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October 21, 2004

The Honorable J. Kenneth Blackwell
Office of the Secretary of State
180 E. Broad Street
16th Floor
Columbus, Ohio 43215

Dear Secretary Blackwell:

In recent weeks and months, there have been questions raised about the provisional ballot requirement contained in the Help America Vote Act of 2002 (HAVA). As co-sponsors and authors of HAVA, we wanted to take an opportunity to bring to your attention the relevant language of HAVA and the Congressional intent regarding this provision.

Under HAVA, if an individual claims to be registered to vote but his or her name does not appear on the official list of registered voters, that individual is permitted to cast a provisional ballot. 42 U.S.C. § 15482. The purpose of this provision is to protect properly registered voters whose names are not on the rolls due to a processing error or other administrative mistake.

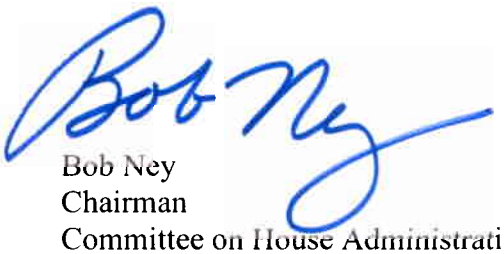
Many of the questions regarding the provisional ballot requirement have focused on whether HAVA requires provisional ballots cast outside the voter's designated precinct to be counted. The simple answer is: HAVA leaves it to the states to decide how to count provisional ballots. The law clearly states that if the appropriate election official determines that the individual casting a provisional ballot "is eligible <u>under State law</u> to vote, the individual's provisional ballot shall be counted as a vote in that election <u>in accordance with State law</u>. <u>Id.</u> § 15482(a)(4) (emphasis added). State authority to determine the conditions under which provisional ballots will be counted is further buttressed by language in HAVA that declares that "[t]he specific choices on the methods of complying with the requirements of [HAVA] shall be left to the discretion of the State." <u>Id.</u> § 15485.

Some have suggested it was the intent of the authors of HAVA to require election officials to count provisional ballots cast in an unassigned precinct. In considering HAVA, Congress was aware that different states have different laws regarding voter eligibility and voting procedures. Congress realized that many states require in-precinct voting and had no intention of overturning such requirements. While we agree that,

under HAVA, every voter who seeks to cast a provisional ballot must be able to do so, regardless if the voter is in his or her designated precinct, it was the intent of Congress to allow state law to resolve the question of whether that provisional ballot will be counted. For this reason, HAVA deliberately left the term "jurisdiction" undefined so that each state could define the term in a manner consistent with state law. By no means did HAVA abolish a state's prerogative to maintain a precinct-based provisional ballot system. Therefore, if a state decides to count only those provisional ballots cast in the voter's assigned precinct, it is perfectly within the state's prerogative to do so. The Department of Justice, in an *amicus curiae* brief recently submitted in federal court in Florida, confirms that Congress did not intend HAVA to overrule state laws that require in-precinct voting.

Again, we want to reiterate that the decision about which provisional ballot system to adopt—whether precinct-based or county-based—is left to the states to determine. HAVA permits voters to cast a provisional ballot, but it is state law that sets the conditions for when that ballot will count.

Sincerely,



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