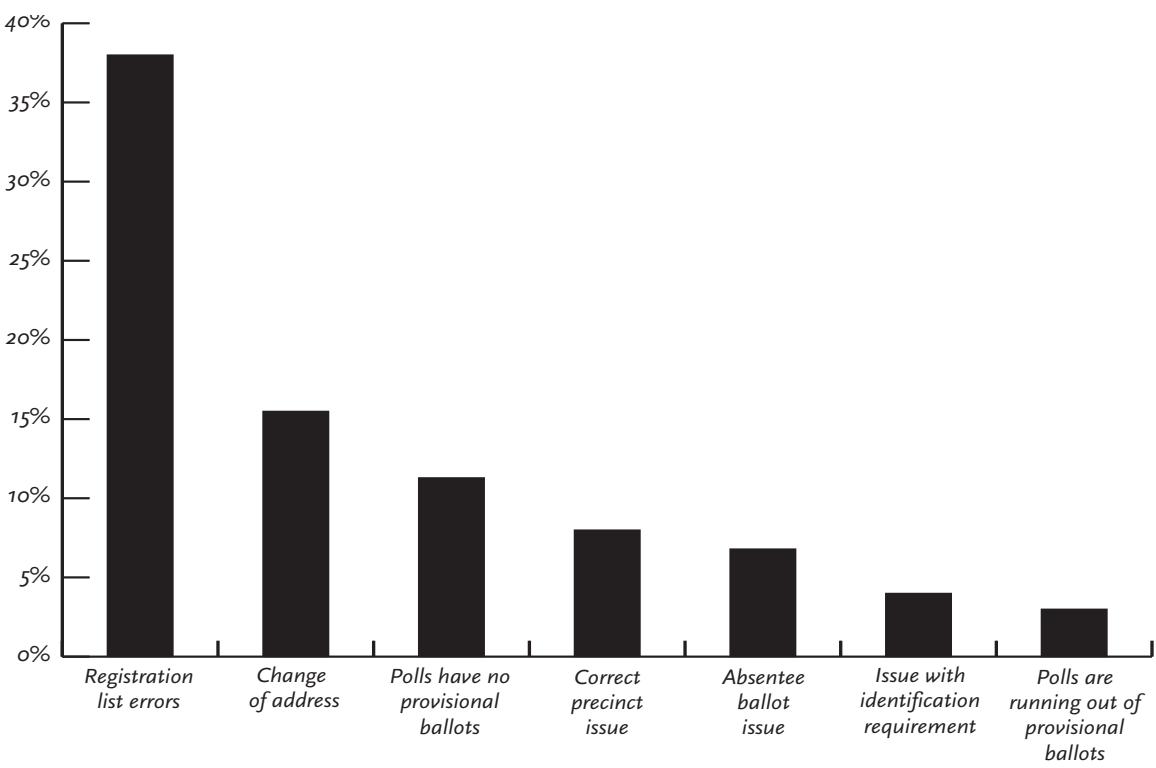
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The general and specific nature of the 744 provisional ballot incidents reviewed in this report are summarized in the following two charts and discussed in greater detail below.

Incident Reports by General Category



Incident Reports by Specific Category



NO PROVISIONAL OR REGULAR BALLOT OFFERED

The single largest group of provisional ballot incident reports involved the failure to offer provisional ballots. Nearly half of the incidents reported to the hotline involved such a failure.

Many callers reported that polling places had no provisional ballots, or had significant shortages and would run out before the polls closed.

Sample reports include:

- 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.
- One Prince George's County, Maryland voter said he and his wife — who had voted at the same location for years — and fourteen to fifteen other people in line behind them were not on the voter rolls and not given provisional ballots because there were “not enough.”
- One voter who had recently moved to Chester County, Pennsylvania and registered there was twice turned away from the polls and repeatedly refused a provisional ballot.
- Poll workers in Cuyahoga County, Ohio refused to provide provisional ballots and told voters “provisional ballots won't be counted anyway so we're saving you the trouble.”

PROVISIONAL BALLOTS OFFERED BY CONFUSED POLL WORKERS

Nearly one in five callers reported being offered provisional ballots despite circumstances that entitled them to vote using regular ballots.

At some polling places, all new voters were required to cast provisional ballots, sometimes receiving conflicting instructions about the paperwork required to cast a valid ballot.

- A voter in Franklin County, Ohio, who had been registered at the same address for eight years, received a post card saying she could only vote provisionally because of her change of address.
- A Lucas County, Ohio voter was told to fill out a provisional ballot even though the board of elections had his name on file. It was later determined that he had been at the wrong precinct table in the right building. The poll worker had asked him to fill out a provisional ballot instead of sending him to the right table.
- Precinct workers distributed provisional ballots to all voters at one polling place in Warren County, North Carolina, and informed them that their votes might not count. Discouraged, some residents left the precinct without voting.
- Poll workers in one District of Columbia precinct were reportedly “pushing the provisional ballots way too hard” because the optical-scan voting machine system was exceeding its capacity. They were directing voters to vote provisionally in instances where slight discrepancies arose over name spellings or other issues.
- A voter in Morris County, New Jersey registered to vote by mail at a new address and received a confirmation by mail, but did not appear on the registration list. Poll workers told him that all first-time voters in new areas must vote by provisional ballot, even if they were correctly registered at their new address.

PROVISIONAL BALLOTS REQUIRED BECAUSE OF ELECTION ADMINISTRATION ERRORS FROM BEFORE NOVEMBER 2

Voters were forced to cast provisional ballots in the 2004 election for reasons beyond poll worker and voter error. Election system errors from before Election Day were often to blame. By far the most common systems problem was the omission of voters' names from registration lists. This category includes voters who recently moved and re-registered under a new address, but who could not cast regular ballots because their names were not on the voter rolls. A less typical systems-related problem occurred when voters were mistakenly marked down as having requested an absentee ballot, or when they never received the absentee ballot they had asked for.

Registration List Errors

Nearly half of the incidents explicitly described problems with registration lists. In county after county, voters — many of whom had voted at the same location for decades or registered in person at the election office — showed up at the polls only to find that their names were erroneously omitted from the voter rolls. Though some of these voters were given provisional ballots, many appropriately questioned whether their votes would eventually count.

Some callers discovered that their names had been left off the rolls because they had been classified as “inactive” voters, or had mistakenly been purged as ineligible felons. In many other instances, the nature of the mistake was unclear. Voters may have been omitted because of erroneous list purges, flawed or delayed data-entry of registration forms, or the failure of state voter registration agencies to submit voter registration applications to elections boards in a timely manner. Dēmos, the ACLU and the Right to Vote Campaign anticipated many of these problems in *Purged! How a patchwork of flawed and inconsistent voting systems could deprive millions of Americans of the right to vote* — a report released just prior to Election Day. Furthermore, some people ended up casting provisional ballots because of deceitful practices by voter registration groups. For instance, in Nevada, Oregon, West Virginia and elsewhere, employees of Voter Outreach of America (Sproul and Associates' voter registration wing) were allegedly instructed to destroy registration forms completed by Democrats.

Provisional ballots cast by otherwise eligible voters such as these will likely be invalidated. Those who were newly registered, who had recently moved, and who were to improperly applied identification requirements will probably be affected most severely.

Two especially noteworthy cases of mistaken omission:

- One Dade County, Florida voter recently moved and returned to her old Florida county to vote. She was told that her name did not appear in the database of voters, that she could not vote, and in fact that she would be arrested if she attempted to cast a ballot. The voter was not offered a provisional ballot.
- One voter in Orleans Parrish, Louisiana had registered to vote after completing his parole but did not bring his parole completion papers to the polls. He presented his voter registration card to poll workers. Although he was legally eligible to vote, poll workers denied him a provisional ballot. They told him to go to City Hall, where he was instructed to come back the following day and register for the December election. [November 3 was the voter registration deadline for Louisiana's December 2004 run-off elections.]

Jurisdictional Problems

With litigation in Colorado, Florida, Ohio, Michigan and Missouri challenging the procedures for verifying provisional ballots cast outside of a voter's home precinct, the proper handling of provisional ballots has been a source of contention and confusion. The EIRS reports show that

the issues raised and perhaps resolved in these suits have yet to be absorbed by many elections staff. Poll workers and voters alike were perplexed by provisional voting.

- Arizona and 30 other states require that provisional ballots must be cast in the correct precinct in order to be counted. But poll workers in Pima County, Arizona insisted that voters could cast a valid provisional ballot in precincts other than those where they were registered.
- A Michigan college student registered in Cuyahoga County, Ohio requested, but did not receive, an Ohio absentee ballot. An elections commission official erroneously informed him that he could vote in Michigan by provisional ballot. Others were told the same thing. In fact, no voter may cast a valid provisional ballot outside of the state in which he is registered.

Absentee Ballot Problems

In some counties, many voters reported that they were forced to cast provisional ballots because the absentee ballots that they had requested had not arrived or because they were marked on the list as having requested absentee ballots, even though they had not. Provisional ballots should, in fact, be offered in instances like these. But reports of misleading information and problematic procedures create doubts as to whether votes will be counted.

- One disabled Broward County, Florida voter did not receive the absentee ballot that she had requested. Poll workers told her that she must fill out a provisional ballot and that it would not be counted, because it was up to their discretion.

NEED FOR PROVISIONAL BALLOTS RARELY VOTERS' FAULT

Only three percent of cases involved provisional ballots cast because of voter error. Often, these were voters who were unsure if they had registered on time, or new voters in a jurisdiction who had failed to fulfill identification requirements.

CONCLUSION

Dēmos' preliminary analysis of one thousand provisional balloting incidents reported in the recent election suggests very serious problems. Poll workers in precincts around the nation were confused about the new HAVA-mandated procedure. Voters were either never apprised of the new "fail-safe" voting option, or offered provisional ballots when they were eligible to cast regular votes. At the time, poll workers offered them as an easy way to keep the lines moving at polling places rather than resolving issues that arose with individual voters.

This first national experience with provisional balloting also highlights ongoing failures in voter registration and the preparation of voter lists. Counties lose valid registrations or delay the processing of registration applications such that eligible voters are deprived of their right to cast ballots. A provisional ballot offered to a new voter whose name was never entered into the registry of voters is a meaningless vote that will be discounted.

The definitive analysis of provisional voting in 2004 cannot yet be undertaken. Yet the data show that provisional voting and the entire system of election administration continue to suffer serious shortcomings. States, localities and the federal government must take stock of the thousands of voters whose attempts to vote were frustrated last November. Additional resources must be found to correct flaws in voter registration systems and improve poll worker performance. And to be truly "fail-safe," provisional balloting must be improved. As the challenges of provisional voting become clear and states bring statewide computerized voter registration systems on-line, other proven remedies like Election Day Registration should be considered.



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