

2009 HOUSE JUDICIARY

HB 1516

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1516

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/26/09

Recorder Job Number: 7718, 7739

Committee Clerk Signature 

Minutes:

Chairman DeKrey: We will open the hearing on HB 1516.

Rep. Randy Boehning: Sponsor, support (attachments).

Rep. Delmore: Have we checked in with the auditors to find out exactly how many of those affidavits have proven to be false. Is this really a problem we're seeing; hundreds and thousands of voters in ND?

Rep. Boehning: I don't have that information in front of me. My major concern is, on Election Day, a person goes to the early election polling place and completes an affidavit.

Rep. Delmore: I understand the attempt of this bill. I know what these affidavits are used for in ND. One of the things that we need a little research on is if this is a problem with these affidavits.

Rep. Boehning: I guess to answer that question, if two thousand ballots were cast where people completed affidavits and if it were proved that they were false or that they voted more than once, it could mean the difference in an election. This bill would separate those ballots until the person is confirmed and then their ballot would be counted. This will bring a higher level of integrity to the election process.

Rep. Delmore: Do you think it is fair to those people to do an additional step in order to have their votes counted.

Rep. Boehning: When we go to the polls, we are asked for an ID. I have no problems showing an ID. We are pretty lax, you only have to be a resident for 30 days and you are eligible to vote. You just have to bring some piece of mail or utility bill to show your address. I think it is our duty to provide the information to be eligible to vote.

Rep. Griffin: On page 3, the county auditor shall attempt to verify addresses of voters where they signed an affidavit. If they can't find the person, their vote would be rejected. It doesn't say what type of verification; would they be "all" out.

Rep. Boehning: I think they would have to verify the affidavit, so we have a process now in place to verify affidavits. I think it is the responsibility of the auditor to verify that I am who I am.

Rep. Dahl: Have you talked to counties about a potential fiscal impact. I know that in my district that over 1/2 the voters are students and aren't going to be on the electoral rolls. Those students have to fill out an affidavit. I can't imagine the number of affidavits the county auditor would have to go through in the next three days to verify them. That would be a huge undertaking.

Rep. Boehning: Students have an identification card. That shouldn't be a problem. When they come in without an ID, they can't vote until they bring something in to the polling place.

Chairman DeKrey: Thank you. Further testimony in support.

Rep. Kim Koppelman: I am a co-sponsor of this bill. Should every vote be counted, absolutely. Should a person be allowed to five times and be able to be counted five times, no.

We've always been proud of the integrity of our elections in ND. We want to make sure that stays that way. Just because we haven't had a problem with it in the past, doesn't mean that

there isn't a potential for problems in the future. Sometimes you don't have a problem, until you have a problem. Can you be preemptive, have something in place to prevent the problem, probably. That is what this bill seeks to address. We need to ensure the process of voting where a person who says who they are is really who they are. The problem is, what happens to that ballot. Theoretically, you go to vote, you don't have an ID, they challenge you, you sign an affidavit swearing I am this person, and the affidavit is forwarded and potentially could go to the state's attorney for prosecution. I would question whether it has ever been prosecuted in ND. The problem is what happens to that vote. If it is found to be fraudulent, the vote is still counted. You can't take it back, it's in the ballot box.

Rep. Griffin: When you look at the statute, if you have a student from Minnesota, they attend UND and live on campus. According to the statute, if they cannot confirm the address from the ID, they need to fill out an affidavit. This new language is going to say if it is passed, that everyone of those affidavits will have to be verified and if for some reason the county auditor can't, and I don't know exactly how they are going to verify the address those ballots will all be thrown out. Shouldn't it be more of a case of we're going to count these unless we find out that this person doesn't live where he says he lives.

Rep. Koppelman: I would see that as being a potential challenge; a potential issue here. I think just as many of the other changes that we make in election law over the past several years need to be disseminated to the public. Education is what is needed. Maybe the students that live on campus, student government or the institution itself can educate the students that they need to have ID or some sort of proof of where they reside. The students are smart enough to figure out what is needed, if they don't want to have to complete an affidavit and/or have a provisional ballot. I would rather make sure that a vote that is counted is a valid vote.

Rep. Delmore: When you look at the mail-in vote, somebody may help someone else fill out that ballot, I see that as a bigger threat to the election integrity if anything. Aren't there some things that are really hard to think about in that way.

Rep. Koppelman: I think this is very simple and straightforward. We have a process in place that says if you can't prove to me that you are who you say you are, I, as the election judge, ask you to sign an affidavit, that much is already in place. You asked about the voter going through an additional step, this doesn't do that. The step that they are subjected to is already in place. They sign the affidavit. It is the process that is subjected to another step. That step is simply saying, just as when you vote absentee, your ballot is in a secrecy envelope so we can't tell it's yours. There are provisional ballots in the same kind of envelope, the only thing is we are taking a step to ensure that it is a valid vote in ND. Once we prove that, their ballot goes in the box.

Rep. Delmore: Do you know how many of these affidavits are signed right now for a legislative district. Also, it sounds to me like the whole election process will go back to the county auditor to try to verify addresses, and in some cases not being able to verify those very people whose right to vote should be upheld and not jeopardized.

Rep. Koppelman: I don't know how many affidavits. As to jeopardizing anyone's right to vote, again I don't think this does that. If, as you are suggesting is that we have this stack of affidavits on election day now that we're ignoring, and aren't being checked, I believe that is a problem. If in fact, I come to the polls and I don't have any kind of ID, under this bill I can go home and get my driver's license and bring it back or water bill, etc. and show it to the election officials. At that point, the ballot goes into the ballot box. So then it wouldn't go to the auditor; but if it does it sets up a reasonable system I think to verify that the ballot is appropriate.

Rep. Delmore: You would also need a separate envelope for each one of those voters, because if you put all of them together in one envelope, I don't know which one belongs to which voter. So that's also one more duty we would be putting on election poll workers.

Rep. Koppelman: A secrecy envelope would be there for the ballot to go into so that no one knows how you voted. Then it is tucked into another envelope with your name. Just like an absentee vote that comes in is in two envelopes.

Rep. Klemin: It is alleged that over in Minnesota, that more votes were cast in some districts than there were voters. Would this bill prevent that type of situation from occurring here.

Rep. Koppelman: That's an excellent example. I would certainly hope that doesn't happen, but that is the intent.

Rep. Klemin: The 3 days on line 27, the county auditor in three days. What's a day. I

remember a situation where the Secretary of State had to be open until midnight once upon a time. If the county office closes at 5:00 pm or do they have to stay open until midnight in case somebody shows up with their ID. What do you think that process would be.

Rep. Koppelman: I hadn't thought about that. I suppose we could say normal operating hours.

Rep. Klemin: It should be a little more precise, like 5:00 pm on the third day.

Rep. Griffin: Let's say as an example, I lived in Larimore but attended UND in Grand Forks in a dorm. There is no utility bill. So I show up to vote, sign an affidavit; then it is sent over to the county auditor and then the auditor calls the school to verify that I live there in the dorms. The college won't give out that type of information. What happens then.

Rep. Koppelman: I think that if you gave them permission to disseminate that information, you probably could. Any example theoretically could occur. I think, again, the point of this would be, if what we're really after here is to make sure that our election process is valid and

that people who are entitled to vote get to vote and those who aren't entitled to vote, don't vote. Are there potential votes in that ballot box that should not be there.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Al Jaeger, Secretary of State: Opposed (attachment). We have a bill in the Senate, SB 2324. We have a central voter file that works. Our concern is that we are talking about a couple of thousand affidavits; but we can't get the affidavits processed and verified in three days. If we can't get it verified in three days, her ballot goes in the trash because we can't get a hold of her. I understand the concept and concerns. In SB 2324, we beefed up this whole matter of affidavits. It does have a requirement in there that a county auditor must check, but there is a longer timeframe allowed. I would ask the committee to allow that bill to become law. I suggest that we allow what we currently have, plus what we have introduced in SB 2324, and allow the voter central file to work. I would suspect that if do find someone who has double voted and is disqualified, it's going to be big time news. The word will get out very quickly. The concern of Rep. Boehning is that in a recount situation, where very few votes separated the two candidates and could have made a difference, I would also offer that if there were several hundred ballots cast in his precinct that were now verified, he might also lose if there are ballots that don't get to be counted. I think we need to be careful. On the national level they are talking about provisional ballots. There is a lot of concern in other states. One of the things that I think, that the entire election process we have in ND is envied by other states. Voter registration doesn't solve this problem.

Chairman DeKrey: Thank you. Further testimony in opposition.

Dannette Odenbach, ND Assoc of Counties: Oppose (attachment).

Rep. Koppelman: Have you had any concern about the affidavits being completed and the person still voting elsewhere. Is there any concern about voter fraud.

Dannette Odenbach: The way our residency laws are right now, we really have no way to enforce where the person should vote. There is no basis in law to determine where to vote.

Rep. Koppelman: Isn't that a potential for problems, especially with someone from out of state.

Dannette Odenbach: They would be prosecuted.

Rep. Koppelman: Let's say someone is prosecuted, in an election where someone won by 3 votes, their vote can't be taken out, it's already been counted. Someone may lose an election because an invalid vote was counted.

Dannette Odenbach: The problem is the residency requirements. We need to clarify residency rules.

Rep. Koppelman: But that still doesn't take the invalid ballot out of the ballot box where it's already been counted. Let's segregate that ballot until we can preserve the election process, and then count that vote after it's been proved that it is valid. If this isn't a solution, I'm open to other options. What would you suggest.

Dannette Odenbach: We understand the concept of what you're trying to accomplish. We don't find this to be a problem as much as residency is a problem, we need to clarify residency rules.

Rep. Klemin: I don't know what's in SB 2324, you talked about changing the rules on residency and Secretary Jaeger talked about working with universities to provide more information on student ID cards. Do you expect those measures will greatly reduce the number of affidavits that might be filed in an election.

Dannette Odenbach: Not if there are no changes to residency.

Rep. Klemin: Do you expect to see a significant reduction in the number of affidavits, do you have an opinion on that.

Dannette Odenbach: I present that it would if we clarify residency. If we go to residence rules, #7 – the union of intent and act, if available.

Rep. Klemin: If we do significantly reduce the number of affidavits, then the burden would be lessened if this bill were passed as is because the county auditor wouldn't have thousands of affidavits to look at. It's a two part process perhaps then, if we don't have anything on the first part specifically about the rules of residency other than the ones you gave us that are in statute now. It should be mentioned that these rules are not just used for elections, they are used for other things too. We have to be careful about unintended consequences.

Dannette Odenbach: In 16-01-04 is the election title.

Rep. Griffin: How do you envision the county auditor being able to verify information on the affidavit, if this bill passed. What if they are unable to reach the voter to verify them.

Dannette Odenbach: That is something else that we talked about. Perhaps additional information will be necessary to add to the affidavit to make it easier to find the voter.

Rep. Boehning: How many affidavits are verified now, and how are discrepancies found.

Dannette Odenbach: The verification process isn't completed yet, but they haven't found any problems so far.

Rep. Boehning: What is the process, how do they get in touch now.

Dannette Odenbach: The county auditor will have information on that.

Chairman DeKrey: Thank you. Further testimony in opposition.

Michael Montplaisir, Cass County Auditor: Oppose (attachment). The process that we go through to verify an affidavit cannot be completed in three days. We had over three thousand affidavits in the last general election. That's a lot of validation. We're a college town; we not only have NDSU, we have Concordia, etc. plus technical colleges. A lot of those students live in North Dakota. There have been a lot of questions about how do you verify these affidavits.

In the past, there were two types of affidavits. The first type was a person shows up, they never voted in the precinct before, they don't have any ID, this was before ID was required, they'd fill out an affidavit. The election judge would certify them as a qualified voter. The second type was that they hadn't lived a long time in the precinct and the only procedural difference is that they would attach a note to that affidavit for me to look at it. A few years ago, they changed the state law so that you have to have an ID with a picture on it. That greatly increased the number of affidavits, particularly for college students. The students that come to Fargo/Cass County that come to go to school, typically vote in Cass County. There was always a question if they should vote in Cass County or at their home. We are able to find that out now, if a voter votes in two places. We did find some instances in the last election, that some people applied for an absentee ballot in Cass County and applied for one in Burleigh County. We called them and found out whether an absentee ballot was sent by the other county to the voter. The law also requires us to send a postcard out to the address to verify that they live there. We sent out three thousand of those postcards. Our goal was to get those out as quickly as possible. Some postcards went to hotels trying to track down students who were placed there at the beginning of the semester, because the student housing was full. Now they had probably been moved on campus and the cards were returned to us. The problem is if they don't have anything to show us anything with their name or picture on it. I think we can try to work on a solution.

Rep. Boehning: You said that you sent out postcards; what happened after that process to find the person.

Michael Montplaisir: If the person gets the postcard we ask them to call, sometimes that happens. If we don't hear from them, we attempt to follow-up through other means. We have about 50-60 left to follow up on.

Rep. Boehning: Don't most students have mailboxes when they move to the college.

Michael Montplaisir: I would like to see the college ID put the address on the card. They won't give me any information at the college or hotel. I just can't get it done in three days.

Rep. Klemin: I'm wondering what the problem is here, having these people being a resident of where they came from and voting by absentee ballot. When I was in college, I never thought for a minute that my residence was at UND, it was back home where I came from. Why can't we do that. We're not disenfranchising someone from voting are we, if we say just vote by absentee ballot back where you came from.

Michael Montplaisir: I don't have a problem with that. That's what you here in the Legislature need to work with and once it's established we will work with it. But right now, the law allows them the choice, they can either vote in their home town by absentee or in the college town, they just can't vote both places.

Rep. Koppelman: I certainly understand the dilemma that you and others have presented and why the provisions of this bill would be a challenge. What is the purpose of the affidavit process right now.

Michael Montplaisir: The purpose of the affidavit is for the voter to verify, under oath, that they live in that address, 18 years of age, US citizen, resident of ND. That is what they are asserting with the affidavit.

Rep. Koppelman: So does it do that. Is the affidavit effective.

Michael Montplaisir: Does it do that, yes I believe it does that. Do we occasionally run into an affidavit where somebody has signed the affidavit stating that they lived someplace and there is a question about it, yes it happens.

Rep. Koppelman: What happened in those cases.

Michael Montplaisir: We haven't prosecuted anybody in Cass County. The state's attorney wrote a letter.

Rep. Koppelman: People voted where they had no legal right to vote, they had signed affidavits swearing that they were legal, they were not prosecuted which is our only recourse for this offense, and their vote was counted, correct.

Michael Montplaisir: That is correct, it did. The problem is are we willing to let one vote count in order to not disenfranchised hundreds or thousands. That's the real question.

Rep. Koppelman: So it's your position then that we're talking about a philosophical issue here not a practical one. You're saying that it's okay if some ballots count that shouldn't, as long as we don't hold anybody up or question them as to the legality of their affidavit.

Michael Montplaisir: That's not at all what I meant. When it says putting into place procedures that within three days I verify the affidavits, that's impossible to comply with.

Rep. Koppelman: What is the solution, how can we both ensure that people who have a right to vote, vote and that every valid vote counts; and also ensure that we don't count votes that shouldn't be counted.

Michael Montplaisir: As I stated in my testimony, I don't believe there is just one solution. I don't have a solution. I think if we sat down and studied the issue, we may come up with several ideas that, while it's not going to solve all the problems with the affidavits, it may solve some. We would like to have fewer affidavits. They are time consuming for election boards, they are time consuming for our auditors and staff, and in most cases we don't find many problems.

Chairman DeKrey: We will recess until 2:00 pm. this afternoon when we will resume testimony in opposition.

Chairman DeKrey: We will reopen the hearing on HB 1516. Further testimony in opposition.

We will close the hearing.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1516

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/4/09

Recorder Job Number: 8680

Committee Clerk Signature *R. Penrose*

Minutes:

Chairman DeKrey: We will take a look at HB 1516.

Rep. Klemin: Explained amendment. The amendment is not completely correct. On page 3, line 10, after "verified" insert "as provided under subsection 4". I move those amendments.

Rep. Koppelman: Second.

Further discussion ensued.

Chairman DeKrey: Voice vote, motion carried.

Rep. Koppelman: I move a Do Pass as amended.

Rep. Boehning: Second.

6 YES 7 NO 0 ABSENT DO PASS AS AMENDED FAILED

Rep. Griffin: I move a Do Not Pass as amended.

Rep. Zaiser: Second.

7 YES 6 NO 0 ABSENT DO NOT PASS AS AMENDED CARRIER: Rep. Dahl

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1516

Page 2, line 26, replace "proof" with "verification"

Page 3, line 7, remove "The county auditor shall"

Page 3, remove line 8

Page 3, line 10, after "verified" insert "through the execution of an affidavit as provided under subsection 4"

Renumber accordingly

VR
2/4/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1516

Page 2, line 26, replace "proof" with "verification"

Page 3, line 7, remove "The county auditor shall"

Page 3, remove line 8

Page 3, line 10, after "verified" insert "as provided under subsection 4"

Renumber accordingly

Date: 2/4/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1516

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Koppelman Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore		✓
Rep. Klemin	✓		Rep. Griffin		✓
Rep. Boehning	✓		Rep. Vig		✓
Rep. Dahl		✓	Rep. Wolf		✓
Rep. Hatlestad	✓		Rep. Zaiser		✓
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar		✓			

Total (Yes) 6 No 7

Absent —

Floor Carrier: _____

If the vote is on an amendment, briefly indicate intent:

Failed

Date: 2/4/09
 Roll Call Vote #: 2

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 1516

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Griffin Seconded By Rep. Zaiser

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey		✓	Rep. Delmore	✓	
Rep. Klemin		✓	Rep. Griffin	✓	
Rep. Boehning		✓	Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad		✓	Rep. Zaiser	✓	
Rep. Kingsbury		✓			
Rep. Koppelman		✓			
Rep. Kretschmar	✓				

Total (Yes) 7 No 6

Absent —

Floor Carrier: Rep. Nabe

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1516: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO NOT PASS** (7 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1516 was placed on the Sixth order on the calendar.

Page 2, line 26, replace "proof" with "verification"

Page 3, line 7, remove "The county auditor shall"

Page 3, remove line 8

Page 3, line 10, after "verified" insert "as provided under subsection 4"

Renumber accordingly

2009 TESTIMONY

HB 1516

House Bill 1516

Mr. Chairman members of the committee for the record my name is Randy Behring State Representative District 27 Fargo and West Fargo. I appear in front of you on HB 1516 relating the canvassing of ballots of voters whose eligibility to vote has been challenged (provisional ballots).

Section 1 subsection 4 (f) informs the voter what he needs to do to ensure that his vote is counted and that he delivers to the county auditor within three days proof of eligibility to vote.

Subsection 6 of the bill lays out what needs to be done by the county auditor and canvassing board on the verification of the affidavit.

Why you may ask am I introducing a bill to limit ability to vote, my answer it is I am not reducing your ability to vote by any means. It is protecting the rights of other voters which is my concern and to make sure that you are a resident at the time you vote in your precinct. Help America Vote Act of 2002 (HAVA) provides for provisional voting in Section 302 of the Act.

What is a provisional ballot you may ask the definition provided by Wikipedia is as follows.

A **provisional ballot** is used to record a vote when there is some question in regards to a given voter's eligibility. A provisional ballot would be cast when:

- The voter refuses to show a photo ID (in regions that require one)
- The voter's name does not appear on the electoral roll for the given precinct.

- The voter's registration contains inaccurate or out-dated information such as the wrong address or a misspelled name.
- The voter's ballot has already been recorded

Whether a provisional ballot is counted is contingent upon the verification of that voter's eligibility. Many voters do not realize that the provisional ballot is not counted until 7-10 days after election so their vote does not affect the calling of the states to different candidates.

A guarantee that a voter could cast a provisional ballot if he or she believes that they are entitled to vote was one of the guarantees of the Help America Vote Act of 2002.

My major concern in voting is that if a person signs a affidavit as we can here in North Dakota his vote is counted regardless of whether or not he or she is a resident of the precinct or state for that matter. Law already does provide that a person can be charged if he lies on a affidavit, but his vote still counts regardless. My question to the committee do we want to count votes that are ineligible the answer should be no.

There was a study conducted Wendy R. Weiser Deputy Director, Democracy Program, Brennan Center for Justice at the NYU School of Law dated March 29, 2006. In her conclusion " provisional voting has been a positive innovation".

Mr. Chairman member of the committee I urge a DO PASS on HB 1516, I will stand for any questions.

SEC. 302. <<NOTE: 42 USC 15482.>> PROVISIONAL VOTING AND VOTING INFORMATION REQUIREMENTS. (a) Provisional Voting Requirements.--If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows: (1) <<NOTE: Notification.>> An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election. (2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is-- [[Page 116 STAT. 1707]] (A) a registered voter in the jurisdiction in which the individual desires to vote; and (B) eligible to vote in that election. (3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4). (4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law. (5)(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if

the vote was not counted, the reason that the vote was not counted. (B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted. States described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)) may meet the requirements of this subsection using voter registration procedures established under applicable State law. The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot. (b) Voting Information Requirements.-- (1) Public posting on election day.--The appropriate State or local election official shall cause voting information to be publicly posted at each polling place on the day of each election for Federal office. (2) Voting information defined.--In this section, the term "voting information" means-- (A) a sample version of the ballot that will be used for that election; (B) information regarding the date of the election and the hours during which polling places will be open; (C) instructions on how to vote, including how to cast a vote and how to cast a provisional ballot; (D) instructions for mail-in registrants and first-time voters under section 303(b); (E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and [[Page 116 STAT. 1708]] (F) general information on

Federal and State laws regarding prohibitions on acts of fraud and misrepresentation. (c) Voters Who Vote After the Polls Close.--Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order. (d) Effective Date for Provisional Voting and Voting Information.-- Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2004.

Are HAVA's Provisional Ballots Working?

Wendy R. Weiser
Deputy Director, Democracy Program
Brennan Center for Justice at NYU School of Law

March 29, 2006

I. Introduction

Provisional balloting was one of the centerpieces of the election reform package Congress passed in response to the widespread problems reported in the 2000 presidential election.¹ In 2000, millions of eligible voters were turned away from the polls because administrative errors caused their names to be omitted from the registration rolls.² The Caltech/MIT Voting Technology Project estimated that 1.5 million rejected votes of eligible voters could have been saved by use of provisional ballots.³ The National Commission on Election Reform, chaired by former Presidents Gerald Ford and Jimmy Carter, also recommended provisional ballots to advance the goal that “[n]o American qualified to vote anywhere in her or his state should be turned away from a polling place in that state.”⁴ Congress agreed, and required provisional balloting as part of the Help America Vote Act of 2002 (“HAVA”). On the night of the final vote in the House on HAVA, Representative Ney, the House sponsor of the bill, explained:

When this legislation goes into effect, the voting citizens in this country will have the right to a provisional ballot, so no voter will be turned away from a polling place, no voter will be disenfranchised, just because their name does not appear on a registration list.⁵

Although provisional ballots had previously been used in some form in about half the states,⁶ before HAVA, at least eighteen states had no provisional voting procedures, nor any safeguard whatsoever for voters whose names were left off the rolls.⁷ And a number of states that had provisional ballots did not offer them to *all* prospective voters not on the rolls.

The November 2004 federal election was the first election in which all states were required by federal law to allow every person who showed up at the polls and claimed to be

¹ Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. § 15482.

² See, e.g., National Commission on Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 34 (2001); Caltech/MIT Voting Technology Project, *Voting: What Is, Could Be*, at 30 (2001).

³ *Id.* at 30.

⁴ *Id.* at 35.

⁵ 148 Cong. Rec. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

⁶ As electionline.org has documented, before HAVA, seventeen (17) states allowed voters to cast provisional ballots similar to HAVA's; an additional seven (7) allowed for election day registration; five (5) allowed for affidavit ballots which would count as regular ballots; four (4) provided for limited provisional ballots in certain circumstances; and North Dakota had no need for provisional ballots because it does not require registration to vote. Electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006*, at 32-34 (Feb. 2006).

⁷ *Id.*

eligible and registered to vote to cast a provisional ballot. HAVA requires provisional ballots not only for voters whose names cannot be found on the “official list of eligible voters for a polling place,” but also for those whom “an election official asserts,” for any reason, are “not eligible to vote.”⁸ Voters who cannot meet HAVA’s identification requirements for first-time voters who register by mail are also entitled to cast provisional ballots.⁹

Provisional ballots thus provide a backup voting mechanism for any voter whose eligibility cannot be determined at the polling place—whether because her name is not on the list, her eligibility is challenged pursuant to state law, poll workers believe she already voted or is in the wrong polling place, or she cannot provide the ID required by federal or state law. After the polls close, election officials can take the time to research a voter’s eligibility—using the information on the provisional ballot envelope, voter registration records, and any other available sources—and to determine whether her vote will count. In theory, this “second look” should save the votes of most eligible voters who otherwise would be erroneously deprived of the franchise.

II. Are Provisional Ballots Working?

Are HAVA’s provisional ballot provisions working? In terms of whether provisional ballots served as a real safeguard for many voters who would previously have been turned away from the polls, the answer is yes.

According to the Election Assistance Commission’s 2004 survey of the states, approximately 1.9 million voters nationwide cast provisional ballots in the 2004 election. Of those, approximately 1.2 million—or 64.5%—were counted.¹⁰ A significant portion of those 1.2 million voters would have been turned away from the polls were there no provisional balloting mechanism. So, in the most basic sense, provisional ballots worked as what the Carter-Baker Commission deemed a “crucial safety net”¹¹ for hundreds of thousands of eligible voters.

But that is not the whole story. There are a number of ways in which provisional balloting failed in 2004. For one thing, more than half a million provisional ballots were *not* counted, even though many of those were cast by eligible voters. Moreover, the national totals obscure significant differences among (and within) the states. The percentage of provisional ballots cast and counted varied widely across the country. According to the EAC survey, the incidence of provisional ballots cast as a percentage of voter registrations ranged from 4.93% in Alaska to 0.3% in Vermont and Wyoming. Washington State reported that provisional ballots made up 11.29% of the votes cast at polling places, compared to the low of 0.5% in Vermont and Wyoming. The percent counted ranged from 100% in Maine and 96.6% in Alaska to 0% in

⁸ 42 U.S.C. § 15482(a).

⁹ 42 U.S.C. § 15483(b).

¹⁰ Election Data Services, *Election Day Survey*, conducted for the U.S. Election Assistance Commission, at 6-5 (Sept. 27 2005).

¹¹ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, at 16 (Sept. 2005); People for the American Way et al., *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, at 8 (December 2004).

Idaho and 6.3% in Delaware. Although the total percentage of provisional ballots counted was 64.5%, the state average was 47.9%.¹²

In many jurisdictions, provisional ballots created significant confusion and problems at the polls and afterward, and may have led to the disenfranchisement of many voters in 2004. The problems states experienced with provisional ballots can be divided into problems of administration and problems of rules or conception.

III. Administrative Failures

A. Problems Administering Provisional Ballots

In part because of their novelty, in many states, provisional ballots generated confusion before, during, and after the 2004 election. A number of states did not plan for provisional balloting until shortly before the election, and the rules kept changing up until the last minute. Not surprisingly, this led to widespread problems at the polls and afterward.

A report of the Election Protection Coalition found that provisional ballot problems were among the top five complaints registered on its 1-866-Our-Vote hotline.¹³ Most of the reported incidents consisted of complaints that provisional ballots were not available at polling sites, that poll workers did not offer or refused to allow voters to cast provisional ballots, and that poll workers were confused about provisional balloting procedures and rules.¹⁴

Problems in administering provisional ballots may have disenfranchised many eligible voters. For example, where provisional ballots were not available or not offered, eligible voters were turned away from the polls as before HAVA. And provisional ballots also created problems that did not exist before. For example, reports from poll sites across the country suggest that many voters who should have been entitled to cast regular ballots were given provisional ballots—which had a lower chance of being counted—instead. In addition, in part because of cumbersome procedures, provisional ballots led to delays at many polling places; the resulting long lines peeled off a not insubstantial number of voters.

Inadequate poll worker training was among biggest causes of provisional balloting failures. Many poll workers failed to inform voters of their right to cast a provisional ballot; many gave voters incorrect ballots; and many misinformed voters about how to use provisional ballots or whether and under what circumstances their provisional ballots would count.¹⁵ The

¹² *Election Day Survey*, at 6-9.

¹³ *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, at 8.

¹⁴ *Id.* As the report found:

There was widespread confusion over the proper use of provisional ballots, and widely different regulations from state to state—even from one polling place to the next—as to the use and ultimate recording of these ballots. Many voters reported that poll workers were either refusing to give out provisional ballots or simply unaware of the federal requirements to distribute provisional ballots. Notably, many voters who complained of not being listed on the voter registration list subsequently complained either about not being offered provisional ballots or of not knowing whether they would ultimately be counted. *Id.*

¹⁵ See, e.g., Demos, *Continuing Failures in "Fail-Safe" Voting*, at 3 (Dec. 2005), available at http://www.demos-usa.org/pubs/continuing_failures_small.pdf.

problem of inadequate poll worker training is not unique to the provisional ballot context, but it is perhaps most salient in that context given the relatively complicated rules and procedures associated with provisional ballots. Unfortunately, the improvement of poll worker performance is made more difficult by the incentive structure created by provisional ballots. Specifically, where poll workers have the option to give voters provisional ballots, their incentives to try to resolve problems at the polls are reduced. It is impossible to gauge the impact of this side effect, but efforts should be made to minimize it.

The good news is that, unlike the more controversial rules-based problems, most of these administrative problems can be resolved through improvements in planning, administration, and most importantly, poll worker training. There is no reason why election administrators should not be able to prevent there from being insufficient supplies of provisional and regular ballots or misinformed poll workers.

B. Provisional Ballots as Indicators of Other Election Administration Problems

The even better news is that provisional ballots can help states identify and rectify other election administration problems that might otherwise go unnoticed. For example, before provisional ballots, states had no convenient way of determining how many voters did not receive adequate notice of the location of their polling places or where the notification problems occurred. Now, states have records—in the form of provisional ballot envelopes—of each vote cast in the wrong polling place, and hence a better sense of where better procedures are needed. Indeed, as discussed further below, the 2004 provisional balloting records revealed widespread problems of voters not being sufficiently informed of the location of their polling places.

Provisional ballot records can also help states identify which election administration practices are least likely to disenfranchise eligible voters. For example, reports of provisional voting in 2004 confirmed the benefits of better voter registration lists in the form of statewide voter registration databases.

The existence of statewide databases generally correlated with a lower incidence of provisional ballots: according to the EAC survey, voters were less than half as likely to cast provisional ballots in states with databases (1.21% of ballots cast in polling places) than in those without (2.86%).¹⁶ Although correlation does not imply causation, it is reasonable to assume that statewide databases may have significantly reduced the incidence of provisional ballots. The surveyors concluded that the data “suggest[s] that better administration of voter registration rolls might be associated with fewer instances where voters would be required to cast a provisional ballot due to a problem with their voter registration.”¹⁷ Thus, as the Carter-Baker Commission noted, if statewide voter registration lists are improved, “the need for provisional ballots will be reduced.”¹⁸

On the other hand, statewide databases did not affect the percentage of provisional ballots counted in 2004: on average, states with databases counted the same percentage of provisional

¹⁶ *Election Day Survey*, at 6-12.

¹⁷ *Id.* at 6-6.

¹⁸ Commission on Federal Election Reform, at 16.

ballots as those without.¹⁹ That makes sense: while better lists may reduce errors that create the need for provisional ballots, it is the quality of the counting rules and procedures, not the quality of the lists, that determine whether the ballots of eligible voters left off the lists will be counted.

IV. Rules Failures

The more difficult problems states experienced with provisional ballots are those resulting from state rules and policies concerning the casting, and especially the counting, of provisional ballots.

A. Inconsistent and Unclear Rules

Most notable was the lack of clear and uniform standards for casting or counting provisional ballots. As many election observers reported, provisional balloting practices varied dramatically from state to state,²⁰ from county to county within each state,²¹ and even from precinct to precinct.²² A number of states had no clearly articulated rules for provisional ballots; others announced partial rules only weeks, or days, before the election; and most left at least some aspects of the provisional balloting process to the discretion of county or local officials.

All commentators agree that states should adopt and apply uniform rules and procedures for handling provisional ballots. Indeed, this was the top provisional balloting recommendation of the Carter-Baker Commission,²³ as well as of the election administrators who formed the National Task on Election Reform²⁴ and of the Century Foundation Working Group on State Implementation of Election Reform.²⁵

Despite the apparent unanimity of opinion on this, many states still do not have clear, transparent, uniform rules for all aspects of provisional balloting—especially for which provisional ballots will count. The resulting differing treatment of voters is unfair, fosters the impression of unfairness, creates opportunities for partisanship in tallying ballots, contributes to poll worker and voter confusion, and invites repeated litigation over the outcomes of elections. For voters to have confidence in the provisional balloting process and the fairness of elections, states must clearly and publicly articulate uniform provisional ballot rules—including rules for which provisional ballots will count—well in advance of any election.

¹⁹ *Election Day Survey*, at 6-12.

²⁰ See, e.g., electionline.org, *Solution or Problem, Provisional Ballots in 2004* (Mar. 2005).

²¹ For example, the Chicago Tribune reported large disparities in the counting of provisional ballots in Illinois, with 61% counted in Chicago compared to only 26% in DuPage County. The difference reflected differing rules for when provisional ballots would count; for example, some counties decided to count those cast out of precinct while others did not. New York similarly had varying rules for counting provisional ballots; for example, Westchester County did not count provisional ballots cast in the wrong polling place while Nassau County did.

²² See, e.g., *Solution or Problem? Provisional Ballots in 2004*, at 1-2.

²³ Commission on Federal Election Reform, at 17, Recommendation 2.3.1.

²⁴ National Task Force on Election Reform, *Election 2004: Review and Recommendations by the Nation's Election Administrators*, at 6, Recommendation 13 (May 2005).

²⁵ Century Foundation Working Group on State Implementation of Election Reform, *Balancing Access and Integrity*, at 31, 33 (2005).

B. Not a True Fail-Safe for All Eligible Voters

What should those rules be? Under an optimally-functioning provisional ballot system, all citizens who are eligible to vote and who submitted timely voter registration forms but whose names do not appear on a polling place's voter list should have their provisional ballots counted. Since provisional ballots are intended primarily to compensate for errors in election administration, the rules for counting provisional ballots should ensure that voters are held harmless for those errors. Unfortunately, the counting rules adopted in many jurisdictions undermine this "fail-safe" function for eligible voters.

1. Replicating Administrative Errors in the Counting Process

First, provisional ballots cannot serve their intended purposes if states replicate in their counting processes the administrative errors that created the need for provisional ballots. For example, it is not sufficient for a state to rely solely on the same list of registered voters used at its polling places to determine whether a provisional voter was registered and whether her ballot will count; such counting practices merely carry forward the same administrative errors that left the provisional voter off the rolls in the first place. And yet that is what many jurisdictions do. The EAC survey reported that the most commonly cited reason that provisional ballots were not counted in 2004 was that the voters were not registered.²⁶

A better practice would be for states to use an independent source to determine whether a provisional voter registered and is entitled to have her ballot counted. Many states rely on a voter's affirmation for this purpose. Other states examine original paper records of voter registration forms. Either method is preferable to one which offers little chance of curing the administrative defect that caused the voter to cast a provisional ballot.

2. Provisional Ballots Cast in the Wrong Precinct

The most controversial and contentious aspect of provisional voting has been whether or not to count provisional ballots cast outside a voter's assigned precinct. This issue generated substantial litigation before the 2004 elections,²⁷ and it was the greatest source of inconsistent rules across and within states. Electionline.org reported that 27 states did not count provisional ballots cast in the wrong precinct, while 17 states counted those ballots if they were cast in the correct jurisdiction (usually county).²⁸ And there were differences within states too. In New York, for example, some counties counted provisional ballots cast in the wrong polling place; others counted only those cast in the right polling place, including those cast in the wrong precinct within a polling place; and still others counted only those cast in the right precinct.²⁹

²⁶ *Election Day Survey*, at 6-5. Although there is no data on how many of these voters in fact registered, anecdotal evidence suggests that a significant number of them did.

²⁷ For a summary of litigation concerning provisional ballots in 2004, see http://www.brennancenter.org/programs/downloads/HAVA/provisional_ballot_litigation_list_v6.pdf.

²⁸ Electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006*, at 32, 35.

²⁹ In *Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (2005), the state's highest court held, in a contest after the election, that state law requires election officials to count provisional ballots cast in the wrong precinct but in the correct polling place and does not require the counting of provisional ballots cast in the wrong polling place. Nonetheless, counties are still permitted to count the latter category of provisional ballots.

The choice of whether or not to count provisional ballots cast in the wrong precinct had a meaningful impact on voters. States reported that the second most common reason they rejected provisional ballots in 2004 was that the ballots were cast in the wrong precinct.³⁰ Those jurisdictions that accepted provisional ballots cast in the wrong precinct counted a much higher percentage of their provisional ballots – 71.7%, compared to 52.5% in jurisdictions that did not.³¹

There are two primary reasons to count a provisional ballot cast in the wrong precinct for all races for which a voter is eligible to vote. The first is that there is no reason good enough to refuse to count valid votes cast by eligible voters. Precinct requirements are merely rules of administrative convenience, while the right of a citizen to cast a vote that will be counted is fundamental.

The second reason stems from the main purpose of provisional ballots—to prevent eligible voters from being disenfranchised because of administrative mistakes. Unfortunately, all too often, election officials fail to inform voters of the location of their polling places, and notices get lost in the mail or are late. One voter hotline, 1-866-myvote1, reported that it received one hundred thousand phone calls from voters trying to determine where they should vote.³² The *New York Post* reported that the New York City Board of Elections responded to voter inquiries about where to vote five months *after* the 2004 election.³³ Voters who do not receive notice may find it difficult or impossible to locate their polling places, no matter how hard they try: board of elections information lines get overloaded on Election Day; polling place locations change, sometimes at the last minute; and poll workers frequently are unable to inform voters of their correct polling places. What is more, election officials sometimes provide voters with incorrect information about their polling places. Litigation in Westchester County after the 2004 elections revealed that many polling places had outdated district maps that caused voters to cast ballots in the wrong precincts. Even if precinct notification systems work most of the time, a voter should not be disenfranchised because of these bureaucratic errors outside her control.

On the other hand, legitimate concerns have been raised about counting provisional ballots cast in the wrong precinct. Many officials worry that such a system would make it difficult to predict where voters would cast their ballots and hence to allocate sufficient resources to each polling place. Others worry that local candidates would lose voters since provisional ballots cast in the wrong precinct would only count for top-of-the-ticket or jurisdiction-wide races. Both concerns rest on the assumption that, given permissive out-of-precinct counting rules, voters will abandon their assigned precincts and will vote at the location most convenient for them. But there is no evidence that this occurs in the jurisdictions that count out-of-precinct provisional ballots. For example, in New Jersey, which counted out-of-precinct provisional ballots, provisional ballots made up 1.88% of all ballots cast at polling places and 1.28% of all registrations, compared to 4.88% and 1.66% in Colorado, which did not count those ballots.³⁴

³⁰ *Election Day Survey*, at 6-5.

³¹ *Id.* at 6-12.

³² Common Cause, *Report from the Voters: A First Look at 2004 Election Data*, at 3 (Dec. 2004).

³³ Stephanie Gaskell, *Elect Panel Dazed*, N.Y. POST, Mar. 24, 2005, at 13.

³⁴ *Election Day Survey*, at ch. 6, appx. p. 1.

In any event, states can address these concerns without disenfranchising eligible voters who, through not fault of their own, cast provisional ballots in the wrong precinct. There are a variety of ways to enforce precinct requirements short of disenfranchisement. Some states make it a criminal offense to knowingly seek to vote at the wrong precinct. In addition, the provisional ballot envelope can be modified to include evidence as to whether the voter went to the wrong precinct purposefully or because of administrative error. For example, voters can be asked to sign an affirmation, under penalty of perjury, that they believe they are in the correct precinct. Moreover, it is not difficult for a poll worker to note the precinct listed on a voter's registration card or whether or not she was able to direct the voter to the correct precinct. Regardless of the method chosen, it should provide a true fail-safe for voters who in good faith show up at the polling place where they cast their ballots and who have no reasonable way of determining their correct precinct.

3. Provisional Ballots Cast By First-Time Voters Without ID

HAVA requires first-time voters who register by mail and whose information is not matched against state motor vehicle or Social Security Administration databases to present identification before casting regular ballots.³⁵ Nonetheless, the statute expressly entitles voters who do not meet those ID requirements to vote by provisional ballot.³⁶ Voters who cannot meet additional state ID requirements are similarly entitled to cast provisional ballots. For voters without accepted ID, provisional ballots were intended not as a safeguard against administrative errors, but rather as an alternative means of verifying their eligibility. Ideally, provisional ballots should ensure that voters without ID are not deprived of their fundamental right to vote, while preserving the state's ability to verify their eligibility by other means.

The 2004 election revealed problems with state rules for counting provisional ballots cast by voters who could not meet federal or state ID requirements at the polls. The lack of proper ID was the third most common reason provisional ballots were not counted in 2004.³⁷ Here too, states varied dramatically as to whether and when they counted those ballots. Many states (such as California) counted all such ballots so long as the voter affirmed her identity in writing at the polls;³⁸ others (such as Florida) counted them if the signature on the provisional ballot envelope matched that on the registration form;³⁹ still others (such as Michigan) counted them only if the voter showed ID to election officials within a set period after the election; and still others (such as Virginia) refused to count them at all.

In jurisdictions that refused to count provisional ballots cast by voters without ID, the provisional balloting mechanism failed; there was simply no way those voters could cast ballots that would be counted. In fact, the provisional ballots offered to those voters were nothing more

³⁵ 42 U.S.C. § 15483(b).

³⁶ *Id.*

³⁷ *Election Day Survey*, at 6-5.

³⁸ In those states, election officials verify the voter's eligibility using the information provided on the affidavit ballot envelope. Each provisional ballot envelope contains a space for the voter to sign, in the presence of an election official at the polling place, an oath or affirmation attesting to her eligibility to vote. That oath or affirmation should be sufficient to confirm the voter's eligibility under state law and for her votes to therefore be counted.

³⁹ Signature matching is widely acknowledged to be a reliable method of verifying identity, especially when done by trained experts.

than sham ballots, void at the moment they were handed out, since the state officials had no plans to take any steps to verify those ballots and since there were no circumstances under which those ballots would count. The refusal to count provisional ballots cast by voters without ID renders HAVA's "fail-safe voting" provisions meaningless.⁴⁰ If all such individuals were presumptively ineligible to have their votes counted, there would be no reason to allow them to cast provisional ballots in the first place. Worse yet, many voters who might have been able to obtain ID were deprived of their ability to cast a vote that would count because once they cast meaningless provisional ballots, they could not return and vote a regular ballot.

The better practice is for states to adopt one of the other available procedures for verifying the identities of voters whose do not meet federal or state ID requirements. Provisional ballots create opportunities for verification after the election that did not exist before. Moreover, the burdens of verification will be significantly reduced once states fully implement matching procedures associated with statewide voter registration databases.⁴¹

C. The Placebo Ballot Problem

Each of the three problematic provisional ballot counting rules discussed above—the rejection of provisional ballots cast by voters not on the registration rolls, in the wrong precinct, or without ID—creates a "placebo ballot" problem. In each case, eligible voters showed up at polling places where they believed they are registered and eligible to vote; they were given provisional ballots by election officials; they believed they were casting meaningful ballots; but there were no circumstances under which their ballots would count. In other words, in each case, the provisional ballots tendered were meaningless placebo ballots, the fate of which was determined before they were cast. What is more, in each case, even the most determined and diligent voters had no means of casting ballots that would count.

It should go without saying that election administrations should avoid procedures that result in placebo ballots that will not be counted under any circumstances. Not only does this undermine provisional ballots as a "fail-safe," but it also misleads voters into believing they have actually voted when they have not. What provisional ballots offer is a way of verifying the eligibility of those voters who fall through the cracks after the election, not a way of hiding decisions made before the ballots were cast.

V. Conclusion

Despite the significant problems with provisional ballot administration and certain state counting rules, on balance, provisional voting has been a positive innovation. For many voters who would previously have been turned away from the polls, it has provided a true fail-safe. Where it has not worked, it has at least created a public record of election administration problems that can be used to improve elections in the future. Nonetheless, there is still a danger

⁴⁰ This violates of accepted principles of statutory interpretation. See *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218 (6th Cir. 1992) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

⁴¹ See generally 42 U.S.C. § 15483(a).

that states will not rectify the problems—especially the placebo ballot problems—discussed in this paper before the next election. If states do not do so, voter confidence will suffer.

ALVIN A. JAEGER
SECRETARY OF STATE

HOME PAGE www.nd.gov/sos



PHONE (701) 328-2900

FAX (701) 328-2992

E-MAIL sos@nd.gov

SECRETARY OF STATE
STATE OF NORTH DAKOTA
600 EAST BOULEVARD AVENUE DEPT 108
BISMARCK ND 58505-0500

January 26, 2009

TO: Rep DeKrey, Chairman, and Members of the House Judiciary Committee

FR: Al Jaeger, Secretary of State

RE: HB 1516 – Affidavits of Persons Whose Eligibility to Vote is Challenged

Under current law, the ballot of a person is placed in the ballot box (scanner) if he or she completes an affidavit under the provisions of N.D.C.C. § 16.1-05-06.

The concern is that the ballot is counted even if it is later discovered that the voter executing the affidavit was not a qualified elector. In that situation, there is no means by which the ballot completed by that person can be identified so that it is excluded from the final tally of votes cast in the election.

To address this concern, the bill proposes to have the affiant's ballot set aside until such time it can be confirmed he or she is a qualified elector. This process is outlined on page 3, lines 3 through 11. However, as proposed, it would be impossible to confirm voter eligibility within three days. The result could be that voters who are qualified electors, according to state law, would have their ballots "rejected as not an elector."

At the request of the Secretary of State, SB 2324 has been introduced. While it does not contain provisions to set aside the ballot, we believe the changes in section 17 of that bill will greatly reduce the likelihood of an unqualified elector being able to cast a ballot.

Since most of the affidavits have been executed by college students, our intent is to work with the respective universities to provide information on student identification cards (which is an acceptable form of ID as established under the provisions of N.D.C.C. § 16.1-05-07 that would result in fewer affidavits being required.

**TESTIMONY TO THE
HOUSE JUDICIARY COMMITTEE**

Prepared January 26, 2009 by

Danette Odenbach

North Dakota Association of Counties

REGARDING HOUSE BILL 1516

Chairman DeKrey and members of the House Judiciary Committee:

The North Dakota Association of Counties (NDACo) submits this testimony in opposition to House Bill 1516.

The 2008 General Election had a 64.6% turnout, and of the 321,133 ballots cast throughout the state, just over 11,000 or approximately 3% were cast by voters who executed an affidavit. Almost 10,500 of those affidavits were executed in the 13 counties where there are one or more institutions of higher education; and two of those counties had over 3000 affidavits each.

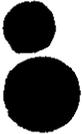
While the concept of HB 1516 is understandable, the verification process as proposed in the bill creates an administrative impasse, particularly in higher population counties. Additionally, as written, the bill does not clearly define who is responsible for the verification – Page 2, lines 25 through 27 indicates the affiant should deliver proof of eligibility to the county auditor. Page 3, lines 7 and 8 indicate the county auditor shall verify the addresses of each affiant within three days. Regardless who is responsible, it would be virtually impossible for a county to verify over 3000 conditional ballots in three days. The proposed conditional balloting and subsequent verification process would disenfranchise large numbers of otherwise eligible student voters in these counties. Statutorily required affidavit review has shown the issue isn't whether these voters meet the rules for eligibility – age, citizenship, 30 days in the precinct – because they do; the issue is finding a way for these voters to prove their residency without an affidavit.

According to NDCC 16.1-01-04, subsection five (attached), a person “cannot be considered either a resident or a non-resident based on their presence or absence while enrolled in college, university or other postsecondary institution of learning”. According to NDCC 54-01-26, subsection seven (attached), the residence (which is “where the person returns in seasons of repose”) can only be changed by “the union of act and intent”. The ‘act’ can be quantified by physically moving to a new location. But how is intent clearly established? How should a student prove the union of act and intent prior to voting? Currently, many of them do so by executing an affidavit.



By clarifying these residency laws, most of the affidavit voting would be eliminated. Remaining would be that small percentage of voters who either cannot or refuse to produce a form of identification. If the type of change proposed in HB 1516 were implemented after clarifying the residency laws, it would be much easier for the higher population counties to comply with conditional ballot verification as the numbers of affidavits would be significantly less.

We appreciate your consideration and request a Do Not Pass recommendation on House Bill 1516.



16.1-01-02.3. Special election costs - Reimbursement. The state shall reimburse each county for the costs incurred by the county for conducting a statewide special election that is not held on the date of a statewide primary or general election. Each county shall submit a detailed statement to the office of the budget which lists all expenses incurred by the county in conducting the special election within forty-five days after the special election. The office of the budget shall submit a request for an appropriation to reimburse the counties to the next regular or special session of the legislative assembly. The legislative assembly shall appropriate the funds necessary for the payment of the special election costs.

16.1-01-03. Opening and closing of the polls. The polls at all primary, general, and special elections must be opened at nine a.m. or at such earlier hour, but not earlier than seven a.m., that may be designated for any precinct by resolution of the governing body of the city or county in which such precinct is located except that in precincts in which seventy-five or fewer votes were cast in the last general election, the governing body may direct that the polls be opened at twelve noon. They must remain open continuously until seven p.m. or such later hour, not later than nine p.m., as may be designated for a precinct by resolution of the governing body of the city or county in which the precinct is located. All electors standing in line to vote at the time the polls are set to close must be allowed to vote, but electors arriving after closing time may not be allowed to vote. The election officers present are responsible for determining who arrived in time to vote, and they shall establish appropriate procedures for making that determination. All determinations required to be made pursuant to this section relating to polling hours must be made, and the county auditor notified of them, no later than thirty days prior to an election.

16.1-01-04. Qualifications of electors.

1. Every citizen of the United States who is eighteen years or older; a resident of this state; and has resided in the precinct at least thirty days next preceding any election, except as otherwise provided in regard to residency in chapter 16.1-14, is a qualified elector.
2. For the purposes of this title, every qualified elector may have only one residence, shown by an actual fixed permanent dwelling, establishment, or any other abode.
3. Except as otherwise provided in this section, an individual's residence must be determined in accordance with the rules for determining residency as provided in section 54-01-26.
4. Pursuant to section 2 of article II of the Constitution of North Dakota, voting by individuals convicted and sentenced for a felony must be limited according to chapter 12.1-33.
5. For the purposes of this title, an individual may not be deemed to have gained or lost a residence solely by reason of the individual's presence or absence while enrolled as a student at a college, university, or other postsecondary institution of learning in this state.
6. For the purposes of this title, a member of the armed forces of the United States may not be deemed to have gained or lost a residence in this state solely by reason of the member being stationed on duty in this state.
7. For the purposes of this title, an individual may not be deemed to have lost residence in the individual's precinct or in the state by reason of the individual engaging in temporary government service or private employment outside the individual's precinct or outside the state.

16.1-01-05. Voting by qualified elector moving from one precinct to another. If a qualified elector moves from one precinct to another precinct within this state, the elector is

1. Citizens of other states; or
2. Aliens.

54-01-23. Duty of citizens - Allegiance defined - How renounced. Allegiance is the obligation of fidelity and obedience which every citizen owes to the state. Allegiance may be renounced by a change of residence.

54-01-24. Rights and duties of citizens not electors. An elector has no rights or duties beyond those of a citizen not an elector, except the right and duty of holding and electing to office.

54-01-25. Rights and duties of citizens of other states. A citizen of the United States who is not a citizen of this state has the same rights and duties as a citizen of this state who is not an elector.

54-01-26. Residence - Rules for determining. Every person has in law a residence. In determining the place of residence, the following rules must be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.
2. There can be only one residence.
3. A residence cannot be lost until another is gained.
4. The residence of the supporting parent during the supporting parent's life, and after the supporting parent's death, the residence of the other parent is the residence of the unmarried minor children.
5. An individual's residence does not automatically change upon marriage, but changes in accordance with subsection 7. The residence of either party to a marriage is not presumptive evidence of the other party's residence.
6. The residence of an unmarried minor who has a parent living cannot be changed by either that minor's own act or that of that minor's guardian.
7. The residence can be changed only by the union of act and intent.

54-01-27. Lease of state-owned property. Notwithstanding any other provision of law, the state, or any agency or institution of the state, may enter agreements to lease all or part of, or an undivided or other interest in, any real or personal property belonging to the state, or any agency or institution of the state, to and, or, from any agency or institution of the state or any person for such compensation and upon such terms and conditions as the parties under such agreement may stipulate. Such agreements must be authorized by the board, if any, or commissioner or other executive officer of the commission, agency, or institution holding, controlling, possessing, or owning the property or on whose behalf the property is held, and must be approved by the industrial commission. For purposes of this section, the agreements include any lease, sublease, purchase agreement, lease-purchase agreement, installment purchase agreement, leaseback agreement, or other contract, agreement, instrument, or arrangement pursuant to which any rights, interests, or other property are transferred to, by, or from any party to, by, or from one or more parties, and any related documents entered or to be entered, including any operating agreement, service agreement, indemnity agreement, participation agreement, loan agreement, or payment undertaking agreement entered as part of a long-term lease and leaseback transaction. A lease obligation under this section may not exceed a term of ninety-nine years. A lease obligation entered into under this section is payable solely from revenues to be derived by the state, or any agency or institution of the state, from the ownership, sale, lease, disposition, and operation of the property; any funds or investments permitted under state law, and any earnings thereon, to the extent pledged therefor; revenues to be derived by

TESTIMONY ON HOUSE BILL 1516

Mr. Chairman and members of the Judiciary Committee, I am Michael Montplaisir, the County Auditor in Cass County. I am in charge of Primary and General Elections for the county. I thank you for the opportunity to express some concerns about House Bill No. 1516. I think we all want the same thing – that only eligible voters in a precinct are allowed to cast and have their ballots counted.

House Bill 1516 requires all ballots for voters who vote by affidavit to be segregated; the voter has to deliver proof of their eligibility within three days to the county auditor and; the county auditor shall attempt to verify the address of each affiant within three days of the election. Further, it requires the county auditor to forward the ballot of each affiant whose address has been verified to the county canvassing board for canvassing, and forward the remaining ballots to the county canvassing board marked as “rejected as not an elector”.

The process outlined may work very well in many counties; however, counties with large student populations would be hard pressed to process all the affidavits within three days. In the 2008 General Election, we had over 3,000 affidavits filed by voters. I would estimate at least 75% of these affidavits were filed by students who moved to Cass County at the start of the fall semester at one or more of the local colleges.

I don't have a solution for you. In fact, there may not be a single solution that would solve the problem. I am, however, concerned about the possibility of disenfranchising voters, and the liability I, as county auditor, would incur as a result of not being able process all the affidavits in the time frame outlined in House Bill 1516.

I would like to see us study the issue and come up with solutions to ensure all eligible voters' ballots are counted. Thank you for the opportunity to speak with you on HB 1516.

House of Representatives Judiciary Committee
HB 1516
Testimony by Jennifer Ring, ACLU of North Dakota
January 26, 2009

Mr. Chairman, Members of the Committee,

On behalf of the ACLU of North Dakota I wish to enter into the record our objections to HB 1516,

House Bill 1516 is a bad bill. Section 1 amends the procedures, set out in Section 16.1-05-06 of the North Dakota Century Code, that apply when a voter's eligibility to vote is challenged at the polls. The amendment shifts the burdens from candidates and political parties, where it ought to be, and onto the backs of voters and local election officials. The result, if passed, will be more work for county auditors and a much greater possibility that legitimate votes will be thrown out.

Under North Dakota's current system, voters whose eligibility is questioned by nonpartisan poll workers or by partisan poll watchers can vote if they fill out an affidavit attesting to their qualifications. As long as the voter is willing to sign the affidavit under penalty of perjury, his or her vote is counted in the initial tally. In most elections, nothing more happens with the affidavits. But the affidavits are kept, of course, and they're available to any candidate or voter in an election contest under NDCC 16.1-16-05. In other words, anyone who contests the election results can use the affidavits to determine whether there were enough illegal votes to place the outcome in doubt. The contestant would have the opportunity and the burden of establishing that a challenged voter was ineligible to vote.

The proposed amendment puts the burden where it doesn't belong -- on the backs of voters and election officials. Under the proposed system, the challenged voter would still be able to cast a vote if he or she signs the affidavit, but the vote isn't included in the initial tally. The ballot is kept separate from the other votes, and it's up to the county auditor to determine, within three days, whether the voter is eligible. If the county auditor can't confirm the voter's eligibility, the ballot is thrown out whether it's legal or not. This creates more work for county auditors at a very busy time, and it obviously creates an unnecessary risk that legal votes won't get counted.

Incidentally, affidavits would still be available in an election contest, but that wouldn't reduce the risk of legal votes being rejected. That's because the amendment doesn't allow the vote to be counted unless the county auditor can confirm the voters eligibility within three days. If the auditor confirms the eligibility on the fourth day, tough luck. That vote can't be counted. And the rejection of lawfully cast ballots isn't one of the permissible grounds for an election contest under NDCC 16.1-16-05.

Two other aspects of the proposed amendment are troubling. First is that, while the amendment requires county auditors to try to confirm the voter's eligibility

within three days, there are no standards for doing so. How hard must the county auditor investigate? Can he or she simply look in the phone book? This creates all kinds of room for mischief.

The other troubling aspect is the new warning to voters included in the bill. The proposed amendment requires the affidavit form to inform the voter that he or she can ensure that the ballot will be counted if he or she brings proof of eligibility to the county auditor within three days. But the amendment doesn't tell the voter that his or her vote won't count unless the county auditor can confirm the voter's eligibility within three days. Those are very different things.

I therefore urge you to reject House Bill 1516. It's a solution in search of a problem. Our current system for handling challenged voters is very inexpensive and carries little risk that legal votes won't get counted. And it preserves a simple way to correct things if illegal votes gets counted. The new system literally creates a new bureaucracy for handling challenged voters, and that bureaucracy carries with it a significant risk that North Dakotans who have legally cast votes won't have those votes counted.

Sincerely,

Jennifer Ring
Executive Director
ACLU of North Dakota