

## **Casting Provisional Ballots in the Wrong Precinct in Florida**

*Florida Democratic Party v. Hood*  
(Robert L. Hinkle, N.D. Fla. 4:04-cv-395)

Florida's Democratic Party sought to enforce the Help America Vote Act (HAVA) by enjoining Florida from rejecting provisional ballots cast in the wrong precinct in the 2004 general election. The case was filed on September 29, and the court issued a preliminary injunction on October 21. The court ruled that HAVA does not require the counting of provisional ballots cast in the wrong precinct, but HAVA does require that the provisional ballots be provisionally accepted.

*Subject:* Provisional ballots. *Topics:* Help America Vote Act (HAVA); provisional ballots.

On September 29, 2004, Florida's Democratic Party filed a federal complaint in the Northern District of Florida's Tallahassee courthouse seeking to enforce the Help America Vote Act (HAVA)<sup>1</sup> by enjoining Florida from rejecting provisional ballots cast in the wrong precinct in the 2004 general election.<sup>2</sup> With its complaint, the party filed a motion for a preliminary injunction.<sup>3</sup> Judge Robert L. Hinkle held a telephonic status conference on the next day.<sup>4</sup> On the third day, Judge Hinkle set an injunction hearing for October 8.<sup>5</sup>

Judge Hinkle typically began emergency cases with a telephonic conference.<sup>6</sup> In twenty years of private practice, he sent a lot of bills to a lot of clients, so he was aware of the expenses involved in travel for in-person proceedings.<sup>7</sup> Election cases often involve out-of-state attorneys.<sup>8</sup> His goal at the status conference was to find out (1) the extent to which the parties had already communicated with each other, (2) how big an emergency the case presented, and (3) whether a prompt hearing would be necessary and whether it would require live witnesses.<sup>9</sup>

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1. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

2. Complaint, *Fla. Democratic Party v. Hood*, No. 4:04-cv-395 (N.D. Fla. Sept. 29, 2004), D.E. 1; *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1074–75 (N.D. Fla. 2004); *see* Lucy Morganjoni James, *New Suit Expands Pre-Election Battles*, St. Petersburg Times, Oct. 8, 2004, at 5B.

3. Preliminary-Injunction Motion, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Sept. 29, 2004), D.E. 4.

4. Docket Sheet, *id.* (Sept. 29, 2004).

Tim Reagan interviewed Judge Hinkle for this report by telephone on October 10, 2012.

5. Order, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 1, 2004), D.E. 8.

6. Interview with Hon. Robert L. Hinkle, Oct. 10, 2012.

7. *Id.*

8. *Id.*

9. *Id.*

On October 8, Judge Hinkle permitted a member of Florida's house of representatives and a voter to intervene in opposition to the complaint.<sup>10</sup> Judge Hinkle decided that HAVA creates federal rights enforceable under 42 U.S.C. § 1983,<sup>11</sup> but Judge Hinkle denied preliminary injunctive relief on the party's main argument.<sup>12</sup> Florida's supreme court determined on October 18 that the requirement that provisional ballots be cast in the correct precinct did not violate Florida's constitution.<sup>13</sup>

After additional telephonic conferences on October 12<sup>14</sup> and 14<sup>15</sup> and amicus participation by the U.S. Department of Justice,<sup>16</sup> Judge Hinkle issued a preliminary injunction on October 21.<sup>17</sup> He determined that the party had not shown a likely right for provisional ballots cast in the wrong precinct to be counted, but it had shown a likely right for provisional ballots cast in the wrong precinct to be provisionally accepted by poll workers.<sup>18</sup> On January 13, 2005, the party voluntarily dismissed its appeal.<sup>19</sup>

Judge Hinkle converted the preliminary injunction to a permanent injunction on February 4.<sup>20</sup> On September 1, he awarded the party \$33,934.04 in attorney fees, expenses, and costs, reasoning that its partial injunctive success merited a 40% reimbursement.<sup>21</sup>

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10. Transcript at 3–4, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 8, 2004, filed Oct. 13, 2004), D.E. 39 [hereinafter Oct. 8, 2004, Transcript]; Minutes, *id.* (Oct. 8, 2004), D.E. 35 [hereinafter Oct. 8, 2004, Minutes]; see Intervention Motion, *id.* (Oct. 4, 2004), D.E. 11.

11. *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1077–78 (N.D. Fla. 2004); Oct. 8, 2004, Transcript, *supra* note 10, at 5–8.

12. *Fla. Democratic Party*, 342 F. Supp. 2d at 1079–81; Oct. 8, 2004, Transcript, *supra* note 10, at 71–75; Oct. 8, 2004, Minutes, *supra* note 10; see Lucy Morganjoni James, *Judge Upholds Restriction on Provisional Ballots*, St. Petersburg Times, Oct. 9, 2004, at 5B.

13. *AFL-CIO v. Hood*, 885 So. 2d 373 (Fla. 2004); see Gary Fineout, *Ruling Backs Voting System*, Miami Herald, Oct. 19, 2004, at 1B; Alisa Ulferts, *Court Clarifies Provisional Ballot Use*, St. Petersburg Times, Oct. 19, 2004, at 4B.

14. Transcript, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 12, 2004, filed Nov. 9, 2004), D.E. 62; Minutes, *id.* (Oct. 12, 2004), D.E. 37.

15. Transcript, *id.* (Oct. 14, 2004, filed Nov. 9, 2004), D.E. 61; Minutes, *id.* (Oct. 14, 2004), D.E. 46.

16. Amicus Brief, *id.* (Oct. 19, 2004), D.E. 52; Amicus Brief, *id.* (Oct. 19, 2004), D.E. 51; Amicus Motion, *id.* (Oct. 19, 2004), D.E. 50; see Oct. 8, 2004, Transcript, *supra* note 10, at 4 (denying a motion to join the U.S. Department of Justice as a party and declining the suggestion that the court be the one to invite the Department's amicus participation); Joinder Motion, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 7, 2004), D.E. 29.

17. *Fla. Democratic Party*, 342 F. Supp. 2d 1073.

18. *Id.* at 1079–81; see *Judge: Provisional Ballots Cast in Wrong Precincts Don't Count*, Miami Herald, Oct. 22, 2004, at 3B; Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 207 (2013).

19. Docket Sheet, *Fla. Democratic Party v. Hood*, No. 04-15456 (11th Cir. Oct. 22, 2004).

20. Order, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Feb. 4, 2005), D.E. 74.

21. Order, *id.* (Sept. 1, 2005), D.E. 90, 2005 WL 2137016; see Satisfaction of Judgment, *id.* (Sept. 26, 2005), D.E. 92; Order, *id.* (May 9, 2005), D.E. 82 (determining entitlement to attorney fees).