
Voting in the Age of Coronavirus: What's Happening in Washington DC

April 20, 2020

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Introduction

- All 3 Branches of Federal Government involved
- Congress
 - Money & Powers for Setting elections
 - Voting in Congress
- Federal Courts
 - Review of Congressional Actions
 - Supreme Court decision in Wisconsin case
- President



Congressional Action

- Stimulus
 - \$400 million in CARES Act
 - Future relief
- Voting Reform Measures Provided
- What are Congress's powers?



Stimulus

- CARES Act
 - \$2 trillion relief measure for hospital systems, small businesses, individuals, states and localities
 - Includes \$4 million for states for election assistance
 - Requires a 20% match from states
 - Is more \$ needed?
- Some in Congress want more flexible \$ in next round of stimulus for states to:
 - Print additional ballots
 - Purchase postage
 - Acquire additional equipment, technology, & software to support the printing & processing of ballots
 - Recruitment or hiring of additional temp staff
 - Procure protective equipment & cleaning supplies



Voting Reform Measures

- Some are perennial and others are Covid-19 specific
- Reform ideas include:
 - Expanding voting by mail
 - Online or same-day voter registration
 - Safety provisions for polling stations and workers
 - No-excuse absentee voting by mail
 - Offering applications for absentee ballots on-line
 - Require states to begin processing absentee ballots at least 14 days before election day
 - Require states to create and publicize contingency plans (emergency poll locations, measures to protect the health of poll workers)



The Natural Disaster & Emergency Ballot Act

- Voters in all states have 20 days of early in-person voting and no-excuse absentee vote-by-mail
- States begin processing votes cast during early voting or by mail 14 days before Election Day to avoid delays in counting votes on Election Day.
- Guarantee that all voter registration applications submitted by mail or online before and 21 days prior to election day are deemed valid. Allow any state to have a deadline which is closer to Election Day.
- Require states and jurisdictions to establish a publicly available contingency plan to enable eligible Americans to vote in the case of an emergency and establish an initiative to improve the safety of voters and poll workers and recruit poll workers from high schools and colleges as well as from other State and local government offices.
- option of online requests for absentee ballots and require states to accept requests received before or 5 days prior to election day. Allow any state to have a deadline which is closer to Election Day.
- Guarantee the counting of absentee ballots postmarked or signed before the close of the polls on Election Day and received on or before the 10 days following Election Day.
- Ensure states provide self-sealing envelopes with prepaid postage for all voters who request a voter registration application, absentee application, or an absentee ballot.

NDMBA continued

- Require states to offer their downloadable and printable absentee ballots under the *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)* to domestic voters who requested but did not receive an absentee ballot for the 2020 election and to voters with disabilities who requested an absentee ballot and reside in a state that does not offer secure accessible remote ballot marking.
- Charge the Election Assistance Commission (EAC) with creating a uniform domestic downloadable and printable absentee ballot that can be used starting in 2022.
- Direct all states that do not already use ballot tracking systems to use envelopes with an Intelligent Mail barcode (IMb) to allow voters to track their ballot for the 2020 general election and successive elections until a state implements a domestic ballot update service.
- Provide additional accommodations for Native American voters including allowing tribes to designate ballot pickup and drop-off locations and not requiring residential address for election mail.
- Authorize funds necessary to reimburse states for the cost of implementing the Act, such as providing additional absentee ballots and prepaid postage, and purchasing additional ballot scanners and absentee ballot drop boxes.
- Provide \$3 million in additional funds to the EAC for supporting states in implementation
- *Michelle Obama* has endorsed. "There is nothing partisan about striving to live up to the promise of our country, making the democracy we all cherish more accessible and protecting our neighbors, friends and loved ones as they participate in the cornerstone of American life."



Congress's Powers to Set Elections

Constitution

- "the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but *Congress may at any time by law make or alter such regulations* except as to the places of choosing senators."
- Both congress and state law makers have control over when a congressional election is held, but congress has the final word if there's a disagreement

Federal Law:

- A trio of federal laws set Election Day for presidential electors, senators and US representatives as "the Tuesday next after the 1st Monday in November."
- Any change to this date requires an Act of Congress



Alternative Voting

- **Internet Voting**
 - Seems like an attractive option
 - However, there are security concerns
 - The American Association for the Advancement of Science and the Association for Computing Machinery - with a diverse group of organizations & experts in cybersecurity and computing sent an open letter to all governors, secretaries of state and other state election directors urging them not to allow the use of internet or voting app systems because of concerns with security which cannot be made more safe in the foreseeable future
- **Vote by Mail**
 - All Mail-In: Utah, Oregon, Washington, Colorado, Hawaii
 - Many others have some mail in options
 - Concerns: voter fraud due to lack of photo ID; stolen mail ballots then sent in fraudulently - But, no major reports



Voting in the House

- Currently, House Rules do not allow for the chamber to vote remotely or for committees to conduct formal hearings or business meetings without a physical presence.
- A rule change would require lawmakers to be in Washington to pass a resolution adopting remote work procedures, unless there is UC among members - unlikely
- Currently broad bipartisan interest in remote voting. But, Pelosi and McCarthy are skeptical about the ability and practicality of quickly implementing a virtual voting system.
- Remote voting raises many issues and concerns, and as well as constitutional issues.
- Any legal challenges would be a novel question for the court



Proposed Congressional Voting Reforms

- Pelosi tasked Chairs of the House Rules and Administration Committees to present options in terms of what is allowed under the constitution, under the rules of the house and what is possible technologically.
- Recommendation: Proxy Voting
 - Allows an absent member to designate a colleague to vote on their behalf
 - No general proxy - just can't let your party's leaders vote for you
 - Must be specific - members would have to direct each and every vote
 - Members would send a letter, electronically, to the clerk to authorize another member to vote on their behalf with exact instruction.
 - Pros: Members still in control of their votes
 - Cons: Some members would still have to come to the Capitol (Maryland and VA delegations??); if there are 20 procedural votes, the time it would take to get update instructions could be VERY long

Concerns with Voting Reforms

- Constitutional
- Policy



Constitutionality of Voting Reforms

- Rulemaking Power: the Constitution provides each chamber with wide discretion to “determine the Rules of its Proceedings” But this cannot conflict with other constitutional provisions.
- Connection between 2 Key Issues:
 - Presence
 - Quorum



Presence

What does “present” mean? We have technological options available now that the Framers could not possibly have envisioned. Do these provisions preclude remote voting?

The text of the Constitution clearly envisions the House and Senate meeting and voting in person.

- Article I, § 4 and the 20th Amendment require that Congress “shall **assemble**” once a year;
- Article I, § 5 authorizes a minority of Members to “compel the **Attendance** of absent Members” and states that neither house “shall, without the consent of the other, **adjourn**...to any other place than that which the two Houses shall be sitting”;
- Article I, § 6 makes Members immune from arrest “during their **Attendance** at the Session of their respective Houses,” and provides that Members “shall not be questioned in any other place...for any speech or debate in either House.”



Quorum:

- Article 1, Section 5 of the Constitution requires a quorum, defined as a majority of members in each chamber to be "present" to pass legislation
- House and Senate voting and quorum procedures have evolved over time.
- From the *Congressional Research Service* (CRS): **"For the House or Senate to authorize remote voting in a way that satisfies the quorum requirement** (and therefore permits either chamber to exercise its constitutional powers) it would **appear that either a majority of Members must be available on the floor to be counted towards a quorum in the traditional way, or the chamber must establish that those absent, but voting or participating remotely may nonetheless be counted towards a quorum.** The constitutionality of the latter approach appears to hinge on whether such a change to the rules would be "reasonably certain to ascertain" the "presence of a majority."
- But what does it mean to be 'present'?" In your seat or On Line? CLE example.



Policy Concerns of Voting Reform

- Congress is supposed to be a deliberative body – how do you do that remotely?
- Would these votes be vulnerable to fraud, cyber attacks?



Federal Courts and Voting:

- Review of Congressional Actions
- Role of Federal Courts



Review of Congressional Actions

- *US v. Ballin*:
 - Courts are reluctant to review House and Senate rules, but it did in 1892 in this case which looked at the Quorum requirement in the Constitution.
 - A statute was challenged on the basis that, while a majority was present in the House when the act was passed, a majority didn't cast votes on it.
 - A unanimous Supreme Court explained that what matters is whether a majority is *present*: "All that the Constitution requires is the presence of a majority, and when that majority are present the power of the House arises."
 - The Court also set an important standard for the judiciary's limited role in evaluating House and Senate rules: while each chamber is empowered to determine its own rules, **it may not do so by ignoring "constitutional restraints ... and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."** "Within these limitations" the Court reasoned, "all matters of method are open to the determination of the house" and "beyond the challenge of any other body or tribunal."



Role of Federal Courts

- Already looked at what the Courts have done in terms of voting in Congress, but lets take a quick look at what courts have done in terms of elections.
- Early Voting:
 - As an alternative to postponing an election, in some circumstances a state might seek to avoid an anticipated disruption by moving elections earlier on the calendar. The Supreme Court, however, has held that while states may allow voters to cast ballots before Election Day during an early voting period, a federal election cannot be conclusively decided before Congress's scheduled date.
- *From CRS:* Courts have divided on their authority to prolong or postpone voting hours in response to irregularities. The judiciary is more likely to intervene when the disruption is so severe that adhering to the regular election schedule would violate voters' constitutional rights to equal protection or due process.



Wisconsin

Wisconsin

- 1st state to have in-person voting amid a statewide stay-at-home order.
- Overwhelming # of requests for absentee ballots and the state had trouble getting supplies such as envelopes - 4x the number of absentee ballots than in 2016.
- Workers were concerned about safety at the polls , so officials had to consolidate voting places resulting in long lines. Many were seniors.
- Governor Tom Evers (D) tried to delay the state's primary which resulted in court challenges going all the way to the US Supreme Court.

US Supreme Court and Wisconsin - Majority

- The question for the court was a technical one: Was a federal judge entitled to change a state's absentee-voting procedures just days before an election? The answer, the majority said, was no.
- "Extending the date by which ballots may be cast by voters – not just received by the municipal clerks but cast by voters – for an additional six days after the scheduled Election Day fundamentally alters the nature of the election."
- "The court's decision on the narrow question before the court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of Covid-19 are appropriate,." "That point cannot be stressed enough."



US Supreme Court and Wisconsin – Minority

- Did not see this as a technical question – but rather an enfranchisement issue
- “Because gathering at the polling place now poses dire health risks, an unprecedented number of Wisconsin voters – at the encouragement of public officials – have turned to voting absentee”...”. Accommodating the surge of absentee ballot requests has heavily burdened election officials, resulting in a severe backlog of ballots requested but not promptly mailed to voters.” – *Justice Ginsburg*
- That justified a brief extension of the deadline for submitting absentee ballots

US Supreme Court and Wisconsin - Implications

- Reinforces idea that the Court is not bi-partisan.
- In the 5-4 Ruling, the Majority was comprised of the Republican nominated justices, who sided with the Republican party in Wisconsin, and the Minority was comprised of Democratic nominated justices, who backed the Wisconsin Democratic position.
- More litigation to come. Will the partisan divide continue?



Presidency

- My colleague has discussed Presidential issues, but I will just add a few points in closing.
- **Uncertainty** going forward
 - Laws governing elections could be changed by an Act of Congress
 - Review by the courts would often be novel cases - 1st impression
 - Would the President threaten to change the election?
- **Certainty** - Twentieth Amendment -
 - "the terms of the President and the Vice President shall **end at noon on the 20th day of January,** and the terms of Senators and Representatives at noon on the 3d day of January."

Hilary F. Jochmans Bio



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Hilary has over 15 years of political and government experience in Washington and New York. Most recently before founding the company, Hilary was the Director of the New York State Governor's Office in Washington for both Andrew Cuomo and David Paterson, and the Deputy Director for Eliot Spitzer. In that capacity, she served as the Governor's chief liaison with Congressional leadership, the NY Congressional delegation and federal agencies. Hilary also spent 11 years on Capitol Hill working for Senator Tom Carper of Delaware and for Congressman Gary Ackerman of New York.

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A native New Yorker, Hilary holds a B.A. from the University of Virginia and a J.D. from the George Washington University Law School. She is admitted to the US Supreme Court Bar and the New York State Bar. Hilary is an active member of the NYS Bar Association where she currently serves as the Co-Chair of the Committee on Legislative Priorities.

