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TITLE Report on Provisional Ballots and American Elections

**Name Daron Shaw
University University of Texas at Austin**

**Name Vincent Hutchings
University University of Michigan**

This is one of a set of research papers prepared for The Presidential Commission on Election Administration. The research reported in this paper represents the research, inferences and opinions of the authors, and not the Caltech/MIT Voting Technology Project nor the individual research members of the VTP.

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REPORT ON PROVISIONAL BALLOTS AND AMERICAN ELECTIONS

Prepared by

Professor Daron Shaw
University of Texas at Austin

Professor Vincent Hutchings
University of Michigan

For the Presidential Commission on Election Administration

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Overview

Both empirical and anecdotal data indicate that the use of provisional ballots in U.S. elections is a mixed bag. On the one hand, providing voters whose eligibility is unclear with an opportunity to cast a provisional ballot might prevent many voters from being disenfranchised. Indeed, the evidence from several states (for example, in California provisional ballots were estimated to be 5.8% of all ballots cast in 2008) indicates that the incidence of disputed eligibility can be quite substantial, and that provisional balloting options are substantively important. On the other hand, those states with provisional balloting systems may be less likely to seek to improve their registration, voter list, and election administration procedures, as provisional ballots provide a “fail-safe” option.

We assume that the goal here is to (a) reduce incidences in which voter eligibility is at issue, and (b) provide an opportunity for all eligible voters to participate. In light of these goals, we recommend the best practices identified in the U.S. Election Assistance Commission’s 2010 report on provisional voting: improving voter outreach/communication, adding to staff and poll worker training, encouraging more consistent and comprehensive Election Day management procedures, and strengthening procedures for offering and counting provisional ballots as well as upgrading post-election statistical systems.¹ These recommendations respect differences between and amongst the states, but provide a pathway for achieving consistency within states and improving voting procedures across the board.

We also recommend that provisional ballot procedures are consistent within a given state, that younger voters be targeted for outreach, that provisional voting data be integrated into the voter lists and analyzed to inform outreach, and that both Election Day and (especially) post-election procedures for using and counting provisional ballots be strictly defined, understood, and implemented by election administrators.

¹ ELECTION ADMINISTRATION COMMISSION, ELECTION ADMINISTRATION AND VOTING SURVEY OVERVIEW REPORT (2010).

Introduction

In this report, we focus exclusively on the issue of provisional ballots². Although the history of provisional balloting in the United States goes back into at least the last century, the underlying issues of voter eligibility and election administration came to the fore in the aftermath of the 2000 presidential election. In 2000, half of the states offered provisional ballots to individuals not on the rolls, allowing voter eligibility to be verified after Election Day. Florida, however, was not one of these states. In response to the public outcry following the controversial resolution to the 2000 presidential contest, Congress passed the Help America Vote Act (HAVA) in 2002 in an effort to avoid similar problems in the future. Specifically, HAVA mandated that each state³ allow voters whose eligibility is questioned to cast a provisional ballot which can be examined after the election.⁴ Section 302 of HAVA “creates the right for potential voters to cast provisional ballots in the event their names do not appear on the registration list or the voters’ eligibility is challenged by an election official.”⁵

In 2004, the first year HAVA-mandated provisional ballots were used, approximately 1.9 million were submitted across the country; 65 percent of them were found eligible and counted. In 2006, nearly 800,000 provisional ballots were submitted; 80 percent were counted.⁶ In 2008, data analyzed by the Pew Center on the States revealed that more than two million voters who showed up at the polls did not cast regular ballots for various reasons. More than 600,000 of these voters’ provisional ballots did not count, while more than 1.4 million voters (1.2 percent of all ballots cast for president) were able to have all or part of their votes counted through provisional ballots.⁷ (See Table 1 for 2008 and 2010 provisional ballot estimates by state.).⁸

Scope of the *Possible* Problem

Provisional ballots are important because they offer voters who otherwise would be denied the right to vote an opportunity to cast a ballot—at least in many cases. Still, a major problem in attempting to evaluate the performance of an election administration system based on the use of provisional ballots is that use of provisional ballots alone can mean any number of things.

² Throughout our report, we rely heavily on a review of the literature and preliminary report prepared by Salvador Perez, a law student at Stanford University, to whom we are greatly indebted. All errors, omissions, and mistakes are attributable solely to the authors.

³ Four states do not use provisional ballots—Idaho, New Hampshire and Minnesota—are exempt because they have Election Day registration. A fifth, North Dakota, is exempt because it does not have voter registration altogether.

⁴ HAVA P.L. 107-252, Sec. 302

⁵ HAVA P.L. 107-252, Sec. 302

⁶ PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 2 (2009).

⁷ *Id.* at 3.

⁸ Official 2012 provisional ballot figures for all fifty states are not yet available. We do have self-reports of provisional ballot rates based on survey data, which indicate that 0.4% of all ballots were provisional. These numbers almost certainly understate both the rate and the total number of ballots, however.

For example, a high rate of usage could represent a vigorous attempt to ensure that no votes are lost while simultaneously providing protection against fraud because the ballots will be subjected to scrutiny before being counted. So, provisional ballots might represent a well-functioning “fail-safe” mechanism to reduce disenfranchisement. But they might also indicate the opposite: a high rate of usage could suggest significant problems with a registration system that is not properly recording the names of registrants, informing those with missing information that they need to update or correct the records, transmitting the names on time to be included in poll books, or preparing the poll books.

A similar uncertainty is associated with the rate of acceptance of provisional ballots. On the one hand, a high rate of acceptance could represent a functioning provisional ballot system, working to count the ballots of those who the registration system failed. On the other hand, a low rate of acceptance might also signal a system that is working well by keeping those not eligible to vote from doing so.

Essentially, given the data available at the moment, it is difficult to state with any sense of definitiveness whether there is a problem in our provisional ballot systems—much less to depict with any accuracy the exact *scope* of the problem. Indeed, any measure of provisional ballot usage is an imperfect measure of policy success. Nonetheless, there is much value in acknowledging what we *do* and *do not* know.

What We Do Know

State Variation

HAVA left states with a great deal of latitude in creating and managing their provisional voting processes. Indeed, prominent experts have described HAVA’s language that relates to implementation as somewhat convoluted and responsible for uncertainty, controversy, and litigation. This, in turn, has led to a great deal of variation in how provisional ballots are issued and counted. Indeed, provisional voting measures vary based on state laws and practice, local practice, demographic characteristics of the precinct, and political factors.^{9 10}

Provisional ballots are issued for a variety of reasons, including: voter’s name is not on the registration list, voter does not have proper identification, a voter has moved within the county, a vote is recorded as having already been cast, or polling place hours are extended beyond regular hours.¹¹

The variation in issuance of provisional ballots is such that four states—California, New York, Ohio, and Arizona—account for the lion’s share (two-thirds, in fact) of all provisional ballots submitted. Similarly, the acceptance and counting of provisional ballots also varies considerably. Ten states, for example, counted more than 75 percent of their provisional ballots, while 17 states counted less than 45 percent.¹²

⁹ See David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447 (2006).

¹⁰ L. PAIGE WHITAKER & ARTHUR TRALDI, CONGRESSIONAL RESEARCH SERVICE, STATE ELECTION LAWS: OVERVIEW OF STATUTES PROVIDING FOR PROVISIONAL BALLOT TABULATION (2004).

¹¹ PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 2 (2009).

¹² *Id.*

Using data from the 2008 election, we see in Table 1 that the rate of provisional ballot usage ranged from 0.01 percent in Wisconsin and Vermont to a maximum of 6.5 percent in Arizona and the District of Columbia. Two other states had provisional ballot usage rates at or near 6 percent of total ballots cast: Alaska (6.2 percent) and California (5.8 percent). Rounding out the “top-ten” provisional ballot states, we see Utah (4.5 percent), Ohio (3.6 percent), Kansas (3.2 percent), Colorado (2.2 percent), and Maryland (1.9 percent). Overall, the average usage rate across the 40 states for which we have data was 1.4 percent. Provisional ballot acceptance rates vary even more widely across the states. Maine, Vermont, and Wisconsin accepted virtually all of their provisional ballots while Delaware, Hawaii, Missouri, Oklahoma, and Virginia accepted almost none of their provisional ballots.

In addition, many states with the highest provisional ballots cast rates also had relatively high acceptance rates. For example, in 2008 6.2 percent of Alaskans cast provisional ballots, and about 98 percent of these provisional votes were accepted. In that same election, Utah’s rates were 4.5 and 84 percent, respectively. California’s were 5.8 and 83 percent. Ohio’s were 3.6 and 81 percent. The District of Columbia’s were 6.5 and 72 percent. Arizona’s were 6.5 and 71 percent. The relationship was not perfect—most notably, some states with low provisional ballot rates also had high acceptance rates for those ballots—but it is the case that in both 2008 and 2010 states with high provisional voting rates were also likely to count those ballots.

Midterms vs. Presidential Elections

Comparing usage and acceptance in 2010 versus 2008, experts have found that (a) usage rates were highly correlated (that is, states with high usage rates in 2008 had high usage rates in 2010), and (b) usage rates were lower in almost every state in 2010.¹³ With regard to acceptance, a large majority of the states had higher rates in 2010 than in 2008. Though a variety of factors might explain this, it is likely that mid-term voters are more engaged, more likely to follow up and provide any necessary documents to ensure their ballots would be counted. Additionally, verification might be easier in a midterm election from the perspective of election officials. A smaller turnout and smaller number of provisional ballots might make it easier for officials to verify registration status. Lower stakes in mid-term elections would also suggest greater laxity in counting provisional ballots as acceptable.

Effect of Specific Triggers

In states that issue a provisional ballot when an individual requested an absentee ballot but did not vote, the usage rate is nearly three times as high as in states that do not use this trigger (1.59 percent vs. 0.54 percent) and the acceptance rate is 17 percentage points higher (71.17 percent vs. 54.03 percent). The results for accepting ballots cast in the wrong precinct are even more striking. The 21 states that allow for this have a usage rate four times higher than states that do not (1.56 percent vs. 0.39 percent) and an acceptance rate 27 percentage points higher than the 24 states that do not count provisional ballots cast in the wrong precinct (74.92 percent vs. 47.89 percent).¹⁴

¹³ *Id.* at 4-17.

¹⁴ *Id.*

Date at Which Provisional Ballots Were Adopted

One key factor found to influence provisional voting is when the state adopted provisional voting. The rate of provisional voting usage and acceptance is substantially higher in the states that had previous experience with provisional voting. With respect to usage, the states that had some variant of fail-safe voting in 2001 (before HAVA) had an average usage rate of 1.38 percent compared to 0.34 percent—nearly four times larger.¹⁵ Moreover, the acceptance rates were quite different when comparing the two groups of states. States with fail-safe voting before HAVA had an average acceptance rate of 68.56 percent compared to 46.68 percent for those who instituted provisional voting in the wake of HAVA—a difference of nearly 22 percentage points.¹⁶

Local Variation

Variation among the states also extends to variation within the states. In Florida, for example, some of the state's most populous counties saw significantly different counting rates. In Duval County, more than 80 percent of provisional ballots were counted while fewer than 60 percent were counted in Hillsborough County. In south Florida, about 33 percent were counted in Miami-Dade and just over six percent were counted in Broward County.¹⁷ The extent of such variation has led some observers to express concern about the potentially different treatment of voters who should be subject to the same rules within the same state.¹⁸

Voter Registration

Following the 2008 election, Pew was able to collect data on why 460,000 provisional ballots were rejected. More than 200,000 of these were rejected because the person was not registered in the state (while some likely never registered, it is possible that at some point between registering and attempting to cast a ballot, many experienced an error due to outdated, inefficient registration systems).¹⁹ These data, however, only offer a partial view of what took place in 2008 with regard to provisional ballots.

Voting Information

In 2008, 30 states and the District of Columbia rejected provisional ballots if they were cast in the wrong precinct.²⁰ Nationally, more than 50,000 provisional ballots were rejected for being cast in the wrong precinct.²¹ These data points suggest that voters possibly lacked the information they needed to verify their registration, their precinct and polling place prior to Election Day. Voters also may have been provided the incorrect polling place in advance or redirected to the wrong one on Election Day due to administrative errors.

¹⁵ *Id.* at 4-19

¹⁶ *Id.*

¹⁷ PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 2-3 (2009).

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Consistent Rates of Usage & Acceptance Across Years

As we await finalized data from the 2012 election, there is little difference in the overall results across the four post-HAVA elections for which we have data (2004, 2006, 2008, 2010). For one, though the mean is higher in the presidential election (1.5 percent versus 1 percent), within election type (presidential versus mid-term) the mean usage rate is roughly the same across years.²² The story remains the same when looking to the unsuccessful provisional vote rate—in both 2010 and 2006 the mean rate was 0.2 percent (the median was 0.1 percent).

Demographic Differences in Provisional Voting

Survey data indicate that certain kinds of voters are more likely to encounter problems at the polls, and to cast a provisional ballot. The 2012 Cooperative Congressional Election Study, an online poll featuring approximately 50,000 respondents and over 40,000 voters, shows that 2.0 percent of people who attempted to vote experienced some sort of problem, and that 18.7 percent of these people ended up casting a provisional ballot (see Table 2). Among those under 30 years of age, however, 4.6 percent experienced a problem and 27.6 percent of those cast a provisional ballot. Similarly, there seem to be differences by race and ethnicity: 3.1 percent of Blacks experienced an issue when attempting to vote, with 27.0 percent of these casting a provisional ballot. For Hispanics, these numbers were 3.0 percent and 30.0 percent, respectively. Interestingly, the small sample of Asian respondents suggests that voting problems and provisional ballots may be an even greater issue with that population. These data correspond to some studies that rely on aggregate-level data from different counties to assess the relationship between race/ethnicity and the occurrence of eligibility issues and the use of provisional ballots.

It is unclear, however, whether differences in age, education, income, and language are driving racial and ethnic differences, or whether race and ethnicity are critical in and of themselves. Most notably, racial and ethnic minority populations tend to be relatively younger and (with some important exceptions) slightly less educated, so it may be that the relationship between provisional ballots cast and race and ethnicity are spurious. To gain some leverage on this issue, we estimate a statistical model where the effects of race, ethnicity, age, and education on casting a provisional ballot in 2012 are assessed. The dominant factor turns out to be age: those under thirty years of age were, all things held equal, 25 points more likely to have cast a provisional ballot in 2012. In contrast, those over sixty-five years of age were 6 points less likely to have cast a provisional ballot. Perhaps more to the point, the effects of race and ethnicity diminish dramatically once age is taken into account: Blacks were more likely to have cast a provisional ballot in 2012 than non-Blacks, but only by about a point and a half. Similarly, Latinos were 1.2 points more likely to have cast a provisional ballot in 2012 than non-Latinos.²³

²² Hanmer & Herrnson, *supra* note 10, at 4-14.

²³ Results are predicted probabilities derived from a logistic regression of casting a provisional ballot in the 2012 election (self-reported).

What We Don't Know

In one word: lots. As the Pew Center on the States itself has acknowledged, the data currently available, while informative, are incomplete “because a number of states do not collect consistent information and could not provide complete county-level information.”²⁴ Precinct-level data, for example, on exactly why provisional ballots are issued and why they are rejected could offer more insight into the differences in the ways poll workers interpret and actually administer provisional ballot rules.

Provisional ballot submission and acceptance rates are not independent of one another and are related to other aspects of election administration. To evaluate measures of provisional voting, both usage and acceptance should be considered together, along with: “(1) the reasons for usage; (2) reasons for counting; and (3) number of people who declined to accept a provisional ballot when offered one.”²⁵ In addition, there remains much to be discovered with respect to the relationship between key demographic characteristics and provisional voting. Data on the quality of the voter registration databases would also be useful, especially when measures of provisional ballot usage could be examined as a function of changes in the quality of the registration databases.²⁶

Some progress has been made on these issues. Most notably, EAVS data from 2010 provide a broad look at why provisional ballots were rejected. These data show that provisional ballots were rejected because the voter was not registered in the state (45 percent), registered but in the wrong jurisdiction (7 percent), registered but in the wrong precinct (11 percent), failed to provide identification (2 percent), submitted an incomplete or illegible ballot or envelope (4 percent), or other reasons (32 percent). Unpacking these other reasons deserves further attention.²⁷

Possible Solutions

Some of those who have studied provisional voting suggest sweeping changes that go well beyond the scope of the current commission. For example, The Pew Center on the States proposes (1) simplifying the provisional ballot process by standardizing it across the country, (2) establishing Election Day registration, and (3) modernizing the voter registration system and automatically registering all eligible voters.²⁸

Given the commission's mandate, the U.S. Election Assistance Commission offers perhaps a more practical set of useful solutions in its 2006 report, “Best Practices on Provisional Voting.” Among the recommendations are: (1) focusing on voter outreach and communication (including online communication) prior to Election Day, (2) offering more formal, standardized, and comprehensive staff and poll worker training, (3) a greater emphasis on Election Day management procedures and protocols, and (4) strengthening

²⁴ PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 5 (2009).

²⁵ Hanmer & Herrnson, *supra* note 10, at 4-8.

²⁶ *Id.* at 16.

²⁷ *Id.* at 20.

²⁸ PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 5 (2009).

procedures for offering and counting provisional ballots, and upgrading post-election statistical systems.²⁹

Based on our reading of the literature as well as well as our own research and analysis, we would add a few additional recommendations.

- As detailed earlier in this report, there are states in which the handling of provisional ballots varies from county to county (for example, Florida in 2008). We would strongly recommend that provisional ballot standards within a state be consistent.
- Our analysis of survey data indicates that younger voters are particularly likely to face eligibility issues that result in a provisional ballot being cast. Voter education and information should therefore target these first-time and “under thirty” voters.
- States often fail to preserve individual-level data on provisional ballots for post-election analysis. These data would be extremely useful for identifying (and helping) those who are most likely to have trouble at the polls. Post-cards could be sent to those who cast a provisional ballot in the last election reminding them to update their registration status and telling them where their current polling place is.
- Election Day is not the day for training, nor is it the proper day for lengthy adjudication of disputed claims. Election Day poll workers need to be provided with clear criteria for identifying an eligible voter or, conversely, for allowing a provisional ballot to be cast by someone who does not meet the eligibility criteria. Disputed claims need to be resolved quickly to accommodate others seeking to cast their ballots.
- Post-election consideration of provisional ballots presents an opportunity for more organized, deliberative processes. This is where time can be taken to ascertain eligibility. Our main concerns are that this deliberation be objective, impartial, and swift. Objectivity means that standards for determining eligibility and whether a provisional ballot will be accepted need to be understood prior to the election and implemented by administrators after Election Day. Impartiality is critical because the fact that administrators know the preliminary outcome creates a potential issue (counting ballots can be polluted by the fact that both partisan sides know how many votes they need to win). Swiftiness is important so that election disputes can be resolved, duly-elected officials can represent their constituents at the beginning of legislative and executive terms, and the public can have confidence that their electoral system functions.

²⁹ ELECTION ADMINISTRATION COMMISSION, ELECTION ADMINISTRATION AND VOTING SURVEY OVERVIEW REPORT (2010).

1. Appendix 1—Salient News Coverage from the 2012 Election

2. Andy Marso, “Bill Shrouding Provisional Ballots Heads to Governor,” *The Topeka Capital-Journal*, 7 April 2013.

Available at: <http://cjonline.com/news/2013-04-07/bill-shrouding-provisional-ballots-heads-governor>

Author reports on ongoing litigation and proposed legislation regarding disclosure of the names of provisional voters in a hotly-contested Kansas House race. Four months after Ken Corbet narrowly unseated Ann Mah for the Kansas House 54th District seat, the race continued to reverberate through the halls of the Statehouse and a federal court. Before adjourning until May, the House and Senate passed a bill barring disclosure of information about voters who cast provisional ballots — a bill largely inspired by Mah. Mah, a Democrat, found herself trailing the Republican Corbet by 27 votes out of more than 10,000 cast on election night last November. The race wasn’t over: 104 Shawnee County voters in her district had cast provisional ballots — ballots that had to be reviewed by county canvassers before they could be counted — and there were more 54th District provisional voters in Osage and Douglas Counties. With about 10 days before the canvass, Mah contacted county officials seeking the names of provisional voters so she could contact them.

3. Meghan Millea, “O’Farrell Files Suit to Contest Vote Count,” *Times Reporter*, 26 December 2012.

Available at: <http://cjonline.com/news/2013-04-07/bill-shrouding-provisional-ballots-heads-governor>

Author reports on ongoing litigation regarding a hotly-contested Ohio House race. Josh O’Farrell, the Democratic challenger for the Ohio House of Representatives 98th District, filed a lawsuit to contest the election with the state Supreme Court. The complaint involves several provisional and absentee ballots that were rejected by the Tuscarawas County Board of Elections, and were not included when the board certified the election Dec. 14. O’Farrell lost to Republican incumbent Al Landis by eight votes, with Landis leading 23,393 votes to 23,385, in both Tuscarawas and Holmes counties.

4. Darrel Rowland, “Husted Illegally Tossing Provisional Ballots, Dems Say,” *The Columbus Dispatch*, 28 November 2012.

Available at: <http://dispatchpolitics.dispatch.com/content/blogs/the-daily-briefing/2012/11/28-november-2012---dems-on-prov-ballots.html>

Author reports on dispute involving counting of provisional ballots in two hotly-contested Ohio House races that triggered automatic recounts. In Tuscarawas County, Dover Rep. Al Landis’ lead in the 98th District race has been trimmed to just 14 votes out of more than 47,000 cast over Democrat Josh O’Farrell. In Cuyahoga

County, Rep. Mike Dovilla, R-Berea, led Democrat Matt Patten by 119 votes. If Democrats lose both races, Republicans - who easily control the Senate - will have large enough majorities to put constitutional amendments on the ballot without a single Democratic vote. Democrats lobbied complaints against GOP Secretary of State Husted.

5. Matt Dixon, "New Law Sparks Increase in Use of Provisional Ballots in Florida Counties," *The Florida Times-Union*, 19 November 2012.
Available at: <http://jacksonville.com/news/metro/2012-11-18/story/new-law-sparks-increase-use-provisional-ballots-florida-counties>

Author reports on new trigger requiring use of provisional ballot. County officials say a new election law sparked the flood of people who needed to cast provisional ballots, which are used when a voter's eligibility is in question and are not always counted. Clay County normally sees about 20 of these ballots. This year, the number ballooned to nearly 400. An election law passed in 2011 required voters who moved to a new county and did not change their address before voting to use a provisional ballot. Before that, Florida voters had been able to change their address on Election Day.

6. Daniel Denvir, "Registered Philly Voters Required to Cast Provisional Ballots in Large Numbers," *Philadelphia City Paper*, 6 November 2012.
Available at: <http://www.citypaper.net/blogs/nakedcity/177510161.html>

Author reports on disruptions that occurred in Philadelphia on Election Day. The names of registered Philadelphia voters did not show up on voter rolls and poll workers instructed them to vote using provisional ballots, according to voters and poll workers in West and North Philadelphia. Provisional ballots, if they are counted, are not counted until days after the election. "We think it's a real concern," said a staffer at The Committee of Seventy, which monitors elections in Philadelphia. Voter ID, he says, is "not the central problem in Philadelphia today: [it's] the messy administration of this election. The phones are just ringing off the hook. We're fielding calls about people who are not in the polling books." Some poll workers did not even instruct people that they could file provisional ballots, and other voters reportedly just walked away in frustration.

7. Joe Guillen, "Ohio's Complicated Process for Counting Provisional Ballots Could Decide the Presidency," *The Plain Dealer*, 6 November 2012.
Available at:
http://www.cleveland.com/open/index.ssf/2012/11/ohios_complicated_process_for.html

Author details the process by which provisional ballots are counted in Ohio and partisan consideration that could have marred such a process. The process could play out slowly and painstakingly over the next couple weeks, and in the end, Republican Secretary of State Jon Husted ultimately could be the person who decides which provisional ballots must be counted and which will be tossed. "That will get dicey," said Edward Foley, director of Election Law @ Moritz, a program at the Ohio State University's Moritz College of Law. "That just shows a structural weakness in our system."

8. Darrel Rowland, "Husted Trying to Unfairly Toss Out Votes, Court Filing Says," *The Columbus Dispatch*, 3 November 2012.

Available at: <http://dispatchpolitics.dispatch.com/content/blogs/the-daily-briefing/2012/11/3-november-2012---emergency-court-motion.html>

Author reports on filing submitted by plaintiffs in a federal suit against Ohio Secretary State. The plaintiffs, the Northeast Ohio Coalition for the Homeless, wanted Judge Marbley to clarify that a provisional vote would still count even if it lacks information that a poll worker was supposed to provide.

9. Amanda Becker, "Ohio Fights on Early Voting, Provisional Ballots," *Roll Call*, 11 October 2012.

Available at: http://www.rollcall.com/issues/58_28/Ohio-Fights-on-Early-Voting-Provisional-Ballots-218133-1.html?pos=htmbph

Author outlines disputes in Ohio related to voting procedures. In particular, the author details SEIU suit against GOP Secretary of State Husted. The Service Employees International Union challenged the state's refusal to count ballots cast in the wrong precinct as a result of poll worker error. The U.S. Court of Appeals for the Sixth Circuit was expected to weigh in on that case within the next week, and the decision could lead to another high court appeal. There was a great deal at stake in Ohio for Obama and Republican presidential nominee Mitt Romney, both of whom focused on the perennial battleground state as the race narrowed to just a handful of states.

10. Rick Hasen, "Breaking News: Sixth Circuit Decides Provisional Ballot Cases, Finds Constitutional Violation in Not Counting Certain Wrong Precinct Ballots," *Election Law Blog*, 11 October 2012.

Available at: <http://electionlawblog.org/?p=41452>

Author reports on Sixth Circuit decision: "This is the most important decision in this election cycle, and it represents a major victory for voters' rights, regardless of party. It is especially important because this was a very conservative Sixth Circuit

panel, and it affirms the idea that Bush v. Gore and Sixth Circuit precedent requires some degree of uniformity and fairness in the counting of ballots.” “I also think this opinion can be very important as precedent in future cases in stopping the most egregious poor treatment of voters going forward.”

Bibliography

1. Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1701 (2005).
 - Offers an informative account of the competing views leading to HAVA's provisional ballot section that provides a useful perspective for understanding the empirical work on provisional voting. He reveals that HAVA's provisional voting section was a compromise between "substantive" and "procedural" views of provisional voting. He describes the substantive view as one that leads to a system that as a practical matter allows Election Day registration. That is, whether an attempt to register was associated with a mistake in the process of pre-election day registration or even if one never tried to register before Election Day, those who hold this view argue that anyone who meets the basic criteria for registration can cast a provisional ballot and have it counted. The procedural view takes a stricter stance on whose provisional ballot can be counted. More specifically, those who hold this view argue that only those who were officially registered to vote by the closing date for registration but due to some mistake with the voter list should have their provisional ballot counted.
 - He goes on to note that though the procedural view (generally preferred by the U.S. Senate) ultimately won out over the substantive view (generally preferred by the U.S. House of Representatives) that the language in HAVA leaves open the opportunity for the substantive view to prevail.
2. EAGLETON INSTITUTE OF POLITICS, RUTGERS UNIVERSITY & THE MORITZ COLLEGE OF LAW, OHIO STATE UNIVERSITY, REPORT TO U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE PROVISIONAL VOTING (2006).
 - A key factor by which provisional voting measures vary is previous history of provisional voting, i.e. whether the states adopted provisional ballot procedures on their own or if they were imposed by the federal government via HAVA.
 - A number of other factors related to state law and practice both directly and indirectly related to provisional voting influence provisional ballot usage and acceptance. As expected due to the benefit of added technology, states with statewide voter registration databases were less likely to issue provisional ballots in 2004. Found that voter registration databases reduced the acceptance rate in states using provisional ballots for the first time.
 - States with shorter time periods set to examine the provisional ballots tended to accept fewer provisional ballots.

3. David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 *ELECTION L.J.* 447 (2006).
 - Provides evidence based on the 2004 elections that provisional ballots were more likely to be submitted and counted in the states that had fail-safe voting mechanisms in place prior to the enactment of HAVA.
 - States that are subject to pre-clearance under the Voting Rights Act tended to accept fewer provisional ballots.
 - The decentralization of election administration within states gives local election officials latitude in administering state and federal regulations. Perhaps the most concerning factor found to influence provisional ballot usage and acceptance is the partisanship of election officials. Authors note that discretion is a simply part of the process of issuing and counting provisional ballot. They first look to the rule creation stage, finding suggestive evidence that Democratic officials tend to adopt more permissive standards. At the issuing and counting stages they find that the interplay between the partisanship of the elected official and the partisanship of the electorate is an important influence. They show that as jurisdictions lean more toward one party the number of ballots issued and accepted increases when the election official is of the same party and decreases when the election official is a member of the other party.
 - The use of provisional ballots rises as the number of ballots cast increase.
 - The rate of provisional ballot usage decreases as the percent 65 and older and as median income increases.
 - With respect to acceptance, authors find that the number of ballots counted decreases as residential mobility increases, and as the percent 65 and older increases.
4. Charles Stewart III, *Early-and-Late-Adopters of Provisional Ballots*, in *PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION* (2009).
 - Uses a different measure of experience and examines provisional voting across several election cycles, he draws similar conclusions. He finds that states such as California that had liberal fail-safe voting laws prior to the enactment of HAVA typically had the highest provisional ballot rates, followed by states such as Ohio that had more limited regulations. States that made no accommodations for provisional voting prior to HAVA, such as Florida, had the lowest usage rates. His interpretation of these results was quite clear: “it defies credulity to claim that the states that had adopted provisional ballots before 2000 are now five times worse in

handling voter registration than the states that adopted provisional ballots after HAVA.”

5. ELECTION ADMINISTRATION COMMISSION, ELECTION ADMINISTRATION AND VOTING SURVEY OVERVIEW REPORT (2010).
 - The states differ considerably in terms of the rules associated with providing and counting provisional ballots. Lists seven items that at least five states have to trigger use of a provisional ballot. The reasons and their frequency follow: name not on registration list (all 45 states that are not exempt from HAVA’s provisional voting requirement); voter does not have proper identification (34 states); voter is challenged as ineligible (26 states); voting hours were extended (22 states); requested an absentee ballot but it was not yet cast (17 states); voter eligibility cannot be immediately established (13 states); and error in party listing on registration record (11 states).
 - Another key difference comes at the counting stage, where twenty states reported that provisional ballots cast in the wrong precinct would not be counted, four states indicated that provisional ballots cast in the wrong precinct but correct county would be counted, seven states reported that provisional ballots cast in the wrong precinct would not be counted, and a number of states highlighted circumstances in which provisional ballots cast in the wrong precinct would be counted.
6. Michael R. Alvarez & Thad E. Hall, Provisional Ballots in the 2008 Ohio General Election, in PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION (2009).
 - The use of provisional ballots rises as residential mobility and non-white population increases.
7. David C. Kimball & Edward B. Foley, Unsuccessful Provisional Voting in the 2008 General Election, in PEW CENTER ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION (2009).
 - The use of provisional ballots rises as population growth and percentage of population that is Hispanic increases.
 - The unsuccessful provisional voting rate increases as the size of the population increases, and as the percent black and the percent Hispanic increase.
8. Michael C. Herron & Daniel A. Smith, *Florida’s 2012 General Election under HB 1355: Early Voting, Provisional Ballots, and Absentee Ballots*, University of Florida Working

Paper (2012).

- African Americans and Hispanic voters were more likely than white voters to cast provisional ballots and nearly twice as likely to have their provisional ballots rejected.

Table 1—Provisional Ballots Cast and Accepted, 2008 and 2010

| | 2008 | | 2010 | |
|----------------------|---------------------|---------------------|---------------------|---------------------|
| | Provisional Ballots | Provisional Ballots | Provisional Ballots | Provisional Ballots |
| | Cast | Rejected | Cast | Rejected |
| Alabama | Inc. | Inc. | 0.20% | 0.10% |
| Alaska | 6.20% | 0.10% | 0.30% | 0.00% |
| Arizona | 6.50% | 1.90% | 0.10% | 0.0% |
| Arkansas | 0.20% | Inc. | 0.20% | 0.10% |
| California | 5.80% | 1.00% | N/A | N/A |
| Colorado | 2.20% | 0.30% | 0.03% | 0.02% |
| Connecticut | 0.04% | 0.03% | 0.10% | 0.10% |
| Delaware | 0.10% | 0.10% | 0.10% | 0.04% |
| District of Columbia | 6.50% | 1.80% | 0.10% | 0.10% |
| Florida | 0.40% | 0.20% | 0.20% | 0.03% |
| Georgia | 0.40% | 0.20% | 2.10% | 0.60% |
| Hawaii | 0.10% | 0.10% | N/A | N/A |
| Idaho | N/A | N/A | 0.10% | 0.10% |
| Illinois | Inc. | Inc. | 0.30% | 0.10% |
| Indiana | Inc. | Inc. | Inc. | Inc. |
| Iowa | 0.30% | 0.02% | 5.20% | 0.60% |
| Kansas | 3.20% | 1.00% | 2.70% | 0.30% |
| Kentucky | 0.05% | 0.04% | 0.01% | 0.01% |
| Louisiana | 0.40% | 0.20% | 0.01% | 0.01% |
| Maine | 0.04% | 0.00% | 5.00% | 0.50% |
| Maryland | 1.90% | 0.60% | 0.80% | 0.20% |
| Massachusetts | 0.40% | 0.30% | N/A | N/A |
| Michigan | 0.10% | 0.04% | 4.00% | 0.30% |
| Minnesota | N/A | N/A | 0.20% | 0.1% |
| Mississippi | Inc. | Inc. | 0.02% | 0.02% |
| Missouri | 0.20% | 0.20% | 0.02% | 0.00% |
| Montana | 0.80% | 0.02% | 2.20% | 0.20% |
| Nebraska | 1.90% | 0.40% | 0.20% | 0.10% |
| Nevada | 0.70% | 0.40% | 0.70% | 0.03% |
| New Hampshire | N/A | N/A | Inc. | 0.20% |
| New Jersey | 1.80% | 0.50% | N/A | N/A |
| New Mexico | 0.80% | Inc. | 0.04% | 0.03% |
| New York | Inc. | Inc. | 0.30% | 0.20% |
| North Carolina | 1.20% | 0.60% | 1.00% | 0.20% |
| North Dakota | N/A | N/A | 0.00% | 0.00% |
| Ohio | 3.60% | 0.70% | Inc. | Inc. |
| Oklahoma | 0.20% | 0.20% | 0.03% | 0.00% |
| Oregon | 0.20% | Inc. | 3.00% | 0.50% |
| Pennsylvania | 0.50% | 0.20% | 2.00% | 0.20% |
| Rhode Island | 0.20% | 0.10% | Inc. | 0.40% |
| South Carolina | 0.50% | 0.30% | Inc. | Inc. |
| South Dakota | 0.10% | 0.04% | 0.20% | 0.10% |
| Tennessee | 0.20% | 0.10% | 0.10% | 0.10% |
| Texas | 0.50% | 0.40% | 1.10% | 0.20% |
| Utah | 4.50% | 0.70% | 1.00% | 0.40% |
| Vermont | 0.01% | 0.00% | 4.70% | 0.80% |
| Virginia | 0.20% | 0.20% | 0.10% | 0.10% |
| Washington | 1.80% | 0.40% | 0.40% | 0.20% |
| West Virginia | Inc. | Inc. | 0.01% | 0.00% |
| Wisconsin | 0.01% | 0.00% | 0.20% | 0.10% |
| Wyoming | N/A | N/A | N/A | N/A |

Table 2—Provisional Voting Rates in 2012 by Sub-Groups

| | Was there a problem with your voter registration or voter identification when you tried to vote? | | Total | Were you allowed to vote? | | | Total | Provisional Votes |
|--------------|--|------|--------|-------------------------------|--|---------|-------|-------------------|
| | No | Yes | | No, I was not allowed to vote | I was allowed to vote using a provisional ballot | I voted | | |
| TOTAL | 98.0% | 2.0% | 40,166 | 12.7% | 18.7% | 68.6% | 795 | 0.371% |
| Male | 98.1% | 1.9% | 19,424 | 11.5% | 16.0% | 72.5% | 357 | 0.293% |
| Female | 97.9% | 2.1% | 20,742 | 13.7% | 21.0% | 65.3% | 438 | 0.444% |
| 18-29 | 95.4% | 4.6% | 4,021 | 18.4% | 27.6% | 54.1% | 185 | 1.268% |
| 30-44 | 97.3% | 2.7% | 4,738 | 14.7% | 24.8% | 60.5% | 129 | 0.675% |
| 45-54 | 97.9% | 2.1% | 7,477 | 13.2% | 20.4% | 66.4% | 152 | 0.415% |
| 55-64 | 98.3% | 1.7% | 12,403 | 10.5% | 10.5% | 78.9% | 209 | 0.177% |
| 65+ | 98.9% | 1.1% | 11,527 | 5.0% | 10.8% | 84.2% | 120 | 0.113% |
| White | 98.2% | 1.8% | 32,645 | 11.4% | 16.8% | 71.8% | 570 | 0.294% |
| Black | 96.9% | 3.1% | 3,259 | 16.0% | 27.0% | 57.0% | 100 | 0.828% |
| Hispanic | 97.0% | 3.0% | 1,930 | 17.9% | 30.4% | 51.8% | 56 | 0.881% |
| Asian | 96.0% | 4.0% | 479 | 5.6% | 22.2% | 72.2% | 18 | 0.835% |
| No HS | 97.4% | 2.6% | 687 | 17.6% | 23.5% | 58.8% | 17 | 0.582% |
| HS | 98.0% | 2.0% | 9,175 | 16.7% | 17.7% | 65.6% | 186 | 0.360% |
| Some college | 97.9% | 2.1% | 10,401 | 17.7% | 20.5% | 61.8% | 220 | 0.433% |
| 2-year | 97.9% | 2.1% | 4,005 | 15.3% | 14.1% | 70.6% | 85 | 0.300% |
| 4-year | 97.9% | 2.1% | 9,716 | 5.6% | 23.2% | 71.2% | 198 | 0.473% |
| Post-grad | 98.6% | 1.4% | 6,182 | 4.5% | 10.1% | 85.4% | 89 | 0.146% |

Source: Data are from the 2012 Cooperative Congressional Election Study.