U.S. Election Assistance Commission
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EAC Advisory 2005-006: Provisional Voting and Identification Requirements

The U.S. Election Assistance Commission (EAC) has recently received an inquiry regarding whether a state may impose an identification requirement that would limit a potential voter's access to a provisional ballot to which he or she is otherwise entitled under Section 302 of the Help America Vote Act (HAVA) (42 U.S.C. §15482). After consideration of the matter, EAC has concluded that Section 302 of HAVA creates a voter right. Specifically, the section creates the right for a potential voter to utilize a provisional ballot in the event their name does not appear on the registration list or the voter's eligibility is challenged by an election official. While States may create voter identification standards that exceed those laid out in HAVA and effect whether a provisional ballot is counted, States may not take action that limits a voter's right to receive and submit a provisional ballot. In explaining this position, this advisory reviews the plain language of HAVA Section 302, examines the differences between traditional and provisional ballots and analyzes the implementation of provisional voting under HAVA Section 303(b). This advisory also addresses the impact of a state's authority to create stricter standards than prescribed by HAVA upon HAVA's provisional voting requirements.[1]

Plain Language of HAVA Section 302. The right to cast a provisional ballot is created in Section 302 of HAVA. Pursuant to HAVA, when an individual declares that he or she is a registered and eligible voter in a federal election, that individual "shall be permitted to cast a provisional ballot" if (1) their name does not appear on the official list of eligible voters or (2) "an election official asserts that the individual is not eligible to vote." (Section 302(a)). This right to receive a provisional ballot is contingent upon only one thing (per Section 302(a)(2)), the individual's execution of a written affirmation that he or she is both a registered and eligible voter for the election at issue.[2] See also, Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004). However, notwithstanding the above, HAVA goes on to recognize that the right to submit a provisional ballot constitutes neither a means to avoid State imposed voter eligibility requirements nor a vote. Instead, HAVA requires election officials at a polling place to

[1] The EAC is the Federal agency charged with the administration of HAVA. While the EAC does not have rulemaking authority in the area of provisional voting, HAVA does require the Commission to draft guidance to assist states in their implementation of HAVA's provisional voting requirements. Although EAC's administrative interpretations do not have the force of law associated with legislative rules, the Supreme Court has long held that the interpretations of agencies charged with the administration of a statute are to be given deferential treatment by Courts when faced with issues of statutory construction. York v. Secretary of Treasury, 774 F. 2d 417, 419 – 420 (10th Cir. 1985) (citing Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 153 – 154 (1963)) See also Christian v. Harris County, 529 U.S. 576 (2000); Edelman v. Lynchburg College, 122 S. Ct. 1145 (2002).

[2] Moreover, a potential voter determined not to be eligible must be informed of their provisional voting rights per Section 302(a)(1) of HAVA.

transmit a provisional ballot (or information associated with the written affirmation) to appropriate election officials for verification. (Section 302(a)(4) of HAVA). These election officials ultimately determine the voter's eligibility based upon information presented to or gathered by it, in accordance with State law. In this way, the State determines whether any provisional ballot submitted will be counted as a vote. Id.

In simplest terms, provisional voting represents the right of an individual (whose eligibility to vote has been challenged), to reserve their right to vote and postpone the voter eligibility determination to a time when more perfect or complete information may be provided. See Sandusky County Democratic Party, 387 F.3d at 570 and Florida Democratic Party v. Hood, 342 F.Supp 1073, 1079-1080 (N.D. Fla. 2004). A provisional ballot does not represent a different way to vote, nor does it serve as a bypass to State laws governing voter eligibility. Rather, it is designed to prevent an individual from losing his or her right to vote due to the fact that a poll worker did not have all the information available or needed to accurately assess voter eligibility. Thus, based upon the plain language of Section 302(a) of HAVA, a challenge to an individual's eligibility to vote (such as a challenge based upon identification requirements) cannot serve as a bar to the receipt of a provisional ballot, because it is the election official's challenge that triggers the provisional ballot procedure in the first place. To hold otherwise would defeat the purpose of provisional voting. In the end, to understand this concept one must understand the differences between traditional and provisional ballots.

Traditional vs. Provisional Ballots. The nature and procedures associated with a provisional ballot are wholly distinct from those of a traditional ballot. Because of this fact, the two processes must be treated differently. While voter identification requirements may serve as a bar to the casting of a traditional ballot, they may not prevent the submission of a provisional ballot.

First, the nature and purpose of traditional and provisional ballots are essentially different. The purpose of a traditional ballot is to allow a confirmed, eligible voter to cast a vote. The purpose of a provisional ballot is to allow individuals whose voter eligibility is challenged to reserve the right to vote by memorializing both their intent to vote and their proposed vote. This is evident by the HAVA processes discussed above. The bottom line is that the casting of a proper, traditional ballot constitutes a vote, while the casting or submission of a provisional ballot does not. A traditional ballot is cast only after voter eligibility has been determined by the State. Hence, the moment it is cast, it becomes an individual's vote. On the other hand, the submission or casting of a provisional ballot is not a vote. Rather, it is a claim that the potential voter who submitted it has the right to vote and reserves that right. As the Sixth Circuit Court of Appeals stated:

> [T]he primary purpose of HAVA was to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers. Under HAVA, the only permissible requirement that may be imposed upon a would-be voter before permitting that voter to cast a provisional ballot is the affirmation contained in [42 U.S.C.] §15482(a): that the voter is a registered voter in the jurisdiction in which he or she desires to vote, and that the voter is eligible to vote in an election for federal office. Sandusky County Democratic Party, 387 F.3d at 574.

This goes to the very heart of provisional voting. If provisional voting is a right triggered by an election official's determination that an individual has not met a voter eligibility requirement, how

can such a requirement also serve as a bar to that right? The concept of provisional voting works only if the right is always available when the application of voter eligibility requirements is in question.

Second, consistent with the differences in purpose between traditional and provisional ballots, the other major distinction between the two lies in the application of voter eligibility requirements. This difference is primarily one of procedural timing. States have the right to create voter eligibility requirements and these requirements must be applied to both traditional and provisional ballots. In casting a traditional ballot, one must meet all eligibility requirements prior to receiving the ballot. However, in the provisional process, the potential voter has already failed to meet these preliminary requirements and the application of State law must occur after the ballot has been received. State voter eligibility requirements should be applied after the provisional ballot and/or supporting affirmation has been transmitted pursuant to Section 302(a)(3) of HAVA. Provisional ballots are counted as votes only after election officials have determined that the individual can meet voter eligibility standards consistent with state law. Again, the purpose of the process is to allow election officials more time, so that they may have more perfect information when making a decision about voter eligibility. Provisional ballots are subject to the full effect of State law regarding the eligibility to vote and the opportunity the law provides provisional voters to supply additional information. Provisional ballots do not escape state or federal voter eligibility requirements, those provisional ballots that do not meet State standards will not be counted.

Provisional Voting Under HAVA Section 303(b). Congress provided an example of how provisional voting works by applying the right to a specific circumstance. Section 303(b)(2)(B) of HAVA, entitled *Fail-Safe Voting*, provides that when a first-time voter who registered by mail is required by HAVA Section 303(b) to show identification, that person must be given a provisional ballot if he or she fails to provide such identification at the polling place. This section is important as it clarifies Congressional intent regarding how provisional voting should function.

The *Fail-Safe Voting* provision of Section 303(b)(2)(B) grants clear insight into how provisional voting should be implemented. While Section 303(b) deals with a specific subset of voters (first-time voters who registered by mail), its application of Section 302(a) supports the concept that a provisional ballot must be given to a voter who is determined (at the polling place) not to meet voter identification requirements. A review of the section shows that in the one area where HAVA set a Federal voter identification requirement Congress made clear that an individual's failure to meet this eligibility requirement triggered the statute's provisional voting section. Congress saw no difference between an individual's failure to meet the voter identification requirements it issued in Section 303(b) and the failure to meet eligibility requirements which trigger provisional voting under Section 302. Section 303(b) makes it clear that Congress did not intend voter identification requirements to limit access to provisional voting. Instead, Congress viewed provisional voting as a right, or more specifically, as a fail-safe. The EAC strongly believes that HAVA provisions must be interpreted to bring about consistent and evenly applied results. In this case, if individuals who fail to meet Federal identification standards have the right to a provisional ballot, so must individuals who fail to meet similar State standards.

Stricter Eligibility Standards and Provisional Voting. HAVA specifically provides that States may create stricter voter eligibility standards than provided in HAVA.[3] Arizona's "Proposition 200" identification requirements are a prime example of this authority. However, the HAVA authority to create stricter eligibility standards does not grant the state authority to create standards that bar access to a provisional ballot. To interpret HAVA otherwise (i.e. allowing stricter state identification standards to bar access to provisional ballots) would render HAVA's provisional voting mandate (Section 302) void and meaningless. HAVA cannot be read to grant both (1) the right to a provisional ballot if an individual's voting eligibility is challenged by a State and, (2) the right of that State to deny an individual a provisional ballot if they do not meet voter eligibility standards. These concepts are mutually exclusive. HAVA cannot be interpreted to allow a State to create voter eligibility standards that bar the Section 302 right to cast a provisional ballot without nullifying the effect and intent of that provision. Any such interpretation of HAVA would run afoul of both HAVA Section 304 and longstanding principles of statutory construction.

First, HAVA notes in Section 304 that while States may create standards that are stricter that those established under HAVA, this authority is limited to the extent "such State requirements are not inconsistent with the Federal requirements under [HAVA]." Clearly, provisional voting is a requirement under HAVA. Section 302(a) notes that qualified individuals "**shall** be permitted to cast a provisional ballot." (Emphasis added). In this way, States may not create standards that are inconsistent or interfere with the provisional voting mandate.

Furthermore, long established principles of statutory construction further prohibit an interpretation of HAVA that would render any of its provisions meaningless. It is "'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001), (quoting Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)).

A Stricter Provisional Voting Standard. As discussed above, States' have the right to impose stricter requirements than those laid out in HAVA. The EAC has already made it clear, above, that a stricter voter eligibility requirement cannot be read to bar an individual's right to a provisional ballot. However, could a stricter requirement regarding provisional voting serve to limit access to such ballots? No. A stricter State requirement for provisional voting would be a standard that enhances a person's access to a provisional ballot. As the Sixth Circuit noted, "HAVA is quintessentially about being able to cast a provisional ballot." Sandusky County Democratic Party, 387 F.3d at 576. "HAVA's requirements 'are minimum requirements' permitting deviation from its provisions provided that such deviation is 'more strict than the requirements established under' HAVA **(in terms of encouraging provisional voting)**...." Id., (quoting 42 U.S.C. §15484, emphasis added). Thus, in terms of provisional voting, a stricter standard is one that serves to further encourage provisional voting. When passing laws affecting provisional voting, States must ensure that their provisions are consistent with HAVA or otherwise serve to further an individual's access to a provisional ballot. EAC concludes that any policy asserting that States may pass laws limiting access to provisional ballots conflicts with HAVA.

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[3] See 42 U.S.C. §§15485 – 15485, entitled *Minimum Requirements* and *Methods of Implementation Left to Discretion of State*, respectively.

Conclusion. A state may not impose an identification requirement that would limit a potential voter's access to and submission of a provisional ballot. However, such requirements (when coupled with a state's provisional ballot procedures) may prevent a provisional ballot from being counted.

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