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## Election Regulation during the COVID-19 Pandemic

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**T**he ongoing pandemic has necessitated dramatic changes to nearly every aspect of American life. The ways we work, shop, eat, and socialize have been radically restructured to protect our own health and that of our communities. This November, that radical restructuring will extend to the way we vote. Changes to our voting systems to safeguard public health, such as by allowing mail-in voting, are sorely needed, particularly if fears of another COVID-19 wave in the fall come true. At the same time, hastily switching from in-person voting to more-anonymized systems with which the states lack experience creates the potential for chaos, errors, and decreased electoral legitimacy in the eyes of voters. With little more than two months until the election, states must finalize decisions on what they are doing and communicate those plans to their citizens and the country as a whole.

### COVID-19 CHALLENGES TO VOTING

The November election looms large as a challenge to the “new normal” of the pandemic world. Whereas fighting COVID-19 optimally requires social distancing, limiting trips to public spaces (at least indoors), and sequestering higher-risk

groups, elections involve lining up at a local poll station run largely by retirees. That’s far from ideal. Even under normal circumstances, it’s not uncommon for voters to stand in line for hours in some places. Crowding that has been largely a nuisance now poses a potential public health threat. While safeguards such as enforced mask wearing, regular sanitizing of surfaces, and social distancing may reduce the risk, the possibility that a poll station where people crowd indoors becomes the epicenter of the next outbreak is real.

Exacerbating the situation, the novel coronavirus has caused poll workers across the nation to drop out, as most are over 60 and thus in a high-risk group.<sup>1</sup> The predictable result of the loss of poll workers has been fewer polling stations serving more voters. In Wisconsin’s April primary, Green Bay was forced to reduce its Election Day polling locations from 31 to only 2, “as only 17 poll workers of the city’s roster of 270 were able to work.”<sup>2</sup> Similarly, in the District of Columbia’s June primary, “there were reports of long wait times—some multiple hours long. . . . The shortage of poll workers to sanitize voting machines and process ballots nearly ground the system to a halt,” despite lower-than-average turnout.<sup>3</sup> Having fewer polling places leads to more crowding, and crowding increases both the possibility of an outbreak and—equally important for

1. Rachel Kleinfeld, “How States Can Make Voting by Mail Easier and Avoid Election Chaos,” *The Dispatch*, April 17, 2020.

2. “Wisconsin Primary Recap: Voters Forced to Choose between Their Health and Their Civic Duty,” *New York Times*, April 7, 2020.

3. Andrew Trunsky, “Logistical Challenges Burden States’ Primaries, Raise Concerns for November,” *Daily Caller*, June 13, 2020.

voter access—the fear of one. The riskier a polling place seems, the less willing voters will be to participate. Even for the most civic-minded and politically engaged citizens, the hazard to one’s own health and that of loved ones may be too high a price for voting. Worse, health-based disincentives to vote would hardly fall evenly on the population; groups that are at higher risk of serious complications from COVID-19, such as the elderly, the immunocompromised, and communities with poor access to health care, will face stronger disincentives to vote than others, potentially skewing elections and decreasing the perceived legitimacy of their results.

## VOTING SOLUTIONS

The harms to public health and election integrity likely to result from a traditional, in-person Election Day this November are too severe to ignore. Our nation’s decentralized, state-by-state approach to election management means that solutions vary widely across the country. One approach favored by the Centers for Disease Control and Prevention and many states is mail-in absentee voting.<sup>4</sup> One advantage to this approach is that all states already allow at least some form of absentee voting by mail, with the practice dating back to the Civil War when soldiers were allowed to vote from the front.<sup>5</sup> Thirty-four states and the District of Columbia allow any voter to request an absentee ballot without needing a special reason, with five of those states conducting elections primarily through the mail.<sup>6</sup> The remaining sixteen states also allow for absentee voting but require one of a list of criteria to apply, such as being absent from one’s home county for work purposes.<sup>7</sup>

In April 2020, a Pew poll found that “almost three out of four Americans favor universal access to mail voting,” including about half of Republicans,<sup>8</sup> and the popularity of the practice combined with fears of COVID-19 has spurred several of the states without universal access to absentee voting to make at least short-term changes. For example, Oklahoma passed a law allowing registered voters who met one of a number of COVID-19-related criteria to claim “physically incapacitated” status, entitling them to vote absentee this year.<sup>9</sup> Other states have resisted this trend. For example, Texas Attorney General Ken Paxton made it clear that his office does not consider “fear of contracting COVID-19” to be a legally sufficient reason to vote absentee.<sup>10</sup>

There is also a practical issue with widespread absentee voting by mail: most states aren’t prepared for it. In states where mail-in voting is the primary means of conducting elections, the changes were brought about gradually so that voters and officials alike could adapt. Pennsylvania, which does not usually conduct elections through the mail, saw a “14-fold increase in requests for absentee ballots over 2016” for its June primary.<sup>11</sup> Wisconsin had five times its normal number of requests for absentee ballots for its 2020 primary, resulting in the state being “unable to mail the ballots out fast enough or handle” other aspects of the process.<sup>12</sup> On the flip side, Iowa and Montana’s “extended preparation for the influx of ballots they were going to receive” helped their June primaries go comparatively smoothly.<sup>13</sup>

It’s critical that election officials in every state “ensure that they have sufficient resources to conduct an election based primarily on absentee ballots,”<sup>14</sup> but voting by mail isn’t the only solution to poll sites overwhelmed under

4. J. Edward Moreno, “Here’s Where Your State Stands on Mail-In Voting,” *The Hill*, June 9, 2020.

5. National Conference of State Legislatures (NCSL), “Voting outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options,” July 10, 2020; and Miles Parks, “Why Is Voting by Mail (Suddenly) Controversial? Here’s What You Need to Know,” NPR, June 4, 2020.

6. NCSL, “Voting outside the Polling Place.”

7. NCSL, “Voting outside the Polling Place.”

8. Miles Parks, “New Poll: Americans Overwhelmingly Support Voting by Mail amid Panic,” NPR, April 28, 2020.

9. S.B. 210, 57th Leg., 2d Sess. (Okla. 2020).

10. Parks, “Why Is Voting by Mail (Suddenly) Controversial?”

11. “The Morning Dispatch: The Mail-In Ballot Battle,” *The Dispatch*, May 21, 2020.

12. Kleinfeld, “How States Can Make Voting by Mail Easier and Avoid Election Chaos.”

13. Trunsky, “Logistical Challenges.”

14. Ad Hoc Committee for 2020 Election Fairness and Legitimacy, *Fair Elections during a Crisis: Urgent Recommendations in Law, Media, Politics, and Tech to Advance the Legitimacy of, and the Public’s Confidence in, the November 2020 U.S. Elections* (Irvine: University of California Irvine School of Law, April 28, 2020), p. 7.

pandemic conditions. Many states already allow voters, their agents, or their family members to turn absentee ballots in at a polling location or deposit them in a secure ballot drop box.<sup>15</sup> Some states provide prepaid envelopes to return ballots through the mail; this option can save the state money while giving voters greater peace of mind on the security of their ballots. Early in-person voting has similar benefits, and while it's more of a health risk than voting by mail is, spreading voters out over more time will still help alleviate crowding on Election Day. Curbside voting at polling places, often available for the disabled and elderly, could provide yet another option to protect voters in high-risk groups and reduce crowding.<sup>16</sup> While each approach has its benefits and drawbacks (we have concerns about long early-voting periods, for example), providing a range of voting methods to allow for maximum flexibility, voter confidence, and safety is important.

## **BALLOT INTEGRITY CONCERNS WITH ABSENTEE AND MAIL-IN VOTING**

While mail-in voting has been on the rise for some time, with roughly a quarter of voters in the 2018 midterms voting by mail, the country is still poised for a dramatic shift in voting processes this fall. Up to 70 percent of ballots cast this November could be mailed in. Such a major change in voting procedures places the integrity of the election in some danger. Thankfully, while fraud in mail balloting is more common than it is with in-person voting, it still hasn't been a significant problem, with one estimate placing the fraud rate at 0.00006 percent.<sup>17</sup>

Absentee ballots are hand-marked paper ballots, which are considered the most secure type of ballot because of the lack of room for machine error, immunity from hacking, and ease of auditing to confirm results.<sup>18</sup> Using modern ballot

practices, ballot forgery is near impossible because each ballot has a barcode unique to the voter and tied to a state database. Fortunately, there is similarly little evidence of widespread ballot theft.<sup>19</sup> Legitimate concerns over ballot integrity do exist, however, regarding ballots mailed to incorrect addresses and the collection of ballots by third parties, known as ballot harvesting.

### **Mailing to Incorrect Addresses**

In states that routinely conduct elections primarily by mail, such as Colorado, ballots are mailed out to every registered voter at the voter's last known address. Such states have slowly implemented vote by mail over the course of many years and are equipped to handle the potential issues, such as outdated addresses, that arise from vote-by-mail systems. As a result, "states that have moved entirely to vote-by-mail have some of the lowest numbers of voter fraud."<sup>20</sup> With the onset of COVID-19, however, states without significant experience processing mail-in ballots on a wide scale have moved to copy all-mail states, with limited success. Maryland, for example, "planned to send every registered voter a mail-in ballot for the June 2 primary election" as part of the state's "effort to curb the spread of the coronavirus."<sup>21</sup> Unfortunately, delays in this effort "resulted in 1 million registered voters in Baltimore City and Montgomery County receiving their ballots late—or not at all."<sup>22</sup>

Similarly, California Governor Gavin Newsom announced that his state would send ballots to every registered voter at their last known address.<sup>23</sup> This is particularly concerning in California, which has a history of sloppy voter-roll maintenance, leaving inactive voters on its rolls for decades without checking against death records or out-of-state reregistrations.<sup>24</sup> Systems like California's where ballots are mailed to voters' last known addresses, particularly in states that have not undergone a careful transition, are rife with the potential

15. NCSL, "Voting outside the Polling Place."

16. See, e.g., Virginia Department of Elections, "Accessible Voting."

17. Parks, "Why Is Voting by Mail (Suddenly) Controversial?"

18. NCSL, "Voting outside the Polling Place."

19. See, e.g., Miles Parks, "Fact Check: Trump Spreads Unfounded Claims about Voting by Mail," NPR, June 22, 2020; Holmes Lybrand and Tara Subramaniam, "Fact-Checking Trump's Recent Claims That Mail-In Voting Is Rife with Fraud," CNN, May 28, 2020.

20. Kleinfeld, "How States Can Make Voting by Mail Easier and Avoid Election Chaos."

21. Moreno, "Here's Where Your State Stands on Mail-In Voting."

22. Jenna Portnoy, "Mail-In Ballot Delays in Maryland Threaten Statewide Primary, Activists Say," *Washington Post*, May 26, 2020.

23. Moreno, "Here's Where Your State Stands on Mail-In Voting."

24. See Susan Crabtree, "Calif. Begins Removing 5 Million Inactive Voters on Its Rolls," RealClearPolitics, June 20, 2019.

for errors and ballot fraud, both intentional and unintentional, and states should be wary of implementing them. When crafting new election rules and procedures for 2020 and beyond, states should consider having voters request absentee mail-in ballots rather than simply mailing them to all addresses on their voter rolls.

### Ballot Harvesting

Another absentee-voting practice under fire is so-called ballot harvesting, where third parties collect and turn in the absentee ballots for an entire nursing home or housing complex, for example, instead of the voters returning or mailing the ballots themselves. Although “Democrats see the practice as helpful for vulnerable populations,” critics have raised concerns that it “opens up those same vulnerable populations to manipulation and vote coercion.”<sup>25</sup>

The legality of ballot harvesting varies widely across the nation. The District of Columbia and 27 states allow a designated agent to return a voter’s absentee ballot, but 12 of these states limit how many ballots a single agent can return. Nine states allow a voter’s family member to return a ballot, and only one state, Alabama, specifically requires that the ballot be returned either via mail or by the voter. The remaining 13 states “do not address whether an agent or family member may return an absentee ballot on behalf of a voter,” with some informally accepting the practice and others not.<sup>26</sup> Several states have further limits on agents returning others’ ballots, such as banning them from being paid for the service.

Turning in someone else’s ballot is not an inherently dubious practice. Allowing a person to return the ballot of an elderly parent or disabled spouse makes a lot of sense—and particularly during the COVID-19 pandemic, states should be wary of placing more obstacles in the way of seniors’ voting. But there’s also a high possibility for abuse by an agent tasked with returning ballots. A voter might be intimidated

or coerced, physically or emotionally, into voting as the agent directs rather than according to the voter’s own preferences. Alternatively, an agent might simply not return a ballot based on which candidate the voter selected or might even alter the ballot where possible. When crafting new election rules and procedures for 2020 and beyond, states should take great care to balance the benefit of allowing an agent to aid an elderly or disabled person in voting with the potential harm of voter disenfranchisement and coercion.

### MITIGATING BALLOT INTEGRITY CONCERNS

Whether as a result of a California-style mailed-ballot system or otherwise, voting by mail lacks many of the safeguards that in-person voting has to ensure that an individual submitting a ballot is who she says she is and is an eligible voter. While there has been “surprisingly little voter fraud” with vote-by-mail systems in the past, it’s “in states where absentee ballots are rare and anomalous to the mass voting system where most fraud has taken place.”<sup>27</sup> States that are adopting or expecting widespread voting by mail this year for the first time, then, would do well to learn from states with experience. All five states with primarily mail-in voting systems require signature verification for submitted ballots, comparing the signature on the ballot with the one in the voter registration record.<sup>28</sup> Only six states and the District of Columbia neither conduct signature verification nor require some other proof of identity.<sup>29</sup>

Given the likely historic number of mail-in votes this year, signature verification should become standard practice everywhere. It may be prudent to also adopt one of the other identity-verification methods some states use for mail-in ballots, such as requiring a scan of a voter’s photo identification with the ballot.<sup>30</sup> As of 2018, 34 states had enacted voter identification requirements for in-person voting without a significant impact on voter turnout.<sup>31</sup> Extending

25. Parks, “Why Is Voting by Mail (Suddenly) Controversial?”

26. NCSL, “Voting outside the Polling Place.”

27. Kleinfeld, “How States Can Make Voting by Mail Easier and Avoid Election Chaos.”

28. The five states are Colorado, Hawaii, Oregon, Utah, and Washington. See NCSL, “Voting outside the Polling Place.”

29. These six states are Connecticut, Iowa, Maryland, New Mexico, Vermont, and Wyoming. See NCSL, “Voting outside the Polling Place.”

30. The Supreme Court has held that voter identification requirements are generally permissible in the context of in-person voting so long as it’s not unduly burdensome to acquire the ID in the first place. See *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

31. Mark Hoekstra and Vijetha Koppa, “Strict Voter Identification Laws, Turnout, and Election Outcomes,” Cato Institute Research Briefs in Economic Policy no. 202, February 19, 2020.

that requirement to mail-in voting would be a logical step given the expected volume this year. One concern with such a requirement would be that the pandemic may make obtaining photo identification—or getting it scanned or photocopied—more difficult and hazardous. As an alternative, states could permit ballots without a photo ID provided they were signed by at least one witness or, short of that, accept the ballot on a provisional basis subject to some form of later verification.

But such measures would be unlikely to cure the ballot-harvesting issue. Indeed, requiring witness signatures has the potential to *increase* the risk of voter coercion by requiring another person to sign off on a ballot. Photo-ID requirements could also disproportionately harm the elderly and disabled, who are less likely to have driver's licenses, underlining the need to further facilitate the acquisition of photo IDs—or for a backup means of verifying a voter's identity. Curbside voting, though easier than in-person voting for the elderly and disabled, suffers from the same issue if the voter does not have a driver's license and relies on another person to drive to the polling location. Although it's hard to prevent every instance of voter coercion without requiring voters to come to the polling places themselves, limiting the number of ballots that a single person can return on behalf of others, as many states currently do, at least reduces the risk of large-scale harms.

In addition to such regulations, states could help reduce ballot harvesting and voter coercion through hotlines, websites, and other resources for those experiencing elder or domestic abuse. Other solutions might be to set up secure ballot drop boxes near nursing homes and retirement communities or to prepay return postage on ballots. Whatever the solution chosen, states should make their policies on ballot harvesting clear and well known to prevent less-informed voters from being taken advantage of.

## CONCLUSION

Although crafting an electoral process that both addresses valid COVID-19-related health concerns and preserves ballot integrity is vital, the most important task for states is to provide clear guidance so that voters understand whatever process is chosen and how things will work on Election Day. Even if a balloting system works well, a popular perception of corruption, fraud, or incompetence—or a lack of general understanding, such that voting results come from a black box—will delegitimize our democratic processes.

This means that states must act now—and should've acted already—to choose how they will handle the election in November and then spend the intervening time dotting their i's and crossing their t's to ensure that the process goes smoothly. Notice to voters as to what is expected of them should be clear, unambiguous, and repeated. This year more than most, the burden will be on the state or municipality running the election to reach out to eligible voters and guide them through the process. If necessary, phone hotlines and websites could provide multilingual assistance on the steps required to vote and answers to questions usually fielded by poll workers on Election Day. Clear guidance will allow voters to choose the safest method of voting available to them, research the steps required to accomplish that, and trust the integrity of the election process.

This last concern means that states must be clear about their plans not only with their citizens but with the rest of the country. Particularly if the election is close, Americans must be able to identify how the outcome was reached and how the results may be verified.

*This bulletin is based on invited testimony the authors submitted on June 29, 2020, to the U.S. Commission on Civil Rights for its COVID-19 supplement to its 2018 report, An Assessment of Minority Voting Rights Access in the United States.*