



DEBRA BOWEN | SECRETARY OF STATE
STATE OF CALIFORNIA | ELECTIONS

1500 11th Street, 5th Floor | Sacramento, CA 95814 | Tel (916) 657-2166 | Fax (916) 653-3214 | www.sos.ca.gov

October 30, 2008

County Clerk/Registrar of Voters (CC/ROV) Memorandum #08311

TO: All County Clerks/Registrars of Voters

FROM: *Cathy Mitchell*
Cathy Mitchell
Chief, Elections Division

RE: November General: Provisional Voting

This is intended to dispel some of the myths and mis-information regarding the use of provisional ballots that I've come across recently.

Basics of Provisional Voting

While provisional balloting may be relatively new in some areas of the country (it was mandated by the Help America Vote Act [HAVA] of 2002), California's provisional balloting statutes have been in effect since 1984.

Provisional balloting exists in California for two fundamental reasons:

First, provisional balloting ensures that no properly registered voter is denied their right to cast a ballot if that voter's name is not on the polling place roster due to a clerical, processing, computer, or other error.

Second, provisional balloting allows elections officials to ensure that no voter votes twice, either intentionally or inadvertently, in a given election.

The most common circumstances when an elections official will ask a voter to cast a provisional ballot are:

1. First-time voters. Here, the voter's name is on the polling place roster, but they are voting for the first time in a federal election and are unable to provide the proof of identification required by federal law (HAVA 303(b).) The elections official will verify the voter's eligibility by comparing their signature on the provisional ballot envelope with the signature on their voter registration form and if the signatures match, then the ballot will be counted. (Elections Code sections 14310(c), 15350, and 3019.)

2. Vote-by-mail voters who appear in person. The voter's name is on the polling place roster and the roster notes the voter requested a vote-by-mail ballot. However, the voter states they didn't receive the ballot, lost the ballot, or spoiled the ballot and doesn't have it with them. After the voter casts a provisional ballot, the elections official will check the records to ensure that the voter did not cast their vote-by-mail ballot. If this is the case and the voter's signature on the provisional ballot envelope matches the signature on the voter's registration card, then the voter's provisional ballot will be counted. (Elections Code sections 3016, 14310(f), 15350, 15100 et seq.) If the voter did vote and return their vote-by-mail ballot before the close of polls on Election Day, then the vote-by-mail ballot will be counted and the provisional ballot will not be counted. If the voter did vote and return their vote-by-mail ballot but failed to sign the vote-by-mail ballot envelope, then the voter's provisional ballot will be counted, provided they complied with the instructions associated with the provisional ballot.
3. Voters who have moved within their county without re-registering to vote. The voter's name is not on the polling place roster because they moved within the county but did not re-register to vote. This also happens when a voter updates their driver's license with the Department of Motor Vehicles (DMV) but the DMV's computer system doesn't update the voter's registration information, as it is required to do by law. In either instance, the voter is entitled to vote a provisional ballot at the polling place based on their current address. The elections official is required to count the ballot if the voter's signature on the provisional ballot envelope matches the signature on the voter's prior registration form. The elections official is then required to re-register the voter at their new address for all future elections. (Elections Code sections 14310, 14311, 15350, 15100 et seq.)
4. Voters who are not on the polling place roster for an unknown reason. In this instance, the elections official will check the county's official registration records after Election Day. If the voter was properly registered to vote in the county and in the precinct in which they voted, their provisional ballot will be counted. If the voter was registered to vote at another address in the county, their votes will be counted in the races they voted on as if they were voting in their home precinct (i.e., their votes for U.S. President, statewide, and countywide measures will be counted, but their votes in a city council race may not be counted if the precinct they're registered in is in a different city council district than the one in which they cast a ballot). If the voter is not registered to vote or is registered to vote in another county or state, their ballot will not be counted in part or in whole. (Elections Code section 14310(c)(3).)
5. Political party registration issues. This won't occur in the November election, but it was certainly an issue in the February 2008 election. In this situation, the voter's name is on the polling place roster, but the voter believes they are

registered with a different political party than is shown on the roster or they demand the right to vote in a particular political party primary. In many instances, poll workers simply provide these voters with provisional ballots and elections officials then count the votes in the races these voters are entitled to vote in. (Elections Code section 14310(c)(3).)

Court Remedy To Compel Counting of Provisional Ballots

Elections Code section 2142 gives voters the right to go to court in order to compel county elections officials to register them to vote and to count their ballot. Elections Code section 2142(b) was created to permit voters who claim they registered to vote through the DMV or any other public agency designated as a voter registration agency under the 1993 National Voter Registration Act (NVRA) to go to court to compel their registration and permit their vote to be counted.

Right to Know if Provisional Ballot is Counted

Both federal and state law permit any voter who cast a provisional ballot to find out if their ballot was counted.

Section 302(a)(5)(A) of the federal Help America Vote Act (HAVA) states:

(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.

Elections Code section 14310(d) states:

(d) The Secretary of State shall establish a free access system that any voter who casts a provisional ballot may access to discover whether the voter's provisional ballot was counted and, if not, the reason why it was not counted.

To determine the free access system that a particular county may be using, please go to the Secretary of State's website at http://www.sos.ca.gov/elections/june08_freeaccesssystem.pdf.

Right to Know if Vote-By-Mail Ballot is Received

California law does require local elections officials to provide vote-by-mail voters with a means of finding out whether their vote-by-mail ballot has arrived back in the elections official's office. (Elections Code section 3017.) AB 2964 (Levine), which sought to allow vote-by-mail voters to find out if their ballot was counted, was vetoed in 2008 by the Governor. Some counties do provide this information to voters voluntarily, so registrars of voters may get questions about the issue from voters.

Questions Arising From Media Reports on Provisional Ballots

I've noticed that questions and concerns have been raised about the provisional voting process in at least three different areas recently. I wanted to make sure you were aware of these reports because voters may incorrectly assume that they are an accurate representation of the provisional balloting process in California, which they are not.

On October 17, 2008, an article titled "Block the Vote" was published in Rolling Stone magazine at http://www.rollingstone.com/politics/story/23638322/block_the_vote.

The section on provisional balloting is on Page 5 of the article and reads in part:

"Challenging "Provisional" Ballots

"In 2004, an estimated 3 million voters who showed up at the polls were refused regular ballots because their registration was challenged on a technicality. Instead, these voters were handed 'provisional' ballots, a fail-safe measure mandated by HAVA to enable officials to review disputed votes. But for many officials, resolving disputes means tossing ballots in the trash. In 2004, a third of all provisional ballots — as many as 1 million votes — were simply thrown away at the discretion of election officials."

On October 24, 2008, actor Tim Robbins appeared on the television program "Real Time With Bill Maher" and according to the program's website at http://www.hbo.com/billmaher/episode/2008_10_24_ep138.html, told viewers:

"Refuse provisional ballots. They're throwing those out. They can throw those out. If that's your last resort, take it, but fight in the polling place to vote. It's your right as an American. You have every right to vote if you're registered."

Every registered voter does indeed have a right to vote, but as mentioned earlier in this document, there are many reasons why a voter may be asked and should be required to cast a provisional ballot.

No provisional ballot is counted or precluded from being counted until the elections official goes through the detailed process set forth in Elections Code sections 14310-14311, 15350, and 15100-15112 to determine whether a voter's provisional ballot should be counted.

Equally important, no provisional ballot – whether it is counted or rejected – is ever “thrown out” because California law requires all ballots and related materials to be kept for a minimum of 22 months for any election in which a candidate for federal office is on the ballot (Elections Code sections 17300-17506.)

On October 27, 2008, a study called “Provisional Ballots: Where to Watch in 2008” was released by Dēmos. The study can be found at <http://demos.org/pubs/provisionalballot%5fbrief.pdf> and it lists eight states – Arizona, California, Colorado, Florida, Indiana, Michigan, Ohio, and Wisconsin – where the group believes provisional balloting problems could emerge on Election Day.

The report examined provisional ballots cast in the 2006 election (it doesn't state if it included ballots from the 2006 primary election, the 2006 general election, or both) and notes about California:

1. The state led the nation in the number of provisional ballots cast (288,213) and over 1 in 20 Californians cast provisional ballots.
2. More provisional ballots were rejected in California than elsewhere (38,984).
3. Of all ballots rejected nationwide because the voter was determined to be “not registered,” over 30% percent were cast in California (22,816).

Even if the raw data is accurate, I would note:

1. California has significantly more registered voters than any other state in the nation. Combining that fact with the reality that our provisional ballot and vote-by-mail laws are more liberal in terms of allowing people who believe they are registered voters to cast a provisional ballot, it's no surprise the state has the largest number of cast and rejected provisional ballots.

Since this data is self-reported by the states and states have very different laws and practices regarding not just provisional ballots but other elections issues, it's difficult to compare states against one another.

For example, as noted earlier in this document, a voter who is on the registration index but has received a vote-by-mail ballot will be asked to vote a provisional ballot if they show up at the polls stating they never received their vote-by-mail ballot. This is not an issue in states that have more restrictive vote-by-mail statutes.

Similarly, during primary elections, many California county elections officials instruct poll workers to provide voters with provisional ballots if they demand the ability to vote in one political party primary even if they are registered with a different political party. This may not be the practice in other states.

2. If more voters are permitted to cast provisional ballots in California and the state is home to more registered voters than any other state in the country, it stands to reason that more provisional ballots will be rejected here than elsewhere. However, according to the report, the number of rejected ballots was 13.5% of those that were cast – the 9th lowest figure in the country.
3. Similar to (1) above, there is no way to determine from the report whether comparing California to other states is actually an “apples to apples” comparison given the different state laws on provisional voting.

The report also notes what it describes as “emerging issues,” which are paraphrased below in italics and followed by my comments:

□ ***No match, no vote***

HAVA requires people registering to vote to provide their driver's license number or their social security number, and then requires elections officials to match that number against the appropriate database. Because all databases undoubtedly contain errors, problems arise in states that have adopted exact, character-for-character data matching requirements.

Unlike many states, California does not have an “exact match” standard when it comes to matching voters in the Social Security Administration or the DMV database. For anyone wishing to review the regulations, they can be found on the Secretary of State's website at

http://www.sos.ca.gov/elections/regulations/hava_statewide_voter_regs_020108.pdf.

□ ***Polling place challenges and foreclosed voters***

The recent mortgage crisis and accompanying wave of home foreclosures and evictions may lead to increased rates of provisional balloting. People in these circumstances may not have updated their voter registrations and while some voters may be able to vote at the precinct of their previous addresses, others may be required to vote provisionally on Election Day. The press has also reported partisan plans in several states to use foreclosure lists as a basis to challenge voters' qualifications to vote at their polling places. Political operatives may target areas with high foreclosure rates in order to depress likely votes for opposing candidates. Challenged voters may only be able to cast provisional ballots.

CCROV #08301, issued on October 14, 2008, makes it clear that based on Elections Code section 349 and the California Supreme Court's 1988 ruling in the case of *Walters v. Weed*, a person can continue to vote based on the address of their former permanent domicile until such time as they have acquired a new permanent domicile. A copy of CCROV #08301 can be found at <http://www.sos.ca.gov/elections/ccrov/pdf/2008/october/08301cm.pdf>.

Unlike some other states, there is no third party challenge of a voter's qualification to vote in California. The only people who may challenge a person's qualifications to vote are members of the precinct board. (Elections Code sections 14240-14253.)

I would certainly encourage all county elections officials to continue to:

- Resolve as many questions about a voter's eligibility to cast a ballot at the polls as possible.
- Provide voters who do have to cast a provisional ballot with information about the process you will go through to determine whether their ballot will be counted.
- Check with the DMV in cases where a voter claims to have registered to vote or changed their voting address through the DMV.
- Encourage and facilitate the court-ordered voting process provided for in Elections Code section 2142 if the voter has no other recourse.

Taking these steps will certainly go a long way to reassure voters that elections officials are taking the steps necessary to determine whether a voter's provisional ballot is indeed entitled to be counted and will be guided by the overarching requirement presented in Elections Code section 14312, which reads:

This article shall be liberally construed in favor of the provisional voter.

If you have any questions or would like to discuss this further, please call me at (916) 657-2166.