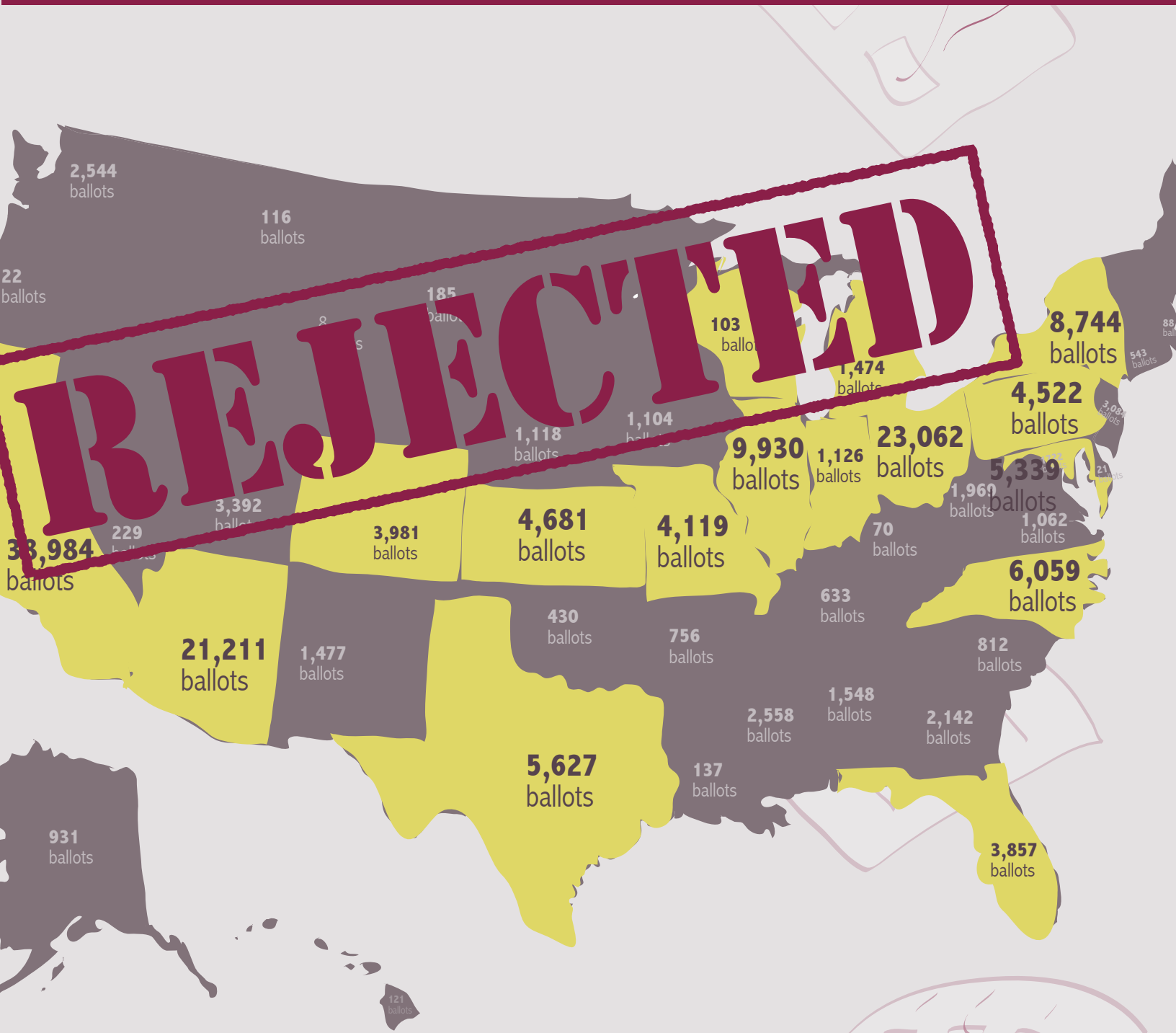


Provisional Ballots: Where to Watch in 2008

a briefing paper

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INTRODUCTION

Under the Help America Vote Act of 2002 (HAVA), voters whose names cannot be found on the voter rolls on Election Day or who cannot meet HAVA's new voter identification requirement must be provided a provisional ballot. These provisional votes are subsequently counted if local election officials are able to verify that the individual is a legitimate voter under state law.¹ With predictions of record turnout, including millions of first-time voters, provisional ballots may play a significant role in the 2008 election.

Importantly, high rates of provisional ballot usage and rejection suggest persistent shortcomings in election administration. More than one in three of the nearly 2 million provisional ballots cast in the 2004 election were ultimately rejected.² Compared to 2004, fewer provisional ballots were cast and more were counted in the 2006 election, yet problems remained. In 2008, continued high rates might exceed the margin of victory in several highly contested states in the November presidential race, casting uncertainty on the ultimate outcome and increasing the likelihood of post-election litigation.

This briefing paper describes some of the common problems experienced with provisional ballots, emerging issues, and states to watch in 2008.³

COMMON PROBLEMS

Unusually high provisional balloting rates

Provisional ballots were envisioned as fail-safe backstops to flawed voter lists, to be used sparingly and under limited circumstances. High numbers of provisional ballots suggest serious errors in voter registries or improper usage by inadequately trained poll workers. Americans cast 791,483 provisional ballots in the 50 states and District of Columbia in the 2006 general election, representing 1.2 percent of all ballots cast at polling places.⁴ State provisional balloting rates exceeding this level should be cause for concern.

High rejection rates

The states rejected 172,555 provisional ballots, 21.8 percent of the total cast, in 2006. Owing largely to differing rules and standards for determining when a ballot is to be counted, rejection rates varied dramatically among states. Questionable reasons for rejection have been challenged in court.⁵

Voter "not registered"

Of those provisional ballots rejected in 2006, 43.1 percent were invalidated because voters were logged as "not registered," the most prevalent cause for rejection. This opaque classification explains little where voters believe themselves to be duly registered and able to vote. It also may suggest a serious breakdown of the voter registration process in select localities or states.

Wrong precinct

One of the most common and problematic reasons for rejecting a provisional ballot is that it was cast in the wrong precinct. Thirty-one states and the District of Columbia categorically reject all such provisional ballots. The simple error of appearing at a nearby precinct managed by the same local election authority can automatically invalidate the vote. Where multiple precincts are housed in a single polling place, a voter who merely gets in the wrong line can see her ballot voided. In 2006, 15.4 percent of rejected provisional ballots were thrown out because they were cast in the wrong precinct.

Insufficient identification

Under HAVA, first-time voters registering by mail who do not include identification with their registration applications and whose driver's license or social security number does not match state or federal database entries must produce certain forms of ID at the polls. Moreover, states may impose more restrictive ID requirements. Voters without the requisite identification are offered provisional ballots, which may be rejected if the voter does not return within a prescribed time with acceptable ID. While 3.4 percent of rejected provisional ballots nationwide in 2006 were rejected because the voter was unable to provide ID, the rejection rate was far higher in several states. The high numbers of new registrants and first-time voters expected in 2008 may lead to a surge in the number of provisional ballots cast and possibly rejected for this reason.

Incomplete and unsigned provisional ballots:

In 2006, large numbers of provisional ballots were rejected because the voter failed to sign the provisional ballot form or enter other requested information, indicating poor ballot design or lax oversight by poll workers. Nationwide in that election, 3.2 percent of rejected ballots were invalidated for being incomplete; 2.2 percent were discarded because they lacked the voter's signature.

EMERGING ISSUES

“No match, no vote”

HAVA requires states to assign each voter a unique identifier, usually the voter's driver's license number or the last four digits of her social security number. States must “match” the data against information stored by state departments of motor vehicles or the Social Security Administration. Both databases contain errors. Hyphenated names may be misentered; records may not be updated when an individual marries and adopts her spouse's surname; birthday digits may be transposed. Problems arise in states that have adopted exact, character-for-character data matching requirements. At least one state (Florida) will reject certain “unmatched” applicants, relegating them to voting provisionally on Election Day. These provisional ballots are ultimately rejected if voters fail to resolve mismatches within a prescribed post-election deadline.

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. Those forced from their homes in recent months may not have had an opportunity to switch their registrations to their new addresses. 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.

WHERE TO WATCH

Ohio:

- » Ohioans cast 127,758 provisional ballots in 2006, the second highest number in the nation. They represented 3.6 percent of ballots cast, over twice the national average (1.2 percent).
- » Over 10,600 provisional ballots were rejected in Ohio in 2006 because they were cast in the wrong precinct. Ohio alone accounted for over one in three of the provisional ballots so rejected nationwide. In Cuyahoga County, 34 percent of these invalid provisional votes were cast in the correct polling place, though the wrong precinct. Another 30 percent were cast within two miles of the voters' correct precincts.⁶ This is especially troubling because Ohio law requires poll workers to direct voters to their correct precinct prior to issuing a provisional ballot.⁷
- » One in 144 Ohio homes was in foreclosure in August, the seventh highest rate in the nation.⁸ Voters caught up in foreclosure proceedings may be required to cast provisional ballots at the polls.⁹

Arizona:

- » A full 9.7 percent—almost one in ten—of ballots cast in Arizona's polling places in 2006 were provisional.
- » Over 30 percent of the 21,211 rejected provisional ballots were thrown out because they were cast in the wrong precinct.
- » Arizona has one of the nation's strictest voter ID laws, requiring each voter to produce either a photo ID bearing the voter's name and address or two forms of non-photo ID containing name and address. Those without ID can cast a provisional vote, but the ballot will be rejected unless the voter returns with acceptable ID within five days of the election. Nearly 2,000 ballots were rejected in 2006 because the voter was unable to produce appropriate ID, almost three times the national rate.

Florida:

- » Almost 27 percent of all provisional ballots rejected in Florida were cast in the wrong precinct in 2006. Evidence suggests that inadequately trained poll workers may have contributed to this high rejection rate; voters were sent in circles in search of correct precincts.¹⁰
- » Slightly over 5 percent of rejected provisional ballots, over twice the national rate, were thrown out because they lacked the voter's signature, suggesting inadequate instruction by inattentive or harried poll workers.
- » Florida's "no match, no vote" law is likely to result in an unusually high number of provisional ballots. As of October 1, 15 percent of the 131,540 new voters registered since September 8 had been flagged because of data match problems¹¹ and 5,324 of such registration applications remained unresolved.

California:

- » California led the nation in the number of provisional ballots cast in 2006 (288,213). Over one in twenty Californian voters cast provisional ballots.
- » More provisional ballots were rejected in California than elsewhere (38,984).
- » Of all ballots rejected nationwide because the voter was determined to be "not registered," over 30 percent were cast in California (22,816).

Colorado:

- » Colorado's 3.8 percent provisional balloting rate was fifth highest in the nation in 2006.
- » Almost 36 percent of rejected ballots were thrown out because they were cast in the wrong precinct. An additional 15.2 percent were rejected for being cast in the "wrong jurisdiction."¹²

Wisconsin:

- » Wisconsin Attorney General J.B. Van Hollen has sued the state's elections board to compel a "match" of all voter registration applications filed since January 2006. Unmatched voters would be removed from the rolls.¹³ While the availability of Election Day registration in Wisconsin may mitigate the impact of large numbers of voters being knocked off the rolls, experts nonetheless predict long delays in certifying the presidential vote should the lawsuit prevail and stacks of provisional ballots need to be processed.¹⁴

Indiana:

- » Indiana's ID requirement, the strictest in the nation, requires all voters to show a government-issued photo ID at the polls. Voters without photo ID must cast a provisional ballot, which will only be counted if the voter can produce the appropriate ID within ten days.

- » Over 50 percent of Indiana's provisional ballots were rejected in 2006.¹⁵
- » Large numbers of voting-age citizens have no driver's license or state-issued ID. The press reported that a dozen elderly nuns were denied regular ballots in the state's 2007 presidential primary because they lacked the requisite ID.¹⁶

Michigan:

- » While Michigan's highly developed statewide database keeps the state's provisional balloting rate relatively low, Michigan nonetheless rejected over 80 percent of its provisional ballots in 2006, the second highest rate in the country.
- » Of those provisional ballots rejected, 24.4 percent were thrown out because they were cast in the wrong precinct while another 8.5 percent did not contain the voter's signature.
- » Michigan has the fifth highest foreclosure rate in the nation, with one in every 332 homes in foreclosure.¹⁷

For more information on provisional ballots, visit <http://www.demos.org>.

ENDNOTES

1. 42 U.S.C. § 15482. Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming are exempt from HAVA's provisional ballot requirement because they have Election Day registration, although Wisconsin and Wyoming offer provisional ballots to voters who cannot meet identification requirements. North Dakota is also exempt because it does not have voter registration.
2. Kimball W. Brace and Michael P. McDonald, 2004 Election Day Survey (U.S. Election Assistance Commission, 2005), http://www.eac.gov/election_survey_2004/toc.htm.
3. All data on provisional balloting in 2006 is taken from the U.S. Election Assistance Commission's 2006 Election Administration and Voting Survey, available at http://www.eac.gov/program-areas/research-resources-and-reports/copy_of_docs/eds-2006/2006-election-administration-and-voting-survey-chapters. Demos thanks Brittany Stalsburg for assistance in compiling the data.
4. All provisional balloting rates in this report represent the number of provisional ballots cast as a percentage of ballots cast in polling places. For convenience, I've referred to these as the "percentage of ballots" cast in the remainder of the report.
5. See *Sandusky County Dem. Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).
6. Advancement Project, *Provisional Voting: Fail-Safe Voting or Trapdoor to Disenfranchisement?*, (September 2008), available at <http://www.advancementproject.org/pdfs/Provisional-Ballot-Report-Final-9-16-08.pdf>.
7. ORC 3505.181 (C)(1)
8. Source: RealtyTrac (<http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=5163&acct=64847>).
9. While Secretary of State Jennifer Brunner has launched a public education campaign to inform foreclosure victims of their voting rights and made clear that inclusion on a foreclosure list is not sufficient to sustain a challenge, the large number of foreclosures is likely to result in individuals being required to cast a provisional ballot.
10. See Advancement Project, Endnote 6.
11. McClatchy Newspapers, "US election: Registration law leads to accusations of voter suppression in Florida," *The Guardian*, (October 1, 2008), available at <http://www.guardian.co.uk/world/2008/oct/01/uselections2008.florida>.
12. Provisional ballots rejected for being cast in the "wrong jurisdiction" were presumably cast in the incorrect county. Colorado's high rate of provisional ballots rejected for being cast in the wrong precinct or wrong jurisdiction occurred despite the prevalence of vote centers—centralized locations in which any voter in a county can vote.
13. In checks conducted since August 2006, 20 percent of registrants, including four of the six members of the Government Accountability Board that oversees the election board, have been flagged as non-matches. See Patrick Marley, "Four of six judges fail voter test," *Milwaukee Journal Sentinel*, September 4, 2008, available at <http://blogs.jsonline.com/allpoliticswatch/archive/2008/09/04/four-of-six-judges-fail-voter-test.aspx> and Todd Richmond, "State Clerks: We're too busy to check IDs," *Associated Press*, September 25, 2008, available at <http://www.greenbaypressgazette.com/apps/pbcs.dll/article?AID=/20080925/GPG0101/80925144/1206/GPG01>.
14. See Richmond, Endnote 13.
15. Indiana failed to provide data on reasons for provisional ballot rejection to the Election Assistance Commission in 2006.
16. The nuns refused to cast provisional ballots citing the impossibility of obtaining the proper ID and the likelihood their provisional ballots would otherwise be rejected.
17. See RealtyTrac, Endnote 8.

PROVISIONAL BALLOTS IN THE 2006 ELECTION

STATE	Total Provisional Ballots Cast	Percent of Ballots Cast**	Provisional Ballots Rejected	Percent Rejected
Alabama	2,370	0.2%	1,548	65.3%
Alaska	11,990	6.5%	931	7.8%
Arizona	73,880	9.7%	21,211	28.7%
Arkansas	1,155	0.2%	756	65.5%
California	288,213	5.2%	38,984	13.5%
Colorado	26,455	3.8%	3,981	15.1%
Connecticut	***		543	
Delaware	25	0.0%	21	84.0%
DC	4,219	3.7%	1,722	40.8%
Florida	14,550	0.4%	3,857	26.5%
Georgia	4,632	0.3%	2,142	46.2%
Hawaii	157	0.0%	121	77.1%
Idaho	0		0	
Illinois	12,611	0.4%	9,930	78.7%
Indiana	2,031	0.1%	1,126	55.4%
Iowa	6,027	0.7%	1,104	18.3%
Kansas	21,097	3.1%	4,681	22.2%
Kentucky	75	0.0%	70	93.3%
Louisiana	274	0.0%	137	50.0%
Maine	316	0.1%	0	0.0%
Maryland	41,485	2.6%	5,339	12.9%
Massachusetts	215	0.1%	88	40.9%
Michigan	1,821	0.1%	1,474	80.9%
Minnesota	0		0	
Mississippi	7,073	1.5%	2,558	36.2%
Missouri	7,403	0.4%	4,119	55.6%
Montana	2,242	0.8%	116	5.2%
Nebraska	7,119	1.4%	1,118	15.7%
Nevada	501	0.2%	229	45.7%
New Hampshire	0		0	
New Jersey	11,410	0.9%	3,084	27.0%
New Mexico	1,378	0.8%	1,477	107.2%*
New York	27,268	0.6%	8,744	32.1%
North Carolina	22,491	1.4%	6,059	26.9%
North Dakota	0		0	
Ohio	127,758	3.6%	23,062	18.1%
Oklahoma	563	0.1%	430	76.4%
Oregon	1,408	0.1%	22	1.6%
Pennsylvania	12,345	0.4%	4,522	36.6%
Rhode Island	***		914	
South Carolina	3,013	0.3%	812	26.9%
South Dakota	341	0.1%	185	54.3%
Tennessee	***		633	
Texas	5,571	0.2%	5,627	101.0%*
Utah	14,730	3.0%	3,392	23.0%
Vermont	16	0.0%	***	
Virginia	1,779	0.1%	1,062	59.7%
Washington	18,825	8.3%	2,544	13.5%
West Virginia	4,358	1.2%	1,969	45.2%
Wisconsin	271	0.0%	103	38.0%
Wyoming	22	0.0%	8	36.4%
TOTAL	791,483	1.2%	172,555	21.8%

Source: U. S. Election Assistance Commission

* All data is that reported by the states. Presumably because of problems in data collection or reporting, both Texas and New Mexico reported rejecting more provisional ballots than having been cast.

** Expressed as a percentage of ballots cast at the polling place.

*** No data provided.

ABOUT DĚMOS

Dēmos is a non-partisan public policy research and advocacy organization. Headquartered in New York City, Dēmos works with advocates and policymakers around the country in pursuit of four overarching goals: a more equitable economy; a vibrant and inclusive democracy; an empowered public sector that works for the common good; and responsible U.S. engagement in an interdependent world.

Dēmos was founded in 2000.

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ABOUT THE DEMOCRACY PROGRAM

The Democracy Program works to strengthen democracy in the United States by reducing barriers to voter participation and encouraging civic engagement. Dēmos supports state and national reform efforts by conducting research on current and long-range issues; advancing a broad agenda for election reform; providing advocates and policymakers with technical support; and strengthening reform networks. Through our recent alliance with the National Voting Rights Institute, we are now able to utilize complementary channels of policy, advocacy and litigation to achieve our goals.

Stuart Comstock-Gay, Director of the Democracy Program

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Scott Novakowski joined Dēmos in September 2005. For the last three years he has been working on a national campaign to improve state compliance with the National Voter Registration Act, in addition to extensive research and writing on election administration and voting rights concerns in the U.S. He holds a Master of Social Work degree with a concentration in Policy Practice from the University of Connecticut School of Social Work and a B.A. in Sociology, also from the University of Connecticut.

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