

STATEMENT
BY
THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
BEFORE THE
U.S. ELECTION ASSISTANCE COMMISSION
PRESENTED BY
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Columbus, Ohio
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Thank you, Madam Chairwoman, for the opportunity to present the views of the League of Women Voters on provisional ballots. The League appreciates the Commission's openness and concern and we look forward to assisting the Commission as you embark on an ambitious and important agenda for 2005.

The League of Women Voters is a nonpartisan citizen organization that has worked for more than 85 years to educate the electorate, register voters and make government at all levels more accessible and responsive to citizens. We believe that voting is the most important expression of a citizen's participation in government.

The League joins the Commission and others in tackling the challenges of fully realizing the promise of the Help America Vote Act (HAVA) – that no voter coming to the polls be turned away without being given an opportunity to cast a ballot and, if the voter is eligible, have that vote counted.

I was privileged to travel to many states throughout 2004 as part of the League's work to educate voters and build citizen participation. I thus had an opportunity to meet with election officials, voters and the media as provisional balloting systems were put in place. In addition, Leagues across the country worked to educate voters and the League of Women Voters of the United States surveyed states and localities on a variety of developing election reform issues. Our testimony today is based on those experiences.

There is good news and bad news from the 2004 election. The good news is that significant numbers of provisional ballots were issued to voters and a high percentage of those ballots were counted in many states. These results suggest that provisional ballots worked to enfranchise eligible Americans. The bad news is that not every eligible voter received a provisional ballot and not every vote cast by an eligible voter was counted. Lack of clear guidance, and differences in polling place operations, interfered with provisional balloting. And some states and localities had policies not to count the votes of certain eligible voters. The promise of the provisional balloting system set up by HAVA was not fully realized in the 2004 general election.

Provisional balloting was designed as a "fail-safe" mechanism for a variety of electoral problems, including the failure to properly process voter registration applications, erroneous purging, and faulty list management, and as a mechanism to achieve uniformity and

nondiscrimination. The fail-safe mechanism is also important for ID issues and for voter challenges generally. By providing a fail-safe voting system across jurisdictions, provisional balloting can improve uniformity and reduce discrimination, but only, of course, if the provisional balloting system is itself administered in a uniform and nondiscriminatory manner, as is required by law.

How did provisional balloting fare in 2004? The record was mixed. More than 100,000 provisional ballots were issued in some states, and more than 50 percent of those ballots were counted in many states. But, in one sense, the issuance of a provisional ballot indicates that the basic electoral system failed. It's good to have a backup, but over time one would like to reduce the need for it. Our experiences last year point to a number of issues the League hopes the Commission will address as it develops best practices for the administration of provisional balloting systems.

There are four areas from the 2004 experience that the League would like to call to your attention. First, timeliness in issuing standards and developing systems was an issue.

Ohio is a prime example. It was not until September 2004, approximately two years after HAVA was enacted, that the Secretary of State issued written guidelines on the issuance of provisional ballots, and that first attempt, which severely limited the eligible voters who could even receive a ballot, was quickly overturned. For approximately two years, localities were on their own in developing the provisional balloting systems that were supposed to be uniform statewide.

Other states and localities were also slow in putting systems in place. While I was traveling in October, many jurisdictions still did not have systems in place or could not describe those systems to the public.

Only when clearly stated guidelines are distributed well in advance of Election Day can polling place operations be properly organized, poll workers be properly trained, and voter education efforts be properly carried out. We urge the Commission to encourage states and localities to set their systems up early in the election cycle.

Our second major concern is that states and localities fell short in 2004 in ensuring uniform standards for the issuing, processing and counting of provisional ballots. Arizona was among the states where the counting of provisional ballots varied according to local jurisdiction, with different operational standards in place in major jurisdictions. In Ohio, counting rates were widely disparate among counties, with some of the most populous counties having significantly lower counting rates. Without clearly stated standards and procedures for issuing, processing and counting ballots, we cannot be sure that voters are treated equally, and that their votes are counted equally.

One of the recurring themes from the 2004 election was the issue of the counting of provisional ballots cast by voters at precincts outside their "home" precincts. We strongly believe that ballots should be counted for every race for which a voter is eligible, whether or not the provisional ballot is cast from the so-called "wrong" precinct. But I would like to make a different point here. For those states and localities that do not plan to count such

votes, it is essential that there be clear and workable requirements that the voter be accurately directed to the “proper” precinct. Strong guidance from this Commission would be very helpful to ensure uniform practices across jurisdictions and within jurisdictions.

I do want to stress this point, because we found that it is surprisingly difficult in many areas for the voter to find out where their polling place really is. It is not unusual for polling places to change from year to year. Indeed it is not unheard of for polling places to be determined within 30 days of an election or for innocent mistakes to occur causing voters to be directed to the “wrong” precinct by election officials. We urge the Commission to be cognizant of this issue.

Our third major area of concern relates to the counting of provisional ballots in 2004. There are a number of issues here. One is related to ID requirements. Under HAVA, first time mail-in registrants must provide ID, but may cast a provisional ballot at the polls if they forget their ID. About half the states do not count the provisional ballot unless the voter provides ID either at the polls or subsequently, thereby transforming an identification requirement into an eligibility requirement. The interaction of the ID mechanism and provisional ballot system in HAVA should not be a “Catch-22,” whereby the provisional ballot backup to the ID requirement is rendered meaningless by a requirement for ID before the vote is counted. This “Catch-22” should be eliminated.

Another issue is whether administrative requirements must be fulfilled before a provisional ballot is counted. At least one state requires a variety of information that does not affect the voter’s eligibility before that voter’s provisional ballot will be counted. We think this is bad practice, and urge you to ask states and localities to guard against it.

The time available for the verification and counting process is also a key issue. State practices vary widely, with at least one state allowing only two days for determining whether to count provisional ballots while other states have a process that can be completed in more than two weeks. Needless to say, the accuracy and completeness of the processes employed in those two examples are substantially different.

Finally, there is the so-called “wrong” precinct issue. Most states now require voters to cast a provisional ballot in the “correct” precinct or polling place. A significant number of other states count the ballot if it is cast within the voter registrar’s or larger jurisdiction.

The League of Women Voters believes that provisional ballots should be counted for all races for which the voter is eligible, regardless of the physical location from which the ballot is cast. We believe this is good policy, we believe it is consistent with the terms of the Help America Vote Act, as well as the National Voter Registration Act (NVRA), and we believe it is consistent with the practices of most states with regard to absentee and overseas ballots.

HAVA provides that a provisional ballot “shall be counted” if the voter is “eligible under state law to vote.” Thus, whether to count the vote is a question of eligibility, not one of administrative practice. Eligibility questions go to the status of the individual, such as age, mental capacity, lawful residence in the appropriate district, and citizenship, including felony status. Administrative issues relate to the time when polls are open, the places where

voters cast ballots and the manner in which polling place operations are managed. It is a mistake to see the physical location from which a provisional ballot is cast as impugning the voter's eligibility. The physical location is an administrative issue – one on which the U.S. Congress has spoken by requiring the issuance of a provisional ballot at the polling place to any person who affirms to being a registered voter in the jurisdiction, as defined by the NVRA.

This understanding of the provisional ballot system is consistent with the states' own absentee ballot laws and the federal laws related to overseas and military voting. Absentee voting is allowed because an eligible voter, lawfully resident in a particular district, is away from that location or otherwise unable to go to the polling place. Provisional balloting is a parallel case, required by federal law.

Counting provisional ballots for every race for which the voter is eligible is simply good policy as well. Provisional balloting is the fail-safe mechanism for the precinct-based voting system. With shifting locations for polling places, it is not unusual for poll workers at one polling place to be unable to direct a voter to the "correct" polling place. Provisional ballots provide the cure. Thus, when an accurate list of voters is not available at polling places, or when voters don't know the "correct" polling place, it makes sense to provide a provisional ballot and to count that ballot for every race for which the voter is eligible. In our view, this does not raise difficult administrative issue for federal elections. We urge the Commission to provide guidance to states and localities on how to make such a system work.

Our fourth area of major concern from the 2004 election is the issue of transparency and reporting. From the League's experiences, it was not always easy to learn how states and localities had designed their systems for 2004. State guidelines, when developed, were not always made public. This made public education and monitoring more difficult. It may be that in some instances state guidance was late in coming, or that local systems were still being developed, so that it was not always possible to say with certainty how provisional balloting would work in 2004. But we believe it is important to note that transparency and public communication is a vital part of provisional balloting systems. We urge the Commission to include these considerations as guidance is developed.

Reporting is also important, and we thank the Commission for its work in developing a real database on provisional balloting and other election reform measures. We urge states and localities to develop their own reports, and to fully assist the EAC as well. The League believes that it is essential to learn in detail why provisional ballots are issued, how they are processed, and why they are or are not counted. We would be interested to know, for example, whether a provisional ballot issued because of an ID problem is more or less likely to be counted than a ballot issued because the voter's name was not on the list.

We do want to thank the Commission for issuing its resolution on provisional voting on October 15, 2004 (Resolution 2002-04). This resolution offered important guidelines to election officials. The League of Women Voters was especially pleased by the emphasis on poll worker training, and the necessity of having clear, uniform written procedures. They represent a good first step. We trust the Commission will build on this resolution as it develops best practices for 2006 and beyond.

We would also like to call attention to the League's own monograph, called "A Guide to Implementing the New Federal Provisional Ballot Requirement," published in August of 2003. This guide offered practical recommendations for achieving the maximum protection of the right of eligible voters to cast a ballot and have their votes counted. Many of the principles outlined in that monograph are still important, and we recommend them to you.

In addition to the principles in the monograph and the concerns raised today about the 2004 election, there are two additional points we would like to call your attention.

We believe that provisional ballots should be treated as a voter registration application. Thus, if the provisional ballot is not counted, the problem will be immediately addressed by the processing of the voter registration application for the next election.

We also urge you to give attention to the systems states are setting up to provide voters with information about whether their provisional ballots were counted.

In closing, I want to again thank you for your openness and your hard work on behalf of the American voter and the League looks forward to working with the Commission, state and local election officials, and the public to address these issues.