

- SUBJECT:** Penalty for knowingly voting a mail ballot without application
- COMMITTEE:** Elections — favorable, without amendment
- VOTE:** 7 ayes — Denny, Bohac, Anchia, Anderson, Hughes, J. Jones, T. Smith
0 nays
- WITNESSES:** For — B.R. “Skipper” Wallace, Texas Republican County Chairman’s Association; Pauline Cusack (*Registered, but did not testify*: Pat Carison, Tarrant County Republican Party Executive Committee; Julia M. Marsden, League of Women Voters of Texas; C.M. “Mac” McGuire)

Against — Ken Bailey, Texas Democratic Party; (*Registered, but did not testify*: Suzy Woodford, Common Cause Texas)

On — Elizabeth Hanshaw Winn, Secretary of State’s Office
- BACKGROUND:** Election Code, ch. 82 establishes eligibility for early voting by mail. A qualified voter can vote by mail if that person expects to be absent from his or her county of residence on election day and during the remaining period for early voting by personal appearance, once the voter has submitted an early ballot application. Also eligible for early voting by mail are voters who have illnesses or physical conditions that prevent them from appearing at the polling place, voters who are 65 years of age or older on election day, and, under certain conditions, voters who are confined in jail at the time of submitting an early ballot application.

Section 84.001 states that to be able to vote an early ballot by mail, an eligible person must apply for a mail ballot. The ballot application must be in writing and signed by the applicant but the use of an official application form is not necessary.
- DIGEST:** HB 2405 would prohibit counting a marked ballot voted by mail from a person who had not applied for that ballot. A person who knowingly voted a ballot by mail under these circumstances would commit a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000).

The bill would take effect September 1, 2005, and would apply only to an election ordered on or after that date.

**SUPPORTERS
SAY:**

HB 2405 would create a penalty for knowingly voting a ballot by mail without having applied for it, thus establishing an enforcement mechanism for a practice that current law already prohibits. The Election Code makes it expressly clear that a person who has not applied for an early ballot by mail is not entitled to receive a mail ballot, regardless of whether the voter meets one or more eligibility requirements. In recent elections, however, evidence has surfaced that the law has been interpreted to allow such mail ballots to be cast and counted, despite voters' ineligibility to receive them in the first place. The bill simply would require voters to exercise common sense. If a person received a ballot through the mail by mistake, the person should not vote it, and there should be a corresponding penalty.

The bill would not impose strict liability but would require a prosecutor to show that a voter was not entitled to receive an early ballot by mail and that the voter had knowledge that he or she was not entitled to receive or vote such a ballot. More incidences of fraud related to early voting by mail are cropping up. If the elections process in Texas is to have integrity, the state must be able to punish these instances of fraudulent voting.

**OPPONENTS
SAY:**

If a sizeable number of voters who did not request mail ballots are receiving them, the problem lies with county clerks and elections administrators, not with voters. These officials should be trained to watch for signature discrepancies and other irregularities because confusion surrounding procedures for requesting and accepting mail ballots likely will increase with time. For example, the federal Help America Vote Act (HAVA) contains provisions stipulating that voters cannot be questioned if they identify themselves as disabled and likely increasing the number disabled voters who use mail ballots. The best approach to avoid future problems is to educate election officials, rather than seeking to punish voters who mark mail ballots that they did not request.

**OTHER
OPPONENTS
SAY:**

While the Legislature should not encourage bad actors or unscrupulous campaign tactics, this bill assumes that unsuspecting citizens possess detailed knowledge of the legal processes and requirements associated with voting by mail. For example, an elderly person who received a ballot in the mail for which he or she did not apply might attribute the event to good fortune or assume that he or she was entitled to vote it by virtue of age. Under HB 2405, not only would that elderly person's vote not count,

but the person who voted the ballot by mail could be found guilty of a crime, when in fact a devious campaign worker likely was to blame.

To protect unsuspecting voters, HB 2405 should contain language stating that a person committed an offense if a person directed the return of a marked early voting ballot by mail with the knowledge that the ballot was from a voter who was not entitled to receive such a ballot. By using the phrase “directed the return,” the bill more likely would reach perpetrators of voter fraud by mail. Further, consideration should be given to making the penalty a class C misdemeanor (maximum fine of \$500), rather than a class A misdemeanor.

Another way to reduce the chance of ensnaring unassuming voters would be for the bill to stipulate that requirements for early voting by mail — including the application requirement — be printed clearly on the outside of the mail ballot. Even more helpful would be the inclusion of a checklist of requirements that voters could mark off before completing the ballot.

NOTES:

During second reading consideration of HB 2405 on April 18 and 19, before the bill was recommitted on a point of order, the House adopted an amendment by Rep. J. Jones that would have required the county clerk to include with the balloting materials a notice in a form prescribed by the secretary of state informing the voter of the categories of persons eligible to vote by mail and stating that the voter should not cast the ballot unless the voter or a person authorized to assist the voter requested the ballot. Before the bill was recommitted, the House was considering an amendment by Rep. Keel that would have substituted for the offense in the original bill an offense to direct the return of a marked early voting ballot by mail with the intent that an unlawful ballot be cast and the knowledge that the ballot was from a voter not entitled to receive a mail ballot and would have made the offense a class C misdemeanor (maximum penalty of \$500). The Elections Committee made no changes to the bill when it was reported again after being recommitted.

A related bill, HB 1994 by Talton, which would make assisting more than one voter casting a ballot by mail a class B misdemeanor (punishable by up to 180 days in jail and/or a maximum fine of \$2,000), was reported favorably, as substituted, by the Elections Committee on April 22.