

## **VII. Provisional Balloting**

# Provisional Balloting

Task Force on the Federal Election System  
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## *Summary of conclusions*

1. Nineteen states with 51 percent of the voting age citizen population of the United States issue provisional ballots to voters whose names do not appear on the precinct voter registry, at least in the narrow circumstances required by the “fail-safe” provisions of the National Voter Registration Act.
2. Washington makes use of provisional ballots in the broadest range of circumstances. Uniquely, Washington requires county election officials to accept votes cast in other jurisdictions by voters who are legal registrants of their counties for the offices that are common to the two ballots.
3. Provisional ballots help to speed operations in polling places. They help election administrators to identify and correct voter registration mistakes. Finally, they make it possible not to have to turn away voters at the polls. On the other hand, provisional balloting is labor intensive and therefore expensive. It also slows official election counts.

The 2000 presidential election made abundantly clear that mistakes occur, mistakes that cause some eligible voters to be denied the right to vote and some ineligible citizens to believe they were denied the right to vote. As a general principle, most Americans would surely agree that honest administrative errors should not contravene a voter’s right to participate in an election. Most Americans would surely also agree that false or mistaken claims of administrative error should not entitle a citizen to vote despite ineligibility. Provisional balloting is one way to advance both principles.

What are most commonly called “provisional” ballots go by many other names as well. They are “special” ballots in Washington State and the District of Columbia, “affidavit” ballots in New York and Mississippi, and “conditional” ballots in Oklahoma and Virginia. Whatever the name, and whatever the state practice, provisional ballots have three common characteristics:

1. *Issue to voters whose names do not appear on the voter registry.* Poll officials provide a voter with a provisional ballot if her name does not appear on the precinct voter registration roll. Almost all states that have adopted provisional ballots issue them in other circumstances as well, but the absence of the voter’s name from the registry triggers issue in all states.
2. *Identification of provisional ballot.* The voter places the provisional ballot inside an unmarked ballot envelope and in turn inside an envelope that bears information about the circumstances of the provisional vote and the voter’s signature.
3. *Post-election determination of eligibility.* After the election, officials use the information on the outer envelope to research the voter’s eligibility. If the voter is found to be eligible, election officials enter the vote into the tally.

These three characteristics helpfully distinguish provisional voting from other balloting practices. Post-election determination of eligibility distinguishes voting by provisional ballot from voting by affidavit in states like Illinois and Michigan. In Illinois and Michigan, voters whose names

do not appear on the registry are required to swear an affidavit, under penalty of law, that they are qualified to vote in the precinct under the laws of the state. Upon execution of the affidavit, however, they cast a regular ballot. Their ballots are not segregated and their eligibility is not researched later by election officials. Upon execution of the affidavit, in short, their ballots count.

Provisional ballots differ from challenged ballots as well. In most states, partisan election observers may bring a challenge to a voter on a variety of grounds, among them invalid registration at the address given. In some states challenges are adjudicated on the spot, often by another voter's sworn affirmation that the challenged voter is qualified under the laws of the state. In other states, challenged ballots are segregated and researched after the election. Voting by provisional ballot, however, is a process that is originated administratively and automatically rather than upon challenge.

The provisional ballot was pioneered by Washington and California, which have used it for more than a decade. Provisional voting spread rapidly following the passage of the National Voter Registration Act (NVRA, or "Motor-Voter") in 1993. Nineteen of the 44 states covered by NVRA use provisional ballots to comply with the "fail-safe" provisions of the Act. The 19 states that provide provisional ballots in at least some circumstances account for 51 percent of the voting-age citizen population of the United States.

In most of the states that have adopted provisional balloting—in fact, as nearly as we can tell, in most states other than California and Washington—poll workers offer the provisional ballot only in the fail-safe circumstances mandated by NVRA. The Act required that states provide the opportunity to cast a vote when

1. Voters have failed to register at a new address within the same precinct, or
2. Voters have failed to register at a new address outside the precinct but within the jurisdiction of the registrar.

In the first circumstance, when voters have moved within the precinct, most states in fact issue a regular ballot for all offices. Six states and the District issue a provisional ballot for all offices. In Kansas, Nebraska, New Mexico, and the District, poll workers provide a provisional ballot immediately. In Alaska, Arizona, and Washington, they first try to determine eligibility and issue a provisional ballot only if eligibility remains a question.

In the second fail-safe circumstance, when voters have moved out of the precinct but elsewhere within the jurisdiction, 17 states and the District issue a provisional ballot for all offices. Two states, Mississippi and South Carolina, provide a provisional ballot limited to federal offices.

States like California and Washington make more expansive use of provisional ballots, employing them in circumstances beyond those required under NVRA. In California, poll workers issue a provisional ballot to a voter who has not moved but whose name does not appear on the voter registration list. In Washington, if a voter's name cannot be found on the registry, poll workers call the central administrative elections office to try to verify registration. But if registration cannot quickly be sorted out, or if a voter cannot wait, or if a voter cannot go back to the precinct in which he is registered, poll workers provide a provisional ballot. Moreover, in Washington poll workers issue a special ballot if registration has been cancelled, for change of address or for conviction for a felony, but the voter claims that the cancellation is in error. In both states, finally, poll workers give a provisional ballot if a voter is listed as having requested an absentee ballot but claims not to have received it or claims to have lost it.

The most expansive use of provisional ballots is in Washington. Uniquely, Washington issues a special ballot to voters who have moved to a new county or even into Washington from another state. After the election, election officials research the eligibility of voters of provisional

ballots. If they determine that a voter is legally registered in another jurisdiction, whether another Washington county or out of state, they mail the ballot to the election office in that jurisdiction. County election officials in Washington are obligated, by law, to accept votes cast in other jurisdictions by voters who are legal registrants of their counties for the offices that are common to the two ballots.

Voter registration problems are common enough that substantial numbers of voters receive provisional ballots in each election. In the majority of cases, election officials find provisional voters to be qualified, as determined from official records.<sup>1</sup> In the 2000 general election in Los Angeles County, California, voters cast 100,168 provisional ballots, about four percent of the total, of which 61,521 (62 percent) were ultimately recognized as valid. King County, Washington (Seattle), received 17,082 special ballots in 2000, about 2 percent of all cast. With Washington's more liberal provisions, election officials determined 13,307 (78 percent) to be valid.

### ***Arguments for provisional balloting***

No matter how well election officials manage voter registration lists, some voters will inevitably be left off the rolls. Often, the fault is the voters' own. Americans move often, and many neglect to re-register at their new address, or they do not realize that they must. Every year, 16.4 percent of the U.S. voting age population changes residence. Fifty-seven percent of the movers (8.8 percent of the voting age population) relocate within the same county and therefore fall mostly within the fail-safe requirements of the NVRA. Another 21 percent (3.2 percent of the population) move to a different county within the same state, and accordingly would be covered by an expansive system of provisional balloting such as obtains in Washington.

In other cases, the fault lies in election administration. With the press of activity, poll workers overlook names that in fact are on the registry. Staff in registrars' offices make clerical errors. Driver's license bureaus and service agencies either fail to elicit required information from registrants or fail to forward applications in time. Third-party registrars—for example, political parties and citizens groups—do not turn the applications they receive into the county registrars' offices. Late closing dates for registration make it impossible for registrars to put all the new registrants onto the official rolls. For all these reasons, in every election, people appear at the polls who believe, quite reasonably, that they are legally registered to vote. But they are not on the rolls.

Because of the inevitability of errors in voter registration, provisional balloting has several attractive features.

First, provisional ballots help to speed operations in the polling place. Because voter registration problems can be resolved after the voter casts a provisional ballot, everybody need not be required to wait while poll workers research the status of a voter's registration.<sup>2</sup> Several county elections officers have commented that they find provisional balloting attractive because it smoothes operations in polling places on Election Day.

Second, provisional ballots make it possible not to have to turn away voters at the polls. People who have been told that they cannot vote because there is no record of their registration tend to react with disappointment and anger, given the time and effort they have already invested in a trip to the polls and given their often-reasonable belief that they are indeed registered. The 2000 Current Population Survey found that 7.4 percent of registrants who did not vote said they were prevented

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<sup>1</sup> In an unknown proportion of the other cases, voters might in fact have made the attempt to register but do not appear on the voter registration rolls because of purely administrative errors.

<sup>2</sup> Moreover, because registration problems are left for later resolution, polling processes are less sensitive to the availability of communications with central elections offices and data servers.

from voting by problems with voter registration. The group of registrants who encountered registration difficulties numbers 1.5 to 3 million people. By providing an outlet for participation, provisional ballots reduce voter frustration and probably also lessen the wear and tear on poll workers, the front line of contact with voters.

Third, provisional ballots help election administrators to catch voter registration mistakes. Neither California nor Washington requires election officials to notify provisional voters of the outcome of their investigation, but it appears that most do anyway. In the 60 to 80 percent of the cases for which the investigation finds a valid voter registration, and the provisional ballot counts, election officials amend the registration administratively and inform the voter of the changes. In the remaining cases, election officials send an application for voter registration so that the provisional voter might be registered, or registered correctly. Provisional balloting provides another opportunity to register people who clearly intend to be registered.

To be sure, the provisional ballot is not the only way that election administrators might identify and correct errors in voter registration. In many of the states that comply with the NVRA by allowing voters to cast a regular ballot, fail-safe voters must first complete a new application for voter registration at the current address.

Nevertheless, the provisional ballot seems to be a superior tool for managing voter registration lists, and for two reasons. First, to the extent that the circumstances that trigger the issue of a provisional ballot are broader than the requirements of the NVRA, election administrators are able to find and fix more errors in registration. Second, because provisional ballots receive a full investigation, election officials can better tell whether the problems are the doing of voters, poll workers, clerical staff, service agency personnel, or third party registrars. They can use the knowledge gained to intervene in administrative processes so as to reduce the number of problems going forward.

### ***Arguments against provisional balloting***

The obvious downside to provisional balloting is its labor intensity. Research into the registration status of provisional voters takes significant amounts of staff time in county elections offices. The Assistant Superintendent of the King County, Washington, Department of Records and Elections estimated that the 17,000 provisional ballots in 2000 had occupied 15 staff for nine days. (Because of the interest in closely contested races for President and Senate, the 2000 election produced roughly three times the usual number of provisional ballots in King County.) On a per-ballot basis, provisional ballots probably consume no more resources than absentee ballots, and in most states there are significantly fewer provisional ballots. Still, provisional balloting requires a noticeable expense.<sup>3</sup>

Second, the process of researching provisional ballots slows official election counts. In most contests, the delay has little consequence because the election is not close enough to hinge on the provisional votes. But in close elections, provisional ballots add to the time until an election can be called decided. In states that issue a provisional ballot to absentee voters who appear in person, the investigation of provisional ballots cannot be completed until all the absentee ballots have been received. In Washington, where absentee ballots need be postmarked but not received by Election Day, the count can stretch for quite a long time.

Third, the use of provisional balloting in broader circumstances might encourage voters to exploit it as a more convenient opportunity for registration or change of address. Many states currently use provisional ballots to comply with the fail-safe requirements of NVRA, which pertain

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<sup>3</sup> As noted earlier, however, some part of this expense might properly be understood as list maintenance.

only to registered voters who move within jurisdiction. With broader use, voters might treat provisional balloting as a back-door form of Election Day registration, albeit with a crucial difference: voters who had not registered prior could not use provisional balloting to participate in the *current* election. But we have no evidence to indicate that states that already make provisional ballots available in circumstances beyond fail-safe, like California and Washington, have encountered this problem in practice.<sup>4</sup>

Finally, the practice of provisional balloting has encountered scattered resistance from voters themselves. According to a 1997 FEC survey, Tennessee election officials found that their fail-safe voters were reluctant to vote by provisional ballot, evidently concerned that their votes might not ultimately be allowed. As a result, Tennessee abandoned provisional voting and instead allows fail-safe voters who have moved within counties to vote by regular ballot.<sup>5</sup>

The same FEC report also noted concerns that provisional balloting might be used to discriminate against minority voters. It did not elaborate the concerns, nor did it provide any instances. One can see the basis for the fear: biased election officials might use provisional ballots to segregate minority votes that they will later, quietly, disallow. On the other hand, minority voters with registration problems (of whoever's making) might find voting by provisional ballot preferable to not being allowed to vote at all. Provisional balloting leaves a paper trail—the ballot envelopes that election officials use to investigate eligibility—which might be concrete evidence to support legal action under the Voting Rights Act.

### *Selected references*

Federal Election Commission, Office of Election Administration, “Implementing the National Voter Registration Act: A report to state and local election officials on problems and solutions discovered 1995–1996,” March 1998.

Federal Election Commission, Office of Election Administration, “The impact of the National Voter Registration Act of 1993 on the administration of elections for federal office, 1999–2000,” final draft, June 2001.

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<sup>4</sup> In 2000, according to the FEC, North Carolina election officials discovered that political parties had mustered unregistered people to the polls to demand to vote by provisional ballot. It is not clear what the purpose was in this tactic, unless to hope that the provisionals would simply be counted without investigation.

<sup>5</sup> Voters in very small jurisdictions might also resist provisional ballots because they are segregated from regular ballots. In smaller, rural districts, the employment provisional ballots may be so infrequent that voters can be identified even after the provisionals have been shorn of the outer, identifying envelopes.

**States with provisional balloting**

State	FEC survey: Provisional balloting for fail-safe voting	Election Center survey
Alabama	Yes	Yes
Alaska	Yes	No response
Arizona	Yes	Yes
Arkansas	Yes	Yes
California	Yes n1	Yes
Colorado	No response	No
Connecticut	No	No
Delaware	No	No response
D.C.	Yes	No response
Florida	Yes (new)	No response
Georgia	No	No
Hawaii	No	No
Idaho	NVRA exempt	No response
Illinois	No	Challenge
Indiana	No	No
Iowa	Yes n18	Yes
Kansas	Yes	Yes
Kentucky	No	No
Louisiana	No	No response
Maine	No	Same day VR
Maryland	Yes (new)	Yes
Massachusetts	No	No response
Michigan	No	No
Minnesota	NVRA exempt	No
Mississippi	Yes	Yes
Missouri	No	No
Montana	No	No
Nebraska	Yes	Yes
Nevada	No	No
New Hampshire	NVRA exempt	No response
New Jersey	Yes	Yes
New Mexico	Yes	Yes
New York	Yes	Yes
North Carolina	Yes n19	Yes
North Dakota	NVRA exempt	No VR
Ohio	Yes	Yes
Oklahoma	No	No
Oregon	Yes n2	Yes
Pennsylvania	Some counties n16	No response

Rhode Island	No	No response
South Carolina	Yes	Yes
South Dakota	No	No
Tennessee	No	Challenge
Texas	No	Challenge
Utah	No	No
Vermont	No	No
Virginia	Yes n17	Yes
Washington	Yes	Yes
West Virginia	No	No response
Wisconsin	NVRA exempt	No
Wyoming	NVRA exempt	No
United States	19 states Yes	19 states Yes

Source: Federal Election Commission, "State fail-safe voting procedures," revised 31 May 2001; Election Center, "Provisional ballot survey," 5 March 2001.