

**Voting in 2004:**  
**A Report to the Nation on America's Election Process**  
*Tuesday, December 7, 2004*  
*Room SD-G50, Dirksen Senate Office Building*

**Panel 3: Provisional Ballots**

Our next panel is about provisional ballots which as many people said in this election cycle,

Ohio was the Florida, provisional ballots were the hanging chad, and there were certainly a tremendous number of questions raised; a lot of people who were concerned about the way they were implemented, the way Congress didn't give necessarily enough direction to the states, the people who came to vote and didn't have a provisional ballot available or felt they were misused. So there are a tremendous number of issues and we're happy to have this wonderful panel here to start this conversation with us today.

Let me just introduce the panelists and then let them go ahead and as last time, I'll try to be a strict timekeeper so we can get to the dialogue and conversation which I know is hard, because they'll have so many wonderful things to say.

Our first panelist is Steve Carbó, who is the Director of the Democracy Program at Demos. Among their other election reform projects, Demos published a report this year critiquing the disparate ways the provisional ballot rules were implemented across the country.

And then we have David Orr who is the chief election authority in Cook County, Illinois. He's worked to expand voting rights over the 25, the past 25 years, and has direct experience with the casting and counting of provisional ballots in Cook County.

Our third panelist I'm happy to say is Spencer Overton. He's a member of our Common Cause board. He's also a professor of law at the George Washington Law School and has written many articles and commentary on the election law and has given a lot of thought and written a lot on the concerns around the provisional ballot use in 2004. So I'm going to let Steve begin, and thank again our panelists for being here, and all of you for listening.

SC: Thank you [unint.]. I want to thank again, I want to thank Common Cause, Century Foundation, the Leadership Conference, for this opportunity to come here today, and address what perhaps is the hanging chad of 2004 election. And for those of us, those of you who don't know us, Demos is relatively new kid on the block. We're a national non-partisan organization based in New York City that looks at removing barriers to political participation and voting.

And provisional ballots is one of the issues that we've looked very closely at. And like the reference to hanging chads, it's probably appropriate to recall how we got to the place where we are, regarding provisional balloting by referencing the 2000 election, an election where up to three million votes were lost because of problems with voter

registration lists and voter registration process, and where proper votes were discounted in at least 25 states.

So Congress of course, came up with the provisional balloting, the so-called failsafe balloting provision, with the intention of curing the problem so that in the future nobody would show up at the polls, attest to the fact that they had registered, find that their names are not on the polls, and be sent home empty-handed. And there were certainly some early warning signs this year, that the provisions may not work out as intended, and speakers have referenced that before this panel.

We did a report earlier this year, actually right before the election placebo ballots where we took a look and contacted election officials in 50 states, and wanted to understand how they were going to be approaching provisional balloting.

Given the fact that Congress was not able to pass national standards, was not able to direct to the states how they should treat provisional ballots once they were cast – which could be counted and which could be discarded. So what we found of course, were some very serious problems and some very clear warning signals. Where 31 of the states were adopting very restrictive interpretations of the provisional balloting requirement or their counting of them, so that if you showed up in the wrong precinct, your vote would be discounted.

Likewise a number of states were taking a very restrictive approach towards the I.D. provisions for that second class of voter who shows up at the polls, who is supposed to show I.D. because they're a first time voter, and does not have their I.D.'s, given their provisional ballot, but some states really provided no effective opportunity for that individual voter to ever substantiate their eligibility and therefore have that provisional ballot counted.

And going into the election soon after the election, there certainly was ample anecdotal evidence that we witnessed in this election a failure in a failsafe voting. So that in places like Bernalino County, in New Mexico, Colorado, Durham County, North Carolina, and Orleans in Louisiana, provisional ballots were being rejected at rates of one quarter to one half of those passed. The failsafe voting provision was a problem.

Now it's going to be awhile before we have a complete picture of how provisional balloting fared across the nation in 50 states and in the District of Columbia. But we decided that we needed to at least do some preliminary analysis and take a look at what was the evidence out there, and come to some conclusions today.

So what we did is we looked at the electronic information reporting system that was referenced earlier that was created by the Election Protection Coalition. To look at the incident reports that were contained there, and take away from that some understanding of the kind of problems that voters experienced around the country.

And as of December 1, as of a week ago, there were 1900 provisional balloting incident reports in the EIRS system, which by the way, is a public database on ... if you go to [voterverify.org](http://voterverify.org) you can see actually the database with all the incident reports.

So we started out with a sample of 1900 provisional balloting incident reports, then we took a random sample of the 1900, and took out a thousand. A quarter of those we discounted because they seemed to in the nature of providing information about provisional reports rather than actually a problem. So we start with a pool of 774 documented provisional balloting problems in that database, and I want to just share the findings that we came out of it, from looking at those incident reports.

Most of the provisional balloting problems that were reported by voters were the result of significant errors by election officials. Many of them were in direct violation of HAVA, and they fall into four main categories – voters who were never offered a provisional or a regular ballot, provisional ballots that were erroneously offered by confused poll workers, voters required to vote by provisional ballot because of pre-election administrative errors and voter error.

The single largest group of provisional ballot incident reports involve the failure to offer provisional ballots at all, accounting for nearly half of those 774 incident reports. Voters reported that polling places had no provisional ballots or had significant shortages and would run out before the polls closed.

So for instance one voter in Prince George's County, Maryland, said that he and his wife who had voted in the same location for years, and 14 or 15 other people in line behind them were not on the voter rolls and were not given provisional ballots because there were not enough.

Second problem. Nearly 1 in 5 of the callers reported being offered provisional ballots under circumstances that in fact entitled them to vote by regular ballots. At some polling places all new voters were required to pass provisional ballots, sometimes receiving conflicting information about the paperwork that was required to cast a valid ballot.

In Morris County, New Jersey, a registered voter who had registered by mail, had a new address and received a confirmation by mail, but did not appear on the registration rolls, the poll workers told this voter that all first time voters in the new areas must be voting by provisional ballot, even if they were correctly registered at the new address.

Third category, again about 20 percent of the reports dealt with voting incidents that reflected pre-Election Day errors in election administration. Two primary are registration lists errors and jurisdiction problems. Nearly half of the election error problem dealt with registration list error where people were not added to the rolls in time.

People that we had problems with erroneous purge lists, flawed or delayed entry of registration applications into the database, people registered in time but their names never

got onto the list, or failure of state voter registration agencies to submit their voter registration applications to election boards in a timely manner.

The other incident, the other category that I mentioned is the one of jurisdictional problems, which again, we flagged early on before the election where were being denied their right to vote because they were in the wrong places, and sometimes being given a provisional ballot which was in fact going to be useless.

So that in Arizona and 30 other states, where you must be in a correct precinct to be able to have your vote counted, poll workers were insisting and telling voters that they could cast the ballot, provisional ballot in precincts, other than those where they were registered, giving out provisional ballots that were not going to be counted, but would in fact be discounted.

I'm over time; I'm going to wrap up, but I would want to say that the one area where there was the least amount of cause for provisional balloting was one of, was voter error. It was only three percent of those 774 cases where there was an error in fact on the part of the voter that caused a provisional balloting problem.

So it's going to be some time before we can make some comprehensive findings about provisional ballots for this election, but the evidence, the preliminary evidence is already clear, I think, that we've got a long way to go before provisional balloting is implemented properly, before voters are really offered a realistic failsafe voting option.

And I would add that, as we look to improve provisional balloting and its implementation, we ought to look at other remedies for these same kind of problems, because the fact is that in six states that have Election Day registration, if you show up at the polls and you are not registered because of some failure in election administration, you can just re-register on the spot and cast a vote that will count. So there are other remedies for the problem that underlies provisional ballot voting that I think we need to take a look out as well. ... [applause] ...

DO: I'm going to try some slides, we'll see if they'll work. First I'm most grateful to today's sponsoring organizations for your hard work over the last several months, as well as here, and what you're doing today. I've learned the hard way how some people will go to any length to deny people the right to vote.

Way back, I was running against the State Council in Chicago, running against [unint.] more than 25 years ago, myself and my supporters were beaten up, we had tickets issued to cars legally parked in front of our homes, tires slashed. The good news is we won the election, because we uncovered a voter fraud scheme before the election.

There's much that I'd love to share with you today, particularly things like that Illinois is the first big state to have a voter verifiable paper trail, but because of the focus ... [applause] ... we've got a lot of need out there for that.

I'm going to focus on provisional ballots and maybe we'll deal with other things in the questions. First of all, my jurisdiction, I want you to know, I represent suburban Cook County, so all your complaints about Chicago, that's not me. I'm County Clerk for Chicago but when it comes to elections, only suburban Cook County. About the same number of voters, about 1.4 million voters, about 2400 precincts and about 12,500 judges, we call them judges, most of you call them poll workers.

Actually provisional voting was pretty successful and important for us in suburban Cook County. Of 5,424 people who otherwise would have been disenfranchised, their ballots were counted. However our success was tempered by the conflicting directions over should we count provisional ballots from people not in their own precincts, and we'll talk about that in a minute.

So first looking in the overall figures in suburban Cook County had a little over a million voters, and of those, like I say, about 5400 of those were cast by provisional voters. We also had another five thousand people who cast provisional ballots whose votes weren't counted.

The breakdowns in both of these categories, those, whose were counted, and those whose weren't, I think is illuminating. And first looking now at those whose provisional ballots, the five thousand I mentioned, who were injected in suburban Cook County, if the chart is working, the next chart, the key to us is the begin reason, and that is almost 89 percent

of all those people who were rejected, were simply not registered to vote; I don't know if you can see that from out there, but 89 percent were not registered.

An important category, the next one, 4.7 percent. This is different names; I don't know how it is in other states and it's something that needs to be changed in Illinois, this is mostly women who changed their name because of marriage and haven't re-registered. Those people, unfortunately, are not allowed to vote. It's ridiculous because they have the same Social Security numbers, the same driver's license. I think it happens in a number of states; it needs to be changed.

If you can't read that, there were another 1.8 percent where the affidavit wasn't signed. This was both a mistake on the part of the voter, but election judges should have caught that. I.D. not provided, .6 percent, and miscellaneous errors which is 3.2 percent. Most of those miscellaneous errors have to do with election judges or poll workers making mistakes.

Now jumping to the accepted provisionals. As I said before, 5400 of the provisional votes counted because we were able to determine that those people were in fact registered. But not all of the provisional voters cast ballots in the correct precinct, so the next slide is a breakdown.

In other words 55 percent of those people voted a full ballot, they got to vote for every candidate on their ballot, whereas around 44 percent, we did count those people who were voting out of precinct for federal ballots only.

Just a quick context. You all know the legal battles going on. While those legal battles were going on, many of us urged the state board of elections to allow us to count ballots out of precinct. The Illinois law is very clear; you cannot do it.

But there was a vague director from the State Board of Elections, just a couple week before the election, which gave us what we felt was an opening to interpret the law in the way we wanted. So we did in fact, both we and the city of Chicago, counted ballots that were out of precinct. Unfortunately that wasn't the case in most counties in Illinois. All the surrounding mostly Republican counties did not in fact count ballots that were out of precinct.

The next slide is confirming registration for provisional voters. Our analysis of this category is pretty important because it reflects the kind of administrative diligence that Steve referred to if we're going to make provisional ballot working. Now again, if you contract see the chart, basically what it points out is the way we confirmed about 79 percent of those, were through basically our own voter registration management system.

Our numbers are higher here than they were before, because again we did accept people from out of precinct. Compare us for example, with 52 percent acceptance, to do Page

County, the Republican stronghold next to us, where they had 964 votes they counted, and twenty seven hundred and eight that they denied.

So there are several steps, I'm not going to ... I don't have the time to really go through it, but we viewed our database, first of all to find voters. Then we had something called search old which is a category where there may be missing information on the part of the voters. We were able to find the information, we could count them.

And there were two categories at the bottom if you can read it, which is about ... it's about 16 percent of those confirmed came from Secretary of State's offices. We had worked out a special situation where we could go on their computer Election Day and after Election Day and if we could find the voters there, even if all the information hadn't been sent to us, in suburban Cook County we could count them.

A couple of quick things. Number one, is one of the very important things for election authorities, is the drain on the workers. Now keep in mind, my staff has been working overtime for about a month – every day, sometimes weekends. Then you go to provisional voting and you're now working two to three weeks of overtime.

This is very dangerous. Here's where people make mistakes. The way we countered that was to bring people from other parts of my office that do birth certificates and taxes and so forth, trained them so they could help with the provisional vote, but take down the draining effect on our regular employees.

What everybody needs to do if they have a lot of those, is need to have other county workers trained to come in, because otherwise you're going to increase your errors if you don't have that.

And finally, the people factor, what strategies we need to do to make this work, this fairly complicated process of provisional balloting, which is a good thing. Number one, public education is critical. I think there's a slide up there. We had our own Election Protection Program which we mailed and sent out tens of thousands of these, to emphasize to the voters, make sure you're registered and how to do that, make sure you know where your precinct is and how to do that, and make sure you know the rules exactly how to vote.

Even more important, there's a train of election judges where we give special training. See judges are supposed to call us when they can't find a voter. They don't always do it. The most classic example was, two judges fighting over the alphabet, and one judge because they refused to admit whether J or K came first, denied our vote or the right to vote. Fortunately it was a provisional so we could count it. They argued over the alphabet. So they're supposed to call us; not all of them do.

We also created a category of what's called technical judges. We could never afford to retrain all the judges just on provisional, so we picked one judge in every precinct, give them extra training so they were the expert. In many cases that we helpful.

We also had street locators so you could know exactly who is in the precinct, and regional locators so you could tell people if they're not in the right precinct, how to get to it. We also sent three newsletters to all these judges emphasizing provisional.

And finally in terms of the evaluation, we assigned troubleshooters or individuals that went around to the polling places. Very, very I'm, very, very successful, telling us where there were problems, where there weren't. We conducted focus group with these judges, it was very helpful, and we did questionnaires to which I [unint.] got more than a 60 percent response. Those were all very helpful and I was trying to figure out what to do better.

In conclusion it worked for us because those 5400 people's votes counted. The biggest problem is lack of uniformity among counties, among states. And finally if I had to give a thing the most important thing to make provisional voting work is the better training of the election judges and poll workers. ... [applause] ...

SO: I want to take my five minutes to focus on what I call the Bush v. Gore problem with counting provisional ballots. We've got two critical questions here, right. The first question is how does every county across a state determine the eligibility of provisional votes in a uniform manner. That issue was brought up by David Orr. Second question is how do uniform rules to the extent we come up with them balance access and administrative convenience. So, now you remember Bush v. Gore the Florida statute had issued provided that no vote shall be declared invalid or void if there's a clear indication

of the intent of the voter as determined by the canvassing board. The Supreme Court stated that this clear intense standard violated equal protection because it didn't satisfy the minimum requirement of non arbitrary treatment of voters necessary to secure the fundamental right of voting.

So, the concern here was that a ballot in one county might be counted whereas a similarly marked ballot in another county wouldn't be counted without more premise standards the argument went that there was too much opportunity for mischief and in counting votes. Whatever you think about Bush v. Gore, I think we've got a similar problem with regards to the counting of provisional ballots. Granted, the question is a bit different. The question is not how officials determined which candidate the voter cast a ballot for. Instead, the question is how officials determined whether the voter is eligible to cast a vote. How (unint.) the first of states to make this determination, some states provide some skeletal guidelines, but they seem to allow for arbitrariness and non uniformity in determining the eligibility of an provisional valid voter.

So, just some quick examples. How much research must a provisional judge, a provisional ballot judge, do to determine whether one who casts a provisional ballot is an eligible voter. Will the provisional ballot judge search through last minute registrations that were not entered into the votable database? How will the provisional ballot judge identify provisional ballot voters whose names don't appear on the voting rules because they were improperly purged by election officials? Are they looking at pre purged lists right when they make these determinations? How will provisional ballot judges determine whether

to count provisional ballots of those who appear on the voting rolls but whose registrations were challenged at the polls, alleged to be invalid at the polls.

When poll workers fail to complete paperwork associated with the provisional ballot, for example, when they fail to sign the affirmation or confirming the affirmation of the voter. Will the provisional ballot judge count the ballot? What standards are used to determine the signature match? A signature match is inherently subjective. What standards can we use to ensure that that's done with some degree of consistency? And there's a uniformity concern with all these questions. The concern is that an election board in county A could aggressively work hard to research these issues and include as many ballots as possible. And an election board in county B might not do the same thing.

So, I think we need more uniform standards here in terms of counting provisional ballots. And this closely contested election in Washington State I think will give us some ideas as to what we need to do in terms of promulgating those uniform standards. I think our biggest problems in terms of the uniform standards have to do with this critical tension between the values of access and administrative convenience, right. States may select restrictive uniform procedures due to concerns about administrative convenience and expense.

In contrast access proponents will argue that hey the primary purpose of HAVA is to include more voters and that the state needs to do more to research and investigate here. The question here is are we going to put more of a burden on the state or on the voter. Where do we draw the line? And let me just close by saying I think we need just need to also be

frank about this point. This problem is complicated by partisan interests, right. Some politicians believe where we draw that line will either help them or hurt them with regard to their electoral prospects.

We talk about partisan districting right to shape AI comes. But politicians also use these rules right, these rules to kind of camouflage by a thicket of regulations that make our eyes glaze over. But politicians are very aware of the impact of these rules. So, it's an increasing problem, voters not selecting politicians but instead the politicians shaping the electorate and determining the electorate by shaping these rules. So, that is a concern I think we need to be aware of. So, thank you very much.

UNIDENTIFIED FEMALE SPEAKER

MOD: So, thank you to the panel. We have time for a few questions. So, let's start over here.

Q: I understand the election assistance commission is working on advising the states or putting out some acceptance rules for the provisional ballots. And I'd like some comment on whether you think this is useful or not, whether it will help with uniformity.

A: I believe any advice from the EAC, the election commission, which is newly formed, is helpful to I think to the public and the election official. On the uniformity issue though, I think as the congressman said this morning, I don't think it's going to change much unless Congress acts. Now, remember, in Illinois I believe we should count the votes out of precinct. That's not the law. And so, we did it this time because of this unique ruling, but the state is going to have to act. And short of federal guidelines states are going to go different ways. So, it probably would be decided by the court possibly and but if the feds

don't act... I don't mean EAC but I mean the Congress, I believe that we will have fifty different states and fifty different definitions short of a court decision which would say you have to count all of them.

A: Yeah, I would agree that I think whatever that the EAC can contribute would be helpful. I mean while the EAC does not have regulatory authority, certainly they have a bully pulpit and they do have an opportunity to get information out there to dig for information to publicize it and really to raise the issues that need to be returned to. But certainly ultimately we're going to have to grapple again with the issue of national standards and in a country as large as ours and as interconnected as ours whether it really makes any sense to have fifty standards or in fact sub fifty standards where different counties even within a state are approaching provisional balloting differently.

A: Just quickly, I think the EAC can make a useful contribution. I think a big concern with Congress though is again where do we draw the line, right. What standards will be promulgated? Will they be very restrictive standards that might be motivated by partisan interests? That is a concern. Certainly as I mentioned before denying women the right to vote is a uniform rule, right, but that's not necessarily the kind of rule we want to promulgate. So, I think that in terms of the federal level the big concern here is does Congress really act to increase access and to kind of further their original goals of provisional ballots, or are there some kind of states right administrative convenience concerns that essential trump the access values or at least that's what's put forth, whereas maybe kind of the underlying motivation is the fewer of these provisional ballots that are counted the better for one particular party or the other.

MOD: Over on this side.

Q: Yes. I hear you all talking about the importance of national standards. And I wonder how each of you would feel about legislation that would give the election assistance commission mandatory rule making authority, and particularly how you felt about that in view of the fact that if it had such authority the President of the United States, whoever that might be at that time, would have the power to make recess appointments to the EAC and you could end up having a partisan majority appointed by the President on the EAC imposing partisan regulations on side or another. Given that risk, how do you feel about giving EAC regulatory authority?

A: Good question. I guess I'd respond by saying I just don't understand how we can avoid the issue. While it's clear that there are very great dangers perhaps, considering the politicization of the appointment process, considering the deep partisan divide here in Washington. From the voters' perspective, I still find it hard to accept a system where a voter who crossed the state lines or even crossed the county lines within a state is going to be a different standards will apply and effectively one vote will count more than another if in one state or one county one vote is credited and another is not. I think we have to come up with a solution.

A: I would simply say at this moment that given that Congress I believe will not act on uniform standards. I think that Congress' view at this moment, unless this group and others can change it, is more of a states' rights position, which is leaving these decisions to the states. Given that reality right now I would encourage the EAC to have more authority than it does.

A: I think my answer is (unint.) in my prior comment.

MOD: Over here.

Q: Yes. I've been working at election protection as a volunteer, and I answered many, and I know there were hundreds of other people, of other volunteers answering questions from people calling to find out if they were registered and if they could find out how they were registered. And each state had a website and we would direct them to the county clerk in their city or in their particular state. Many of those people would call back and say they were unable to reach that county clerk office. The lines were busy hour on end. Some of the states, however, had a place you could simply input the information of your name, your address and they asked further questions depending on how easy it was to access whether or not you were registered. I know Michigan was one of them. They would ask maybe a social security number or a birth date, and also to find out where your polling place was to be. This is such a basic simple thing that each state could do that I just want to put that out to recommend that we all urge our states to put that information online so that you can find out online if you're registered and save all those endless phone calls that don't get answered. Thank you.

A: Just real quickly. We have that on our website in Suburban Cook County which is very valuable to us because we had I think maybe twenty five thousand calls on election day which is an enormous amount of calls just for one jurisdiction. Having all those people using the website particularly before the election to check if they're registered and to find out their polling place is exceedingly helpful to us. And, yes, it should be at the state level too.

MOD: You know since we have a very long panel as our next panel that's on voting machines and I know it's something that people want to talk a lot about, I'm going to sort of take my privilege as the moderator to give one more question over here. I'm going to take one

more question and then wrap up because our next panel is here and ready to go. And that will once again keep us moving today.

Q: Great, thank you. Thanks for the panel. David, it's great to see you again. You're a fabulous administrator of Cook County and I have tremendous respect for you. My question is the number that I was most intrigued by that you shared with us was that eighty nine percent of the five thousand provisional ballots that were not counted were not counted because weren't registered. So, I would ask you if in Cook County you use a provisional ballot which simultaneously serves as a voter registration application.

A: Yes, and thanks for the nice comments. We do. So, if those people who were not allowed to have their provisional ballots counted, they're automatically registered next time. Real quickly, I thought you were going to ask because other panels will deal with this, but thousands of people tried to register and vote after, in our case in Illinois, the October 5<sup>th</sup> deadline. That's a major, major problem. These people were not allowed to vote. They wanted to. We really have to look at same day registration, early voting. And Illinois has got this crazy law, which we're trying to change right now, that all of the first time male registration voters, you know the motor voter card, in Illinois, which is unique. There's only a couple of states that still do that. Those people can't vote absentee and lock the vote and others I think to the best to understand this. But in the absence of not knowing that, students took the card, registered, and then low and behold they're in New York. Unless they fly back to Chicago, they can't vote. That is a travesty. I think we will change that in Illinois. I don't think it's in other states. It's just one of those issues. I thought you were going to ask how come those five thousand people thought they were registered. And there's lots of reasons. But if we will deal

with something to make registration go up to election day, we're going to capture lots more people and have less problems with provisional.

MOD: Again, I want to thank this panel for taking on a confusing and complicated issue and approaching it from a lot of different perspectives. So, again, thank you very much, and we'll get the next panel and look forward to the next one.