

Edward B. Foley  
Director, *Election Law @ Moritz*  
Robert M. Duncan/Jones Day  
Designated Professor of Law

Direct Dial: (614) 292-4288  
Fax: (614) 688-4202  
Email: foley.33@osu.edu

February 16, 2005

The Honorable Gracia Hillman  
Chair  
U.S. Election Assistance Commission  
1225 New York Avenue, N.W., Suite 1100  
Washington, D.C. 2005

Re: Comments for Public Hearing on Provisional Voting, February 23, 2005

Dear Chair Hillman:

Thank you for your invitation to participate in the Commission's hearing on provisional voting. These written comments are in response to your request and are based on my previous work on the subject, including:

*Minimizing the Need for Provisional Ballots: A Reform Worth Wishing For*  
<http://moritzlaw.osu.edu/electionlaw/comment1221.html>

*When Should a Presidential Election Be Over?*  
<http://moritzlaw.osu.edu/electionlaw/analysis/041117a.htm>

*Problems with Provisional Ballots*  
<http://moritzlaw.osu.edu/electionlaw/analysis/041111a.htm>

## Summary

- 1 It is better to resolve whether a particular individual is eligible to vote in an election *before* Election Day, rather than afterwards:
  - 1.1 before Election Day, it is easier to resolve such eligibility questions without regard to which candidate or party is better served by a particular ruling;
  - 1.2 after Election Day, when candidates and parties know which side is ahead based on regular (i.e., not provisional) ballots, and by how many votes, there is too great a temptation to make arguments about eligibility based solely on whether the argument favors one side or the other;

- 1.2.1 the side that comes up short among regular ballots will attempt to “harvest” extra provisional ballots through an expanded standard of eligibility;
    - 1.2.2 conversely, the side that is ahead among regular ballots will argue for a narrow standard of eligibility.
  - 1.3 Conclusively determining before Election Day that an individual *is* eligible to vote will permit that individual to vote a regular, rather than provisional, ballot, thereby reducing the number of provisional ballots in need of post-election evaluation.
- 2 It is desirable to reduce the number of provisional ballots cast (as a percentage of total ballots) in any given election, as well as the time it takes to evaluate their eligibility:
- 2.1 The larger the number of provisional ballots as a percentage of total ballots, the more likely that it will be impossible to declare a winner on Election Night.
    - 2.1.1 When the number of provisional ballots exceeds 2 percent (as it did in Ohio in 2004), there is a significant risk that the number of provisional ballots will exceed the number of regular ballots by which the leading candidate is ahead;
    - 2.1.2 While Americans are willing to tolerate the occasional uncertainty in election results, particularly for smaller races, Americans want to know who won the White House on Election Night, and would like to know the next Governor of their state before New Year’s Day.
  - 2.2 The more complicated the process of evaluating the eligibility of provisional ballots, the longer it will take to resolve close elections, and the more uncertainty there will be about the rightful winner:
    - 2.2.1 If it takes a month to process provisional ballots (as it did in Ohio in 2004), then in a close race not only will there be no certified winner for a month, but the inevitable post-certification litigation will delay the ultimate resolution of the election even longer (as it has in the Washington gubernatorial race).
    - 2.2.2 In presidential elections, it is simply not feasible to take a full month after Election Day to process provisional ballots, as doing so leaves no time for any post-certification challenges prior to the Electoral College deadlines established by Congress.

- 2.2.3 The greater the complexity of evaluating provisional ballots for eligibility, the more likely there will be plausible grounds for challenging these eligibility determinations.
  - 2.2.4 In a close election, where the number of provisional ballots exceeds the lead in regular ballots, if an official winner is certified based on a complicated process of evaluating provisional ballots, with no opportunity to challenge these eligibility determinations because “the clock has run out” and the official winner must be installed into office no matter how suspicious these eligibility determinations may appear, the consequence will be public perception that the electoral process was corrupt and the winner illegitimate.
- 3 With a well-designed system for verification of voter registration lists, it is possible to resolve most issues concerning voter eligibility before Election Day, thereby largely eliminating the need to make eligibility determinations regarding provisional ballots afterwards:
  - 3.1 Shortly after the deadline for the submission of new registration forms, the State should make publicly available on a website a complete List of Registered Voters;
  - 3.2 Individuals (or groups representing them) who are not on the list and believe that this omission is in error should be permitted to challenge the omission in an expedited administrative procedure;
  - 3.3 Likewise, if individuals or groups believe that there are names on the list that are erroneous (deceased voters, fraudulent names, or otherwise ineligible individuals), they should be permitted to challenge the inclusion of these names in a similar expedited procedure;
  - 3.4 The procedures for challenging either omissions or inclusions on the list should be open, so that adverse interests may be represented:
    - 3.4.1 if someone wishes to defend the omission of an individual from the list, even as the individual is challenging the omission, the procedures should provide that opportunity;
    - 3.4.2 likewise, if an individual whose name is on the list is being challenged as ineligible, that individual should receive notice of the challenge and an opportunity to defend the inclusion.
  - 3.5 The resolution of these challenges to the omission and inclusion of names on the list should result in the publication *prior to Election Day* of a Verified List

- 3.6 of Registered Voters, which should provide the exclusive – and conclusive – basis for settling eligibility disputes on or after Election Day:
  - 3.6.1 if an individual is on the Verified List, that person is eligible without further inquiry;
  - 3.6.2 if an individual is not on the Verified List, that person is not eligible and that determination is final.
- 3.7 In essence, the procedures for converting the initial List of Registered Voters into the Verified List of Registered Voters should cause eligibility determinations to be made in the month of October rather than the month of November:
  - 3.7.1 it is the same kind of eligibility rulings, using the same sort of procedures, just “front-loaded,” so that they occur before Election Day rather than afterwards;
  - 3.7.2 in other words, a well-designed process for verifying voter registration lists in October avoids the need for eligibility rulings over provisional ballots in November.
- 4 The process of evaluating provisional ballots for eligibility should be simple and perfunctory, with little room for disagreement, controversy, or discretion.
  - 4.1 If a well-designed process of preparing a Verified List of Registered Voters is in place (as described in Point 3, above), then the procedure for evaluating a provisional ballot becomes straightforward:
    - 4.1.1 if the individual who casts a provisional ballot is on the Verified List, then the provisional ballot is included in the final vote totals;
    - 4.1.2 conversely, if the individual who casts a provisional ballot is not on the Verified List, then the provisional ballot is excluded as ineligible.
  - 4.2 With this Verified List system in place, there should be very few provisional ballots actually cast:
    - 4.2.1 voters will either vote regularly or not at all, knowing whether they are on the Verified List and therefore eligible;
    - 4.2.2 this low number of provisional ballots is itself a good thing (as described in Point 2, above).

- 4.3 Even with this Verified List system in place, it still makes sense to give a provisional ballot to those few persons who show up at the polls on Election Day believing themselves to be eligible even though the poll workers cannot find their names on the Verified List:
  - 4.3.1 It may be that the poll workers inadvertently cannot find these names of on the Verified List even though they are there, in which case these provisional ballots will be quickly ruled eligible after the fact;
    - 4.3.1.1 In this way, provisional ballots serve their core “insurance policy” function.
    - 4.3.1.2 No one who is truly eligible is turned away from the polls because of administrative error.
  - 4.3.2 Similarly, even with respect to the provisional ballots quickly ruled ineligible because the individuals were not on the Verified List, disputes at polling places were avoided:
    - 4.3.2.1 Individuals were permitted to cast a ballot in accordance with their belief in their eligibility.
    - 4.3.2.2 Afterwards, the system “double-checked” itself and easily determined that, indeed, the poll workers were correct and, according to the Verified List, these individuals are not entitled to participate.

In my oral comments on February 26, I will elaborate on this summary outline of points and will be happy to address any questions the Commission may have. I look forward to seeing you then.

Respectfully submitted,

Edward B. Foley  
Director, *Election Law @ Moritz*  
Robert M. Duncan/Jones Day  
Designated Professor of Law