

The Provisional Ballot vs. Challenged Ballot:

A Brief Comparison

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Introduction

This paper provides an overview of the provisional and challenged ballots and discusses their similarities and differences. Contrary to popular belief, the right to vote is not a right enumerated in the Constitution;¹ nonetheless, it is guaranteed through the Equal Protection Clause of the 14th Amendment.² In light of this, the right to vote is a right that must be protected.³ The provisional and challenged ballots are important tools in election law reform used as part of the effort to ensure that every person's vote counts.⁴ Whether it achieves that goal is subject to debate.

The Provisional Ballot

A substantial number of votes were not counted in the 2000 presidential election. Given that, Congress signed into law the Help America Vote Act (HAVA).⁵ This act creates new safeguards and strengthens old safeguards to ensure that no one is turned away at the polls.⁶ Among the safeguards addressed in the HAVA is the provisional ballot.⁷ A provisional ballot is a standardized procedure that is used at polling places to allow a voter to cast their vote even though there is question about their right to vote.

Initially, a person who attempts to cast a provisional ballot must sign an affidavit stating that they are (1) registered to vote in the precinct in which they are attempting to vote and (2) that they are eligible to vote in the election.⁸ Once the person fills out the affidavit, they are given an envelope and a ballot. At this point they are allowed to vote.⁹ That person's name is then added to the poll list with an indication next to their name that they are voting a provisional ballot.¹⁰ However, the vote is not counted on election-day, instead it is set-aside and forwarded to an election official who will decide if the vote should be counted in the election.¹¹ In the event a vote is not counted, the election official will notify the voter 10-days after the local canvass with an explanation as to why the vote was not counted.¹²

¹ Bush v. Gore, 531 U.S. 98, 104 (2000).

² U.S. CONST. amend. 14, § 1.

³ Demos – A Network for Ideas & Action, *available at* <http://www.demos.org/page142.cfm>.

⁴ *Id.*

⁵ Help America Vote Act of 2002, Pub. L. No. 107-252, § 302, 116 Stat. 1666 (2002).

⁶ Brian Kim, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 581-82 (2003).

⁷ *Id.* at 592.

⁸ TEX. ELEC. CODE ANN. § 63.011.

⁹ Texas Secretary of State (October 2005) *available at* www.sos.state.tx.us.

¹⁰ *Id.*

¹¹ Kim, *supra* note 6 at 592.

¹² *Id.*

The Challenged Ballot

The challenged ballot is not specifically mentioned in the Federal Election Reform Act;¹³ however, it is still governed by HAVA because it is comprised of essentially the same procedures as the provisional ballot. Though each state has assigned the ballots different names, they fundamentally serve the same purpose.¹⁴ Texas is one of the few states that utilize the challenged ballot.¹⁵

A challenged ballot is used when an individual whose eligibility to vote is in dispute by a polling official.¹⁶ A voter must be challenged by an election official when the person gives the agent his or her name; if however, a challenge is raised after the voter has received a ballot, no subsequent challenge to that voter will be entertained.¹⁷ If a proper challenge occurs, the voter is directed to an election judge who will request that the voter present proof of identification.¹⁸ If the voter's identity is verified, he or she will be required to fill out a challenged voter affidavit.¹⁹ With this affidavit the voter sets forth facts that prove their eligibility to vote.²⁰ The voters name is then listed on the voter poll. In Texas the word "sworn" will be placed next to the voter's name.²¹ The ballot accompanying the affidavit is used by the voter and is then placed in the ballot box, after which the voter signs a stub that is placed in a sealed envelope; the vote will only be counted if there is a recount ordered of all votes.²² If the voter challenge is denied, a judge will enter "challenged and rejected" beside the voter's name on the poll list, and the voter may not vote in that election.²³

Similarities:

The two ballots have three common characteristics. First, each ballot will issue if the voters name does not appear on the voter registry.²⁴ It does not matter whether it is the provisional ballot or the challenged ballot; all states require the potential voter to complete one of the affidavits if they are not registered to vote in the particular precinct where they are attempting to vote. Second, each requires identification of the ballot, meaning each voter must place a signed ballot in a sealed envelope that bears information about the circumstances surrounding the ballot. The third similarity is the post-election vote count; neither ballot is counted until after the election has ended.²⁵

¹³ Pub. L. No. 107-252, § 302, 116 Stat. 1666, 1706 (2002).

¹⁴ Pub. L. No. 107-252, § 305, 116 Stat. 1666, 1714 (2002).

¹⁵ TEX. ELEC. CODE ANN. § 63.011.

¹⁶ Pub. L. No. 107-252, § 302, 116 Stat. 1666, 1706 (2002).

¹⁷ *Id.*

¹⁸ TEX. ELEC. CODE ANN. § 63.010.

¹⁹ *Id.*

²⁰ D.C. Public Employee Relations Board, Election Procedure: Eligibility, *available at* http://app.perb.dc.gov/services/perb_2000/511.shtm.

²¹ TEX. ELEC. CODE ANN. § 63.010.

²² Pub. L. No. 107-252, § 305, 116 Stat. 1666, 1717 (2002).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Differences:

The most obvious difference in the two ballots is that the challenged ballot usually issues when an election official disputes a person's right to vote.²⁶ On the other hand, the provisional ballot is issued when it is apparent that the voter is not registered in the particular precinct or is not a registered voter at all.²⁷ Another distinction is the post-election determination of eligibility required by the challenged ballot.²⁸ A person will not be allowed to cast a vote until their identity is verified.²⁹ However, the person who is required to fill out the provisional affidavit is allowed to vote simply by claiming that they are eligible to vote.³⁰

Unlike the provisional ballot, the challenged ballot envelope will only be opened and verified in the event of recount.³¹ Another peculiarity is the 10-day notification requirement of the provisional ballot; there seems to be no such requirement of the challenged ballot.³² The voter who uses the provisional ballot will receive notification that the vote was not counted along with explanation as to why the vote was not counted.³³

Conclusion

The provisional ballot and the challenged ballot are very similar in format, yet dissimilar in procedure.³⁴ What is most important is that each one plays a significant role in the electoral process. Their ultimate function is to ensure that every citizen who desires to vote can vote in spite of the absence of meeting certain requirements and that such vote will be properly counted.

²⁶ *Id.*

²⁷ TEX. ELEC. CODE ANN. § 63.010.

²⁸ Pub. L. No. 107-252, § 302, 116 Stat. 1666, 1706 (2002).

²⁹ TEX. ELEC. CODE ANN. § 63.010.

³⁰ Pub. L. No. 107-252, § 302, 116 Stat. 1666, 1706 (2002).

³¹ *Id.*

³² TEX. ELEC. CODE ANN. § 63.010.

³³ Pub. L. No. 107-252, § 302, 116 Stat. 1666, 1706 (2002).

³⁴ Kim, *supra* note 6 at 581-82.