

Conducting Elections During a Pandemic

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SUMMARY. At the beginning of 2020, many believed that the biggest threat to our elections was foreign interference, consistent with disinformation campaigns launched by our adversaries. But even with this lingering threat, it was expected that voter turnout in the 2020 presidential election would break records – perhaps even reaching the highest level of turnout since the nation saw more than 65% of eligible voters participate in the election of 1908, over a century ago (USEP, 2020). The onset of the pandemic brought much uncertainty, as election officials faced unprecedented challenges, unsettled law, and diminishing resources, while voters were torn between concern about our democracy and fear of contracting COVID-19. Widespread shortages of poll workers and safe polling locations, rushed transitions to mail voting, and insufficient funding could not diminish the democratic spirit, however, and we’ve seen primary turnout break records in some states. Most experts in the field believe that we should plan for the highest turnout in generations this fall, even as we expect that restrictions and fears due to the pandemic will be in full force. What’s also apparent, however, is that law, policy, and perhaps most importantly, administrative and informational practices in our highly decentralized administration of elections are not yet fully equipped to facilitate safe, secure, and convenient voting for 150 million Americans in the midst of a global health crisis. And while solutions like expanding mail voting will be necessary, no one solution will solve this problem, nor will all states find themselves able to offer the same options to all voters. We will need a multifaceted approach including easy mail voting, a massive recruitment of new poll workers to allow for safe and convenient in-person voting, and an unparalleled voter education effort to meet this challenge.

Introduction

By the beginning of March 2020, voters and election officials were feeling the effects of COVID-19 in the primary elections, including polling place closures, poll worker cancellations, and shifts to mail voting. A week after Super Tuesday voters were becoming increasingly concerned about the March 10, 2020 Michigan primary, which may have contributed to record mail voting in that election. By March 17, 2020, the pandemic’s impact on the primaries was palpable. While Arizona, Florida, and Illinois went forward with their primaries, Ohio saw a state court deny an order to postpone the primary, followed by an emergency executive order to postpone coming from the director of the Ohio Department of Health just hours before voting was to begin (Smith, 2020). Georgia followed suit, postponing its primary scheduled for March 24, 2020. Other than Wisconsin (which held its primary as scheduled on April 7, 2020, after much legal wrangling and confusion) and Ohio (which held its rescheduled primary on April 28, 2020, almost entirely by mail after the legislature disagreed with the election officials in the state), every other state with a scheduled primary in April 2020 postponed it. By July 2020, however, most states have held their presidential primaries, and we have learned some clear lessons about holding elections during a pandemic.

Lessons Learned from Primary Elections During the Pandemic

Resources are Lacking

A lack of resources seems to be the one constant from every one of these primaries. First and foremost among these is a shortage of poll workers. Typically, for a presidential general election, our nation relies upon more than one million volunteers to staff all the polling places and facilitate voting. Most poll workers in the United States are over the age of 60, the highest risk group for COVID-19 (Barthel & Stocking, 2020). Every single state has seen vast shortages of poll workers, and last-minute cancellations by those who had previously volunteered. And those volunteers who do staff the polls are often without adequate training, as in-person trainings are no longer held, and some get recruited at the last minute. Without an adequate number of poll workers, fewer polling locations can be open, and voters wait longer to vote.

In addition, even if an adequate number of poll workers can be recruited and trained, states are suffering from a lack of appropriate polling sites, which could lead to voters having fewer places to vote, or having to travel farther than usual. Polling

places are usually placed in local neighborhoods, close to the voters assigned to them, but many of them may be too small to accommodate social distancing or are located close to at-risk populations, like senior citizens. Schools may not be appropriate depending on the status of the school system. This means that states and counties are consolidating precincts, and that many more voters will vote in each site, and often at a location with which they are unfamiliar.

Finally, holding elections during a pandemic is more costly. As voting rules may change (sometimes at the last minute), polling places are relocated, and there are new options for voters (like voting by mail), the need for constant communication with voters becomes more critical and more expensive. States like Georgia, Iowa, and Michigan sent mail ballot applications to all voters in advance of their primaries, successfully boosting mail voting turnout and easing burdens on polling places but spent millions of dollars in the process. And as states are seeing vast revenue reductions in light of the pandemic, state election offices are seeing budget cuts just as the need for more funding becomes more crucial. Congress appropriated \$400 million earlier this year, but that fails to fulfill the dire needs of the states.

Toxic Partisanship is Poisoning the System

As demand for safer voting options increases, so too are the efforts of partisan politicians to game the system. This is most prominent in the false claims coming from President Trump that mail voting will somehow lead to “rigged” elections, despite the fact that the president, vice president, and many others in the White House all vote by mail (Steinhauser, 2020). There are basically three different approaches to mail voting in the United States. First, “universal” mail voting, where all registered voters receive a ballot in the mail, which is the system in place in Colorado, Hawaii, Oregon, Utah, and Washington, and the one likely to be implemented in California, Nevada, and Vermont this fall. Second, “no excuse” mail voting is in place in the vast majority of states, where any voter can request a mail ballot for a particular election, without needing any excuse. Finally, “excuse required” mail voting, where a voter may request a mail ballot but must provide a specific excuse, such as illness or travel, is the system in a minority of states, including Texas, though some states, such as Alabama, have extended excuses to include those related to COVID-19.

While almost all election officials of both parties are putting voters first and offering more options to vote safely (either by mail or in person), the partisanship does not stop at the White House. In Georgia, Iowa, and Ohio, Republican secretaries of state all requested more flexibility to offer options to their voters during the pandemic, only to have their Republican-dominated legislatures deny their requests. And Democrats are not immune, with some anticipatorily claiming “vote suppression” and possibly dissuading voters from participating in places like Kentucky where the primary election went particularly smoothly (Montellaro, 2020).

It is difficult enough to run an election in perfect circumstances, given the distrust that much of America feels for the rest, and other divisions that run through American society. But in a

pandemic, it becomes exponentially more challenging. Add in the constant factor of foreign interference and disinformation, where adversaries use our division against us, to diminish our confidence in elections, and we have a perfect storm. We will need partisans to put their immediate, selfish interests aside to put voters first and allow their voices to be heard.

The Courts are Struggling

We have never before held elections in an environment where voters are both enthusiastic to participate and fearful of infection at the same time, with shortages of poll workers and polling sites, diminished resources, and the constant threat of foreign interference. While there is no historical precedent for holding a presidential election in this environment, there are two legal precedents that could apply. First, the *Anderson-Burdick* test which states that if an election law imposes a “severe burden,” strict scrutiny applies when determining whether the election procedure unduly burdens the fundamental right to vote. (*Anderson v. Celebrezze*, 1983; *Burdick v. Takushi*, 1992). Second, the *Purcell* principle, which restricts the ability of states to impose changes to election procedures close to an election (*Purcell v. Gonzalez*, 2006). While the *Burdick* test results in the most comprehensive balancing of interests, when an election law change has been made in close proximity to an election (as we now find ourselves less than three months before voting ends), courts have tended to give the *Purcell* principle precedence. However, our current situation is unique, and while *Purcell* has typically applied to last-minute changes that could burden voters’ rights, we are in many cases seeking to evaluate emergency provisions to ease burdens on voting during a crisis like the pandemic.

In just the last few months, we have seen several courts, at both the state and federal level, deal with changes to voting procedures in different, often in contradictory ways. In Ohio, the state court declined to postpone the March 17, 2020 primary at the governor’s and secretary of state’s request, leaving the director of the Ohio Department of Health to postpone the primary at the last minute by executive order (Corasaniti & Saul, 2020). The Ohio Supreme Court then upheld the postponement order just hours before the polls were to be opened.

In Wisconsin, less than 24 hours before the polls were to open, the state supreme court overturned the governor’s order to postpone the April 7, 2020 primary, while the U.S. Supreme Court intervened to overturn a lower court order extending the time to count mail ballots (Neely, 2020). And most recently in Alabama, the U.S. Supreme Court in a 5-4 vote reversed a lower court ruling that eased the mail ballot requirements for voters, reinstating some of the toughest mail balloting restrictions in the nation that required a notary or two witnesses to verify every ballot and a copy of photo identification to be included even during the pandemic (Barnes & Viebeck, 2020).

Both of these cases were largely decided on the basis of administrative law and separation-of-powers doctrines, and given the flexibility states have to dictate how and when candidates are nominated in primaries and caucuses, the states (and the political

parties) had some degree of flexibility. But as states prepare for the general election, the stakes are higher, and despite tweets from the president, (Shabad, 2020), the voting in the 2020 election will be completed on November 3, 2020 (National Task Force on Election Crises, 2020). We are beginning to see more cases involving executive or legislative authority to ease voting requirements due to COVID-19, including sending ballots to all voters, easing mail ballot witness/notary requirements, early voting options, polling place locations, and other considerations (Levitt, 2020).

While it is understandable that courts are reticent to change election policy, particularly in light of the *Purcell* principle, it is also clear they have not quite determined their proper role during this unprecedented situation. Voters want to participate but they are also scared, and it may be that, with toxic partisanship and a lack of resources, courts need to reconsider their role and be more willing to apply a *Burdick* test to balance which measures are necessary to facilitate the right to vote, while maintaining the integrity of the ballot, and which may be superfluous given the strong interest in each individual's right to vote.

What Must Happen in November?

COVID-19 raised challenges during the middle of the primary calendar with little time to address those challenges, creating significant problems. However, it also enabled us to view those problems during elections that were, in essence, nominating contests with relatively low turnout. In some ways, we may be fortunate that the pandemic's effects were first felt early this year rather than in the fall, enabling us time to build further resilience into our election system. However, a presidential general election will see turnout at least double, if not triple, that of the primaries, and partisan tensions will be higher. Preparing for the election now — and defining how to measure success for this election — will be crucial.

Over the last half century, perhaps contrary to conventional wisdom, it has become easier to vote than ever. Registering to vote is simpler, with 39 states and the District of Columbia offering online voter registration (NCSL Online Voter Registration, 2020), while 19 states and the District of Columbia have passed automatic voter registration (NCSL Automatic Voter Registration, 2020). Thirty states and the District of Columbia belong to the Electronic Registration Information Center (ERIC), which enables states to reach out to potentially eligible voters for registration and keep state voter lists more up-to-date (ERIC, 2020). Voters in 21 states and the District of Columbia have access to same-day voter registration, where they can register and vote at the same time (NCSL, 2019). And easy mail voting and early voting is available to more voters than ever before in the vast majority of states (NCSL Polling Place, 2020).

We are fortunate that the election environment is more voter-centric than ever but, given the challenges related to the pandemic, voters must have access to different voting options and be made aware of those options. While no-excuse mail voting is available to most voters in the country, it is common in most states for most voters to vote in person. Many states, including Georgia, Kentucky,

North Carolina, Pennsylvania, and Wisconsin, have traditionally seen less than 10% of all ballots returned by mail. Several of these states, including Georgia and many others, saw record numbers of mail ballots during the primaries, often driven by mailing mail ballot applications to all voters. States are considering ways to continue easing the mail voting process, including mailing applications to all voters again (as Michigan is doing) or creating an online mail ballot application portal (as in Georgia).

But mail voting is not for everyone, and it will not save us from the pandemic. Mail voting requires significant advance planning, can lead to voter errors, and is unfamiliar to many. Even in states where election officials have actively promoted mail voting, millions of voters have chosen to vote in person, even during a health crisis. No matter how many mail ballots are requested, election officials should plan for a very large number of citizens voting in person. Officials should promote early in person voting for those that prefer or need to vote in a polling place. Where possible, states should expand early voting hours and locations to try to direct more in-person voting to before Election Day so that we can facilitate safe, convenient in person voting options that minimize the need for large numbers of people to congregate together at the same time.

As discussed above, as a nation we have relied upon an army of more than a million, primarily older poll workers to facilitate elections. But in the current environment, that isn't safe, desirable, or possible. We must find new ways to engage younger, healthy individuals to help run our elections, many of whom may bring important skillsets, like technology or language skills, to the process. This will require a new effort in partnering with the business community, colleges and universities, and others to recruit a new generation of poll workers. Businesses should offer paid time off and schools should offer credit for poll worker service and training and promote poll worker service via their platforms. States should create central, online poll worker sites to make it easy to volunteer.

Along these lines, we will need rethink the vision of the 21st century polling place. Polling places this year, and perhaps for the foreseeable future, will need to be larger to accommodate distancing and consolidation of many precincts under a single roof. A model may be the mega-voting-center that was created in Louisville, KY, at the Kentucky Expo Center, where thousands of voters voted in the primary. Sites with large, open areas that accommodate distancing and are centrally located with ample parking and access to public transportation are especially ideal. States are already planning to adopt this model for early voting (and perhaps Election Day voting), partnering with the NBA to use their arenas in cities like Atlanta, Detroit, and Milwaukee (Parks & Swasey, 2020). When appropriately staffed, such sites enable hundreds or thousands of citizens to vote with minimal lines and sufficient social distancing.

Perhaps most importantly, election officials should begin identifying appropriate voting sites and recruiting and training poll workers immediately. This should include recruiting and training far more poll workers and securing more voting sites than they anticipate needing. No matter how much states promote mail

voting, tens of millions of Americans are going to need safe and convenient locations to vote in person.

Regardless of how each state plans to meet the challenges of the pandemic, one thing is certain: voters will experience many changes to the election process that they may not be prepared for, particularly if they are less-frequent voters. Election rules, polling places, deadlines, etc., all could change, in some cases quite rapidly. Election officials and other groups will need to engage in the most broad-based voter education campaign in our nation's history, regularly communicating with voters. This is even more crucial since we are still operating in an environment where foreign adversaries are spreading disinformation to weaken confidence in our democracy.

We live in an environment where we need to plan for everything, from something as trivial as a trip to the grocery store to things as significant as expressing our democratic voice. While each voter may have the right to register or request a mail ballot at the deadline or get in line to vote minutes before the polls close, that is not a recipe for success. Thus, while we're focused appropriately on the preparedness of election officials, we will also have to prepare the electorate so they can plan to vote in a way in which they're most comfortable, and which maximizes the success of their voting experience.

While the \$400 million that Congress already appropriated to the states (as part of the CARES Act) is a good start, covering some expenses from the primaries, it is woefully inadequate to fund necessary efforts for the fall. Election officials across the political spectrum agree that we will need billions of dollars to recruit enough poll workers, secure appropriate polling locations, keep our electorate informed, and process the 150 million ballots that will be cast through various means. Particularly as state budgets are stretched, we will need the federal government to step up and assist the states in administering the upcoming federal election.

Unfortunately, most Americans and the media have somewhat unrealistic expectations for elections, even in the best of circumstances. Any time where 150 million Americans are doing the same thing, nationwide, in a system run by volunteers, there are bound to be some problems and delays. While there are significant instances, even today, of barriers to the franchise (sometimes intentionally-placed to affect traditionally-disenfranchised groups), most voting issues are not the result of intentional malfeasance, voter suppression, or partisan manipulation. Many problems that occur are merely the natural result of an imperfect system under stress; our adversaries know this, and seek to inflame concerns about lines and other problems to further diminish voter confidence. During a pandemic, we are exceptionally vulnerable to such machinations and we should be especially patient, understanding that those running elections are public servants — our neighbors and fellow citizens — doing the best they can under trying circumstances.

Patience will be doubly required when it comes to waiting for election results. While we normally expect results just hours (or minutes) after the polls close, those expectations cannot be met as we expand mail voting much more widely. Many ballots won't be processed until after the polls close, and results may not be available in some states until days after the election. Election officials and the media have been responsible in resetting these expectations, and that must continue, particularly as foreign governments may seek to sow further discord by alleging that the normal, if time-consuming, process of legitimately counting ballots is somehow evidence of fraud. 🦠

Recommendations for Action

Federal government:

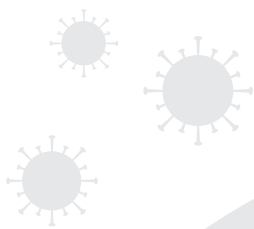
- Congress must fund the administration of the forthcoming election. As state budgets are stretched, the federal government must step up and assist the states in administering the upcoming federal election during the public health emergency.

State governments:

- Legislatures or the executives should expand voter options to include easy mail and early voting.
- Election officials should prioritize efforts to recruit new poll workers and provide an adequate number of convenient and appropriate voting locations.
- Election officials should embark on an historic voter education initiative to foster understanding of the challenges caused by the pandemic and the changes that will follow. In particular, officials should reset expectations regarding the time that may elapse before results are known.

Courts:

- Courts need to reconsider their role and be more willing to apply a *Burdick* test to balance which measures are necessary to facilitate the right to vote, while maintaining the integrity of the ballot.



About the Author

David Becker is the Executive Director and Founder of the non-profit Center for Election Innovation & Research. Prior to founding CEIR, David was Director of the elections program at The Pew Charitable Trusts, where he spearheaded development of the Electronic Registration Information Center (ERIC), which to date has helped a bipartisan group of thirty states update over 10 million out-of-date voter records, and helped those states register millions of new eligible voters. Before joining Pew, David served for seven years as a senior trial attorney in the Voting Section of the Department of Justice's Civil Rights Division, overseeing voting rights enforcement in several states, including California and Georgia, and served as lead counsel on major voting rights litigation, including the case of *Georgia v. Ashcroft*, ultimately decided by the U.S. Supreme Court. David received both his undergraduate and law degrees from the University of California, Berkeley.

References

- Anderson v. Celebrezze, 460 US 780 (1983).
- Barnes, R., & Viebeck, E. (2020). Supreme Court says Alabama does not have to loosen ballot restrictions because of virus. *Washington Post*. Retrieved July 17, 2020, from https://www.washingtonpost.com/politics/courts_law/supreme-court-says-alabama-does-not-have-to-loosen-ballot-restrictions-because-of-virus/2020/07/02/fd7d32de-bcca-11ea-8cf5-9c1b8d7f84c6_story.html
- Barthel, M., & Stocking, G. (2020). Older people account for large shares of poll workers and voters in U.S. general elections. *Pew Research Center*. Retrieved July 17, 2020, from <https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/>
- Burdick v. Takushi, 504 U.S. 428 (1992).
- Corasaniti, N., & Saul, S. (2020). Ohio's Governor Postpones Primary as Health Emergency Is Declared Over Virus. *The New York Times*. Retrieved July 17, 2020, from <https://www.nytimes.com/2020/03/16/us/politics/virus-primary-2020-ohio.html>
- Electronic Registration Information Center (ERIC)(2020). Retrieved July 17, 2020, from <https://ericstates.org/>
- Levitt, J. (2020). The list of COVID-19 election cases. Retrieved Aug. 3, 2020, <https://electionlawblog.org/?p=111962>
- Montellaro, Z. (2020). Coronavirus threatened to make a mess of Kentucky's primary. It could be a model instead. *Politico*. Retrieved July 17, 2020, from <https://www.msn.com/en-us/news/politics/coronavirus-threatened-to-make-a-mess-of-kentuckys-primary-it-could-be-a-model-instead/ar-BB16kIZL?li=BBnbfcl>
- National Conference of State Legislatures (NCSL)(2019). Same Day Voter Registration. Retrieved July 17, 2020, from <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>
- National Conference of State Legislatures (NCSL Automatic Voter Registration)(2020). Automatic Voter Registration. Retrieved July 17, 2020, from <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>
- National Conference of State Legislatures (NCSL Online Voter Registration)(2020). Online Voter Registration. Retrieved July 17, 2020, from <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>
- National Conference of State Legislatures (NCSL Polling Place)(2020). Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options. Retrieved July 17, 2020, from <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>
- National Task Force on Election Crises (2020). Can the President Cancel or Postpone the General Election? <https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f22c800c516197500f1c997/1596114945315/ElectionTimingGuide.pdf>
- Neely, B. (2020). Wisconsin Plans To Vote In Person Tuesday After Last Minute Chaos. *NPR*. Retrieved July 17, 2020, from <https://www.npr.org/2020/04/06/828191015/wisconsin-governor-effectively-reschedules-tuesdays-primary-election>
- Parks, M., & Swasey, B. (2020). Need A Polling Place With Social Distancing? 3 NBA Teams Offer Venues. *NPR*. Retrieved July 17, 2020, from <https://www.npr.org/2020/07/02/886566523/need-a-polling-place-with-social-distancing-3-nba-teams-offer-venues>
- Purcell v. Gonzalez, 549 U.S. 1 (2006).

Shabad, R (2020), Trump floats delaying the election, but he can't do that. *NBC*. Retrieved Aug. 3, 2020, <https://www.nbcnews.com/politics/2020-election/trump-suggests-delaying-2020-election-n1235300>

Smith, A. (2020), Ohio primary called off at last minute because of health emergency. *NBC*. Retrieved Aug. 3, 2020, <https://www.nbcnews.com/politics/2020-election/ohio-governor-calls-state-postpone-tuesday-s-primary-elections-n1160816>

Steinhauser, P. (2020). Trump claims mail-in ballots 'will be printed by foreign countries.' *Fox News*. Retrieved July 17, 2020, from <https://www.foxnews.com/politics/trump-claims-mail-in-ballots-will-be-printed-by-foreign-countries>

United States Election Project (USEP)(2020). National General Election VEP Turnout Rates, 1789-Present. Retrieved July 17, 2020, from <http://www.electproject.org/national-1789-present>