



Absentee and Mail Ballots in America: Improving the Integrity of the Absentee and Mail Balloting

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Introduction

Recently, a growing movement has expanded the once limited use of absentee and mail ballots, leading to the mailbox becoming the ballot box. While mail ballots were used in the past primarily in unique circumstances for military votes and those absent on Election Day, only in the 1990's did Oregon become the first state to conduct a statewide race using mail as the exclusive means to vote.² Voting by mail in the United States has grown from an infrequently and relatively narrowly used method of voting for those absent to a more dramatic increase in use with the movement in Western states toward more voting by mail.

This paper will look at the early history of absentee and mail voting in the United States, and how it has increased in use to a point in our current election process where now about a quarter of all voters cast their ballots by mail. This paper will also look at some positive and negative features of the mail voting experience that a jurisdiction (and the voting population) should weigh when determining whether to expand the use of mail voting as an option or to move solely to that system of voting.

Mail voting is fairly popular with most voters, however so are other available options of voting, including early voting and Election Day voting. This paper will look at the popularity of and how voters view the use of mail voting and other means of voting. The paper will also look at the unique problems associated with mail voting when compared with the in-person casting and immediate tabulation of votes. The paper will explore the different types of voter fraud, counting standards, and irregularities sometimes associated with mail voting and how states have responded to mitigate the unique vulnerabilities associated with mail voting. The paper will look at legislation across the country that may increase the use of voting by mail, attempt to improve the functionality and security of mail voting, or reduce the potential for absentee or mail voter fraud with a more modernized means of confirming identity. Finally, the paper will provide some recommendations to improve the mail ballot process.

History of Absentee/Mail Voting

The history of absentee voting goes back to the origins of our country because there has always been some voters, either civilian or military, who were not able to be present at their precinct due to required or temporary absence or deployment. Despite these circumstances, most

² JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 14 (2006).

of the early period voting in America was strictly confined to precinct balloting due to many reasons, including primarily the prominent tradition of voting in person and in a very public way, by voice vote, which required the presence of the voters.³ Long before the future Australian ballot reforms, voting “viva voce” publicly was the customary norm in the early colonies, and the law in six of the original colonies and many new states joining the new country.

For example, this practice of voting in Alexandria, Virginia was described as follows:

Before the Civil War, Virginians voted by voice, "viva voce", in which each and every voter called out the name of the candidate they wanted for each office in public. Each voter would ascend, one by one, onto a raised platform to voice their vote. There, election clerks sat at tables and inscribed on the left side of each page of their book of the poll, the name of the voter as he came before them and then indicated by number or tick across the page his choice of candidates for each of the many offices being filled at that election.⁴

Therefore, in most cases, if an individual were absent from the county of residence, then the opportunity to vote would not be available.⁵ The thought of voting absentee in another state simply did not reflect the existing values of the day in voting.⁶

Another factor was that the number of men who served away from home in a standing army was relatively low. As a result, the states did not feel the requisite public pressure to change tradition or practice to accommodate these citizens despite the apparent exigent circumstances. Another factor – still true today - is the reminder that states independently ran their own elections with no coordination with other states or oversight from the federal government.

As a result, even if a few states found unique ways to accommodate absent military voters, that particular process would only apply to a limited number of their voters and was never an adopted uniform process that would accommodate deployed military from other states to vote absentee. Therefore, even for the men serving in the army, most were still required to be present in the proper precinct or county to vote.

History does document a few exceptions to the rule. In one instance, men from a New Hampshire town deployed with the Continental Army requested that they be permitted to cast their votes by proxy in a local election due to their absence. In that instance, this request was

³ DONALD S. INBODY, *THE SOLDIER VOTE: WAR, POLITICS, AND THE BALLOT IN AMERICA 2* (2016).

⁴ Emma of Alexandria, *Elections in Alexandria*, <http://www.emmaofalexandria.net/elections-in-alexandria.html>, citing University of Virginia, Institute for Advanced Technology in the Humanities, *Voting Viva Voce: Secrecy in Voting in American History: No Secrets There*, <http://sociallogic.iath.virginia.edu/node/30>. Even up to the 1860 presidential election, approximately 10% of Americans voted in a very public manner. *Id.*

⁵ University of Virginia, *supra* note 4. Though a system of proxy voting developed in the mid-nineteenth century that allowed landholders to vote while remaining at home. James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 *MERCER L. REV.* 331, 337 (2014).

⁶ Inbody, *supra* note 3 at 1-3.

actually granted.⁷ However, good intentions are often not enough to overcome the general rule. For example, in 1777, the New York Committee of Safety, an interim civilian government institution established after the British departed, specifically authorized soldiers to vote at polling places near their duty stations and not necessarily their home district. However, the New York Legislature quickly overrode that idea, requiring that all persons vote in the district where they actually resided.⁸

Similarly, partial attempts were also made to allow deployed soldiers to vote absentee in the War of 1812, particularly in Pennsylvania and New Jersey, which enacted laws to allow soldiers stationed more than two miles from their homes to vote by absentee ballot.⁹ However, in a sign of the times, these laws were successfully challenged as unconstitutional or legislatively repealed.¹⁰

With the large number of soldiers in the Civil War, the first substantial attempt to accommodate absent military members was made by the Union, in which soldiers were allowed to cast ballots in the field or, in the alternative, family members were able to actually vote absentee ballots for deployed soldiers by proxy.¹¹ Many of the Northern states were part of a concerted effort to transport the election to soldiers by shipping mail paper ballots and sending election commissioners to the battlefield to collect ballots in the 1864 Presidential Election. As a result, many soldiers were able to vote in camps and hospitals established under the onsite supervision of administrators or state officials. But while there were a number of states that passed legislation to accommodate the unique situation of the deployed soldiers of the Union Army, there were just as many that did not take any additional steps to assist these voters with some form of absentee voting. In the end, many either went home to vote or did not vote at all.¹²

Unfortunately, politics was part of the calculus. While many Republican states at the time approved additional options to allow Union soldiers to vote by absentee, many Democrat states failed to take any action to set up an alternate way of voting, reflecting concerns of the Democratic Party of the potential partisan disadvantage from large scale voting by the Union Army against the Democratic nominee for President.¹³

Turning to the positive for deployed soldiers voting, there were examples of successful steps by the states to administer the voting process in the Civil War for soldiers in the field. For

⁷ *Id.* at 4.

⁸ *Id.*; New York Committee on Safety: “To aid the war effort and fill the void of civil government left when British colonial institutions collapsed, the Continental Congress recommended each colony establish a committee of safety to execute resolutions – especially when the legislature adjourned. Smaller than the cumbersomely large Provincial Congress, the New York Committee of Safety could act more efficiently. Occupying a somewhat vague position within both the civil government and military hierarchy, the short-term Committee worked with General George Washington to preserve order amidst the ongoing struggle.” Joshua Canale, “New York Committee and Council of Safety,” George Washington Digital Encyclopedia, Mount Vernon Estate, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/new-york-committee-and-council-of-safety/>.

⁹ Inbody, *supra* note 3, at 4.

¹⁰ *Id.* at 4.

¹¹ *Id.*; see also Michael P. McDonald, *A Brief History of Early Voting*, HUFFINGTON POST, Sept. 28, 2016, https://www.huffingtonpost.com/michael-p-mcdonald/a-brief-history-of-early_b_12240120.html.

¹² Inbody, *supra* note 3, at 5.

¹³ *Id.*

example, records indicate that Pennsylvanian officials “prepared mailing materials for conveying the votes gathered at the front” and one state official listed in his diary that among the supplies sent to the armies were “poll books and tally lists, copies of laws, detachment, envelopes” and stamps, in order to supervise the voting in the battlefield.¹⁴ These poll books indicate that, in the end, many soldiers were able to effectively cast ballots for presidential electors in 1864.¹⁵ Similarly, Ohio officials produced separate envelopes for the soldiers to vote in the federal “presidential election” in November and even provided a separate envelope for the separate Ohio state election in October of 1864.¹⁶

With the inconsistent, non-uniform efforts, about 150,000 of the million-man Union Army voted in the 1864 General Election, and a large number of soldiers were able to return home to vote in person.¹⁷ In the end, approximately 230,000 Civil War soldiers and sailors voted out of 4 million votes nationwide – approximately 5.8% of the total vote.¹⁸

The Slow Early Growth of Absentee Voting

In the nineteenth century, a tsunami of electoral corruption had flooded national and local elections in America. Corruption and fraud were far too widespread, and in close elections, significantly impacted elections and the will of the people. In that era, both major parties were engaged in significant efforts to steal and buy votes in the 1876 presidential election, a race that ended in deadlock. Hayes won by a single, disputed electoral vote in a congressionally created commission.¹⁹

Subsequent charges of ballot tampering, vote buying, electoral irregularities and coercive voting by corrupt machine politics in the 1884 and 1888 presidential elections resulted in the renewed push for voting reforms in America.²⁰ The distaste of widespread corruption and fraud

¹⁴ “Mailing proxy votes, ballots or tally sheets was part of the 1864 absentee voting procedures for Connecticut, New York, Ohio, Pennsylvania, and West Virginia. Soldiers and sailors voted in camps and hospitals under onsite inspection by appointed clerks or state officials. For instance, Pennsylvania officials prepared mailing materials for conveying the votes gathered at the front. State official David McKelvy listed ‘Poll Books and tally lists, copies of laws, detachments, envelopes and 960 12 cent P.O. stamps and 320 3 cent P.O. stamps’ in the account of his trip to oversee voting in the field.” Lynn Heidelbaugh, “Absentee Voting in the Civil War: Ohio Cover,” Smithsonian National Postal Museum, Nov. 2012, <https://postalmuseum.si.edu/collections/object-spotlight/tally-sheet-cover.html> (internal citations omitted) (citing Russ W. Carter, *WAR BALLOTS: MILITARY VOTING BY MAIL FROM THE CIVIL WAR TO WWII* 2-15 (2005) and David McKelvy et al., *Notes and Documents: Soldier Voting in 1864: The David McKelvy Diary*, 115 *PENN. MAGAZINE OF HISTORY AND BIOGRAPHY* 371, 390 (Jul. 1991)).

¹⁵ Inbody, *supra* note 3, at 41-44. Not all states provided means for absent soldiers to cast ballots, either in the field or by proxy. *Id.*

¹⁶ Heidelbaugh, *supra* note 14 (“The absentee vote in this [state] election made up nine percent of the vote. In the presidential election, Ohio’s qualified military absentee voters (white men over the age of 21) cast 12 percent of all ballots.” (internal citations omitted) (citing Josiah Beaton, *VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR* 77-78 (1915)).

¹⁷ Inbody, *supra* note 3, at 5.

¹⁸ Fortier, *supra* note 2, at 34.

¹⁹ John Fund, *How to Steal an Election*, *CITY JOURNAL* Autumn 2004, <https://www.city-journal.org/html/how-steal-election-12824.html>.

²⁰ Norman J. Ornstein, *The Risky Rise of Absentee Voting*, *The Washington Post*, Nov. 26, 2000, <https://www.aei.org/publication/the-risky-rise-of-absentee-voting/>.

was so overwhelming to citizens that by 1889 at least nine states had adopted secret ballot reforms, and by 1892, over 38 states had reformed their practices to require secret ballots.²¹

The Australian ballot reforms of secrecy and private voting in America had been specifically implemented to reduce this voter fraud and corruption. As a result, this history and new reforms tamped down any enthusiasm or calls for increased use of absentee mail voting. The Australian ballot reforms instead called for in-person voting of official ballots in a controlled environment, not remotely by mail.²² These reforms also limited the distribution of official ballots to only registered voters *inside a polling place* staffed by election officials and which required private voting booths to ensure secrecy in casting votes.²³ The reforms were an all-out attempt to regulate an out-of-control fraudulent electoral system, and many claimed the reforms worked. For example, the turnout in New York State elections dropped some 15 percent after the anti-fraud measures took effect.²⁴

For decades to come, the Australian ballot reforms impacted any consideration of absentee voting where the potential for ballot fraud may arise. For example, between 1911 and 1938, while many states had started to adopt some excuse absentee voting, many of these laws had been challenged and restricted for violating secrecy or privacy requirements set in law or state constitutions.²⁵ By the 1936 election, only about 2% of 45 million votes were being cast by absentee ballot, and in the ensuing years of the twentieth century, absentee ballot voting remained a very limited and restricted means of casting a ballot in the nation.²⁶

During World War II and into the 1950's, there was specific legislation passed to improve and promote overseas absentee voting by the military; however, absentee voting by the civilian population remained fairly limited in use. By 1960, it was estimated that less than 5% of voters had cast absentee ballots in any election, and that small percentage remained steady into the early 1970's when the absentee voting rate remained between 4-5% of the overall vote in presidential general election years.²⁷

Nationwide, in the later 70's and early 80's, there were a few additional reforms to accommodate overseas citizens and military absentee mail voters, but there was no marked increase in the use of domestic absentee ballots. Once "excuse" absentee voting in California shifted to "no-excuse" absentee voting in 1978, the use of mail ballots slightly ticked up to 6.2% of the overall vote. After California had shifted to "no-excuse" in the voting of absentee ballots, a number of states slowly began to move in that direction in the 1990's. By 2004, over 26 states

²¹ S.J. Ackerman, *The Vote That Failed: Old style ballots cast illegally in Indiana helped topple a president then he helped topple them*, SMITHSONIAN MAGAZINE, Nov. 1998, <https://www.smithsonianmag.com/history/the-vote-that-failed-159427766/>.

²² See Fortier, *supra* note 2, at 8-10.

²³ *Id.* at 9-10.

²⁴ Fund, *supra* note 19.

²⁵ Fortier, *supra* note 2, at 10.

²⁶ *Id.* at 34.

²⁷ *Id.* at 12, 34.

were offering “no-excuse” absentee voting to citizens and the percentage of voters who voted by mail had increased to approximately 14.5% of a total 123 million votes nationwide.²⁸

While California was the first state to drop the requirement of an excuse to vote by mail, it was not until the mid-1990’s that Oregon conducted the first statewide mail-only election for a race to fill an open federal Senate seat.²⁹ By 2000, Oregon had become the first state to adopt all vote-by-mail for all elections when a citizens’ initiative passed with nearly 70% approval.³⁰ This was quite a significant change, particularly with most of the country still voting in polling places on Election Day.

In subsequent years, Washington and Colorado would join Oregon after they similarly witnessed the gradual growth of voters who decided to primarily use the mail system to receive and cast their ballots. Due to increasing popularity and potential administrative efficiencies, both of these states shifted to all-mail voting processes in 2011 and 2013, respectively.³¹

Currently, there are increasing signs that Utah may become the next state to move to an all-mail voting system. Once legislation authorized Utah counties to individually move to all-mail voting if they chose to do so, Utah voters continued to trend toward choosing to use the mail system to receive and vote ballots. Lawmakers do not normally take voting choices away from voters unless they show a clear preference for voting a certain way, and the trend in Utah appears to be clearly in the direction of mail voting. For example, over 772,000 Utah citizens voted by mail out of a total of 1.1 million total votes cast overall in the 2016 Presidential Election.³²

As previously witnessed in Colorado, Utah is rapidly approaching an election administration logistical tipping point where a significant majority of voters have shifted away from other methods of voting – early in-person or Election Day voting – to a predominantly mail system of voting. This often occurs when local election officials push and persuade voters to try mail voting in order to reduce the logistical costs associated with increasing precincts to accommodate Election Day voting. Once this shift happens, election officials are then more able to logically make the budgetary and administrative case to lawmakers to justify the move from expensive early and precinct voting to only one method of voting – mail voting.

While relatively few states have dramatically moved to all-mail voting systems, currently 29 states, including the District of Columbia, do authorize a “no-excuse” absentee or mail voting

²⁸ *Id.* at 13-15, 22, 34.

²⁹ Oregon Secretary of State, Oregon Vote-by-Mail (2000), <https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf>. The primary for the special Senate election was conducted by mail in December 1995 and the general election was conducted by mail in January 1996. Oregon had previously conducted two statewide special elections on ballot questions by mail, in June 1993 and May 1995. *Id.*

³⁰ *Id.*

³¹ Olivia B. Waxman, *This Is How Early Voting Became a Thing*, TIME, Oct. 25, 2016, <http://time.com/4539862/early-voting-history-first-states/>.

³² U.S. Election Assistance Commission, The Election Administration and Voting Survey, 2016 Comprehensive Report, June 29, 2017, at 25, https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf [hereinafter EAVS].

option which provides a mail ballot opportunity to voters.³³ There are also 18 states that allow certain elections - usually local, municipal, or certain primary elections - to be conducted by all mail ballots when it makes economic sense for the locality to do so.³⁴

Another 19 states, such as Indiana, South Carolina, and Virginia, allow its citizens to vote absentee with a valid excuse or when they qualify for one of many statutory reasons to vote early by mail or in-person.³⁵ In these states with an “excuse” option, many voters choose to vote by mail. In Indiana, for example, out of 2.8 million total voters in the 2016 election, there was significant absentee voting with over 943,000 ballots returned, almost a third of all voted ballots.³⁶

Growth of Absentee and Mail Ballot Voting – 2016 and 2018

Americans love options and choices: choices with their cars, cable channels, and yes, even their options in voting. Election Day, early voting, and vote by mail have all become options for many voters in a busy mobile society. Vote by mail has quietly become a comfortable option for the elderly, the disabled, and now a significant minority of all voters in the country, adding a level of convenience and flexibility for a voter who may not be able to vote on a single Election Day or may not want to vote in person at a precinct or early voting site.

Out of the 140 million Americans who voted in the 2016 election, over 33.3 million returned their absentee mail ballot to be counted, with 23.7% of voters casting ballots early by mail.³⁷ In relation to early in-person voting or voting on Election Day, the vote by mail option is gradually increasing in overall use by voters as a percentage compared to other means of voting.

The statistics seem to confirm that voters are generally more likely to vote by mail if there is no excuse required for voting by mail. For example in 2016, 29% of all voters decided to submit their ballots by mail in no-excuse absentee states, compared to only 9% where an excuse is required.³⁸ If given the option, a certain number of voters will decide to vote by mail.

It should be no surprise that Colorado, Oregon, and Washington have the highest percentage rates of mail voting as these states have formally transitioned to a system where all registered voters are sent a mail ballot to vote, the ballot should be returned by mail or to a designated return box, and only a relatively small number of voters still vote in person - either early or on Election Day. What is as remarkable is the incremental yet significant growth of no-

³³ National Conference of State Legislatures, Absentee and Early Voting, Jan. 25, 2019, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>. For examples of no-excuse laws, *see* Ariz. Rev. Stat. § 16-542(A); Minn. Stat. § 203B.04(1); N.C. Gen. Stat. § 163A-1309(a); Utah Code Ann. § 20A-3-304(2).

³⁴ Absentee and Early Voting, *supra* note 33. For examples of these laws, *see* Fla. Stat. § 101.6102; Idaho Code § 34-308; Neb. Rev. Stat. § 32-952; Wyo. Stat. § 22-29-115.

³⁵ Absentee and Early Voting, *supra* note 33. For examples of these laws, *see* Ala. Code § 17-11-3(a); Ind. Code § 3-11-10-24(a); S.C. Code § 7-15-320; Va. Code § 24.2-700.

³⁶ EAVS, *supra* note 32, at 25.

³⁷ *Id.* at 8, 25.

³⁸ MIT Election Data and Science Lab, Voting by Mail and Absentee Voting, <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting>.

excuse mail voting as more voters have become more comfortable with voting by mail and regularly voting that way each election.

For example, in California, no-excuse absentee or mail ballots now represent more than 50% of all ballots cast, with over 8.5 million mail ballots cast out of a total of 14.6 million votes.³⁹ Also, vote by mail has become a sizeable method of voting in many battleground states so it receives a lot more attention from the media and political observers. Three significant examples include Florida, Ohio, and Arizona. In the 2016 election, over 28.4% of 9.6 million Florida voters cast their ballots by mail, returning over 2.7 million vote-by-mail ballots to election officials.⁴⁰

Even though it was a midterm, there was no correlating dip in the number of mail ballots voted in the 2018 midterm elections from 2016, when over 3.4 million voters requested mail ballots for the elections.⁴¹ When the dust settled in the 2018 midterms, over 2.6 million voters (or 28.7% of all Floridians who voted) had returned their mail ballots to be counted, almost the same number as had voted by mail in the 2016 Presidential Election.⁴²

Ohio is another battleground state where voters returned over 1.2 million absentee mail ballots to be counted in the 2016 Election, a number which equals 21.5% of the total 5.6 million voters in the state.⁴³ Ohio is one of the few states that routinely mails unsolicited absentee ballot applications to all registered voters. While most voters in Ohio still vote at their precinct on Election Day, the overall percentage of voters who voted absentee has remained fairly consistent in midterm elections with 21.5% choosing to vote by absentee in the 2010 midterm elections and 22.9% in the 2014 midterms.⁴⁴ In 2018, 21% of ballots were cast by absentee ballot.⁴⁵

Other states have also seen increased use of no-excuse absentee or mail voting. Arizona, for example, has evolved towards even more significant use of no-excuse absentee voting with over 2 million mail ballots being returned to local election officials out of the 2.7 million total Arizonians casting ballots. Similarly, in Iowa, out of the 1.5 million total voters in Iowa, over 650,000 voted by voting no-excuse absentee (mail or in-person). In Hawaii, of the 437,000 total

³⁹ EAVS, *supra* note 32, at 23.

⁴⁰ Florida Department of State, Early Voting and Vote by Mail Report, 2016 General Election, <https://dos.myflorida.com/media/697363/early-voting-and-vote-by-mail-report-2016-gen.pdf>; Florida Department of State, Voting Activity by Ballot Type for 2016 General Election, Mar. 24, 2017, <https://dos.myflorida.com/media/697842/2016-ge-summaries-ballots-by-type-activity.pdf>.

⁴¹ Florida Department of State, Vote-by-Mail Request & Early Voting Statistics, Nov. 21, 2018, <https://countyballotfiles.elections.myflorida.com/FVRSCountyBallotReports/AbsenteeEarlyVotingReports/PublicStats>.

⁴² *Id.* See also Complaint for Injunctive and Declaratory Relief, *VoteVets Action Fund v. Ken Detzner*, No. 4:18-CV-00524-WS-CAS (N.D. Fla. Nov. 12, 2018).

⁴³ EAVS, *supra* note 32, at 24.

⁴⁴ U.S. Election Assistance Commission, 2010 Election Administration and Voting Survey, Dec. 2011, at 22; U.S. Election Assistance Commission, The 2014 EAC Election Administration and Voting Survey Comprehensive Report, June 30, 2015, at 201.

⁴⁵ Ohio Secretary of State, 2018 Official Election Results, <https://www.sos.state.oh.us/elections/election-results-and-data/2018-official-elections-results/>. If absentee ballots requested and voted in person are included, 30% of ballots were cast absentee. *Id.* See also Andrew J. Tobias, *Absentee ballot requests up in Ohio's Republican-leaning counties, but suburbs, independents remain major wildcard*, CLEVELAND.COM, Nov. 1, 2018, https://www.cleveland.com/open/index.ssf/2018/11/absentee_ballot_requests_up_in_1.html.

voters statewide, over 190,000 were cast by no-excuse absentee voters. In Montana, out of the 516,000 total voters statewide, 333,000 were returned by absentee voters to election officials. And Minnesota had over 671,000 voters out of 2.9 million total voters cast an absentee mail ballot.⁴⁶

Public Opinion on Absentee Voting and Vote by Mail

Voting by mail has become a popular option for voters; however, a large majority of Americans have not yet concluded that all voting should be conducted solely by an all-mail ballot system. In fact, a majority specifically rejects the idea of mail voting as their only option.⁴⁷ While some voters may have had negative experiences with delays in receiving or returning their ballots in time to meet a deadline, other voters may simply believe that casting a ballot on a voting machine in a polling place has more integrity and provides a better chance that their vote will count. These are not false notions. There are administrative challenges or potential for errors in mail voting outside of the voter's control that many voters simply do not want to chance when voting. Many simply decide that if they have the time to go vote in-person, they will do so.

However, probably the most significant reason expressed by Americans for the rejection of all-mail voting systems in opinion polls is not that they want to discard mail voting altogether, but that they simply want choices or different options in voting. For example, in a recent poll by the Pew Research Center, about 34% of Americans strongly or somewhat favored conducting all their elections by mail with about 65% opposing "vote by mail" being the only method of casting their ballots. Is it a political or ideological divide? Not significantly. When broken down by political party, 26% of Republicans and 40% of Democrats support conducting all their elections by mail.⁴⁸

Yes, there are many conservatives who believe that voting in person is much more secure and communal, and provides more integrity to the process because voters must confirm identity before casting a ballot. And while there are many other voting policy recommendations with more support expressed by Democrats, there are many Democrats who believe an all-mail system which provides ballots to all registered voters, even inactive voters, will help some voters who have challenges with the time and distance necessary, even if limited, to travel to the polling places.

However, once again desiring a choice in the way they vote, over 71% of Americans support early "no-excuse" voting by mail as an option available to voters.⁴⁹ In some ways,

⁴⁶ EAVS, *supra* note 32, at 23-24. No-excuse absentee was enacted in Minnesota in 2013 and available in the 2014 midterm elections.

⁴⁷ Pew Research Center, Elections in America: Concerns Over Security, Divisions Over Expanding Access to Voting, Oct. 29, 2018, at 75, <http://www.people-press.org/2018/10/29/elections-in-america-concerns-over-security-divisions-over-expanding-access-to-voting/>.

⁴⁸ *Id.* See specifically the partisan breakdown at 3, available at <http://www.people-press.org/2018/10/29/elections-in-america-concerns-over-security-divisions-over-expanding-access-to-voting/3-25/>.

⁴⁹ *Id.* at 20.

Americans are doing what Americans do – when they do not need to make a permanent choice, they simply add options to the table of choices available and then let the market decide what form of voting becomes the most popular over time.

Voter Confidence in Absentee Mail Voting

One very important aspect of the popularity of any method of voting is how confident voters are that their ballots were counted. Looking back at the opinion of voters after the 2016 Presidential Election, voters were asked: “How confident are you that your vote in the General Election was counted as you intended?” In one post-election survey, 66% of the overall respondents said they were “very confident” (with 27% “somewhat confident”) that their vote was counted.⁵⁰

When specifically asking vote-by-mail or absentee voters, the confidence level dipped slightly lower to 62% of all mail or absentee voters who expressed that they were “very confident” (with 28% being “somewhat confident”) that their vote was counted.⁵¹ This is lower in comparison to voters who cast ballot in-person during early voting or Election Day where a slightly higher 68% were “very confident” (or 28% “somewhat confident”) that their ballot was counted.⁵²

One interesting aspect was the potential lack of confidence in the return of the ballots by mail. About 25% of absentee and mail voters hand-delivered their ballots to the election office after receiving the ballot by mail. In comparison, 65% of voters returned their ballots through the USPS reflecting, in my opinion, the discernment of many voters for the potential of late delivery in returning the ballot less than a week before the election.⁵³ Voters in all-mail ballot states returned their ballots by hand at much higher rates than voters in other states: 73% in Colorado, 59% in Oregon, and 65% in Washington.⁵⁴

Problems in Absentee/Mail Voting and Counting in the 2016 Election

When absentee or mail voters were surveyed after the 2016 Presidential Election, the vast majority did not report having significant problems voting absentee. Very few voters – under 2% - found it somewhat or very hard to vote absentee.⁵⁵ However, there were a number of problems that voters identified as negatively impacting them in the process.⁵⁶ About 1.5% of absentee voters stated that they had some sort of problem receiving their ballot when requested, another 1.3% encountered a problem marking the ballot, and 1.2% found the absentee instructions “somewhat hard” or “very hard” to interpret.⁵⁷ Less than 2% of voters responded that it was “somewhat or very hard to complete the absentee voting process.” A much lower rate

⁵⁰ Charles Stewart III, 2016 Survey of the Performance of American Elections: Final Report, at 4, *available at* <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/Y38VIQ>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 26.

⁵⁴ Stewart, *supra* note 50, at 26.

⁵⁵ *Id.* at 26-27. 73% of voters under 30 and 87% of older voters rated mail voting as very easy.

⁵⁶ *Id.*

⁵⁷ *Id.*

of absentee mail voters reported a problem (3.1% of absentee or by-mail voters) when compared to the 14% of those who voted in-person early or on Election Day reporting a problem. However, 15% of those who encountered a problem voting absentee encountered more than one problem, compared with 7.3% of early voters and 13% of Election Day voters.⁵⁸ Voter age somewhat correlated with how difficult voters found the mail voting process. Very few voters – under 2% - found it somewhat or very hard.⁵⁹

Due to voter error, mistakes, or signature omission or mismatch, or other reasons, mail ballots have historically been counted at a slightly lower percentage than ballots cast in person on Election Day. In the 2016 election, only about 1% of all absentee ballots were rejected for administrative reasons, including non-matching signature, missing a deadline, no witness signature, or having no signature at all. This is compared to a 1.4% rejection rate in the 2014 mid-term election.⁶⁰ About 27% of the total ballots rejected were for a “non-matching signature” and 23% were rejected for “not being received on time or missed the deadline.”

Approximately 20% of the ballots were rejected for having “no signature” and 14% were rejected for some other defect. For example, according to information at the Election Assistance Commission, about 3% of ballots not counted in the states were rejected for having “no witness signature,” which is a requirement to confirm identity in a number of states. About 1% of these rejected ballots failed to comply with the first time voter requirement of proper identification for registration by mail.⁶¹

There have been attempts to reduce the fatal errors of voters through education and public information on the importance of following instructions and updating of voter signatures. More states are providing a window of opportunity for voters to be notified of errors and ways to remedy the problem and have the mail ballot counted. As a result, there has been some reduction in the number of ballots not counted.

Age, Demographic, and Racial Differences in Mail Voting

There are also racial and demographic preferences on voting mail ballots that impact whether there should be a wholesale change of voting methods. Voters of different races often have different preferences in when to vote and by what method. For example, in 2016, African-Americans voted using absentee voting at lower percentages than whites or Hispanics (17% compared to 25% and 26%, respectively).⁶²

In many states, African-Americans prefer the in-person voting experience, either with early voting polling or voting at the precinct on Election Day. As one would expect, the elderly and individuals with disabilities have often used absentee or mail voting at higher percentages than younger voters or individuals without disabilities due to the effort necessary to walk or drive to a precinct polling place or to stand in line.

⁵⁸ *Id.* at 3, 35.

⁵⁹ *Id.* at 26-27.

⁶⁰ EAVS, *supra* note 32, at 11; 2014 EAVS Report, *supra* note 44, at 12.

⁶¹ EAVS, *supra* note 32, at 11.

⁶² Stewart, *supra* note 50, at 13.

The statistics seem to support the fact that the elderly and aging population will choose mail ballots more often. In 2016, 33% of voters seventy years and older voted by mail, while only 20% of voters in their thirties voted by absentee or mail. Similarly, 30% of voters with a disability cast ballot by mail while only 22% of voters without a disability voted absentee by mail.⁶³

Also interesting is that higher levels of education seem correlated with more voters selecting early or absentee voting: 46% of voters with at least some college education voted either absentee or early, while only 39% of voters with a high school education or less chose to vote before Election Day.⁶⁴ There was little partisan difference among voters who chose mail voting: 26% of Democrats, 22% of Republicans, and 24% of Independents.⁶⁵ Likewise, there was little difference among voter experience for those who chose mail voting: 20% of first-time voters and 25% of experienced voters.⁶⁶

The View of Absentee/Mail Voting by Presidential Commissions

As the growth of vote by mail (and no-excuse absentee voting) has expanded, there have been a number of national commissions that explored the growth, value, and security of mail ballot voting in future elections. The Commission on Federal Election Reform, otherwise known as the “Carter-Baker Commission,” viewed the overall potential of mail voting as a mixed bag of convenience and security concerns – increasing access to vote for groups like the elderly, noting the convenience for many current voters, but also noting the potential lack of security.

No Marked Increase in Voter Turnout

These commissions have noted that while vote by mail may not necessarily increase the overall turnout in elections, it appeared to increase turnout in smaller local elections.⁶⁷ This finding conformed to the general consensus of experts that vote-by-mail elections increased turnout in smaller elections, but not necessarily in statewide or federal races.⁶⁸

One of the debates over mail voting is whether it will increase the overall turnout of voters. Lawmakers will occasionally make changes to the way citizens vote to add new levels of convenience such as early voting or vote by mail, but it is a much bigger step to take voting options away from voters, such as Election Day. Inevitably the question arises whether overall

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Commission on Federal Election Reform, Building Confidence in U.S. Elections: Report on the Commission on Federal Election Reform, Sept. 2005, at 35, <https://www.eac.gov/assets/1/6/Exhibit%20M.PDF> [hereinafter Carter-Baker Report].

⁶⁸ For instance, “Utah cities conducting all vote-by-mail elections saw an average increase in turnout from 21% in 2011 to 38% in 2015.” Utah Foundation, Voting in Utah: Analyzing Current Practices and Future Options for Utah Voters, Report No. 735, Dec. 2015, at 1, <http://www.utahfoundation.org/uploads/tr735.pdf>.

turnout of voters will be increased or decreased in any significant way to justify legislative changes and additional resources to the election process.

While one study found that vote by mail may decrease turnout in statewide or gubernatorial races, it also found that vote by mail increased turnout in local elections by over 7%.⁶⁹ Generally, most of the data and studies have determined that there no substantial increase or decrease in statewide election turnout by transitioning to vote by mail. This is significant in that these local and primary races are where you would normally anticipate lower turnout.

Mail Ballot Elections Result in Personnel and Logistical Efficiencies, Reduce Lines

The logistics and expenditures necessary in the administration of a local election is a strong incentive to local election offices to push for sending mail ballots to all voters instead of engaging in training and paying of poll workers to man polling places. Many local election officials see the mail option as a unique opportunity to save tax dollars while increasing the potential for more participation.⁷⁰

One additional advantage to local election officials is that solely voting by mail or by any one single method of voting inevitably simplifies the administration of elections. Counties and localities that provide multiple ways for voters to cast ballots will inevitably find an increase in the complexity in the overall administration of elections as each stage of voting progresses in an election cycle. Vote by mail, early voting, and then Election Day each has separate challenges, processes and required expertise. Each stage will have separate preparation, supplies, personnel, and security procedures necessary for the correct administration of elections.

Vote by mail reduces many of the federal and state legal requirements inherent with polling place management, including accessibility, and removes some of the challenges in identifying adequate buildings to serve as polling places. Voting solely by mail inevitably decreases the complexity of running multiple stages of an election that includes early voting, vote by mail, and Election Day precinct voting. Accordingly, the complexity and expense in the recruitment, training, and deployment of poll workers, and the acquisition, maintenance, and transport cost of large numbers of voting equipment and poll books are reduced or eliminated, thus decreasing the logistical costs of administering the election.

Lack of Privacy and Potential Pressure on Voting

However, the Carter-Baker Commission also raised justifiable concerns that mail voting may negatively impact the required privacy and secrecy of the cast ballot due to the potential abuse or pressure on voters when marking a ballot at home outside the privacy of the voting booth. These are the fundamental concerns earlier in American history that prompted the Australian ballot reforms. Many observers, including the Carter-Baker Commission, have

⁶⁹ Thad Kousser and Megan Mullin, Will Vote-by-Mail Elections Increase Participation? Evidence from California Counties, Feb. 23, 2017, at 1, <https://www.eac.gov/documents/2017/02/23/will-vote-by-mail-elections-increase-turnout/>.

⁷⁰ *Id.*

pointed out some of the drawbacks in voting at home and not in an election office or polling place. They generally point to the potential lack of privacy, the greater potential for identity fraud, and the potential for other improper pressure on a voter to cast a ballot for a certain candidate.

The activities inside a polling place or early voting site are strictly regulated by state law to prevent improper pressure and ensure privacy, and have additional protections for voters that include the right to vote without interference from third parties. While many in today's America have always experienced a private setting for voting in person, past episodes of improper pressure of voters, voter fraud and the "buying of votes" were major impetuses for the polling place voting experience in America.

The Presidential Commission on Election Administration

About a decade after the Carter-Baker Commission, the Presidential Commission on Election Administration (otherwise known as the PCEA) was created to study and make formal recommendations to reduce the congestion of voters at the polls that often resulted in long lines of voters waiting to cast a ballot.⁷¹ The PCEA noted that of the 47 million Americans who cast ballots early prior to the 2012 Election Day, over 29 million of these ballots were cast by mail, a significant amount of votes by any standard.⁷²

Because of the congestion at Election Day and early voting places, the PCEA recommended increased use of data and technology to more efficiently process in-person voters at the polling place to avoid long delays. As part of its recommendations, the PCEA noted that all things being equal, the more voters who cast their ballots by mail would help reduce the potential of long lines of citizens waiting to vote on Election Day, and therefore, election officials should efficiently accommodate this form of voting. This was not a surprising recommendation considering that the most straightforward way to reduce potential lines at the polls is to reduce the maximum number of voters at the precinct by either creating another precinct, and the more registered voters that cast ballots early in the process reduces the number of voters still eligible to vote on the last day of voting, Election Day. Indeed, the recommendation was based on the testimony of state and local election officials who would often encourage voters in informational campaigns and public service announcements to avoid the long lines of voters waiting to vote by casting an absentee ballot instead.

While recognizing that mail ballot or absentee voting may not increase the overall turnout of an election, the PCEA encouraged the expansion of mail voting by highlighting the general ease and overall convenience to voters. They also recognized the potential of mail ballots to allow resource strapped counties to find financial and logistical efficiencies in administering elections despite an increasing number of voters in a community. The bottom line recommendation was that the more voters who cast a ballot early by mail would give voters an

⁷¹ Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, Jan. 2014, <https://www.eac.gov/assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [hereinafter PCEA Report].

⁷² *Id.* at 54.

additional convenient way to vote and, at the same time, alleviate some of the pressure and lines of voters found at early voting or Election Day polling sites.⁷³

Recognition of More Errors and Omissions in Mail Voting

In addition to the positives of mail voting, the PCEA also recognized that no-excuse absentee voting and vote by mail often lead to more errors or omissions made by the voter that may negatively impact the counting of the ballot. The PCEA called for a number of best practices to reduce the rate of rejection of ballots.⁷⁴ For example, absentee mail ballots may be delayed or lost in the mail unnecessarily or received too late by the voter to meet ballot return deadlines, and voters occasionally make other mistakes or omissions by failing to meet witness, signature, or other verification requirements.⁷⁵ In addition, accidental overvotes (vote for two candidates in one race) or undervotes (no vote for any candidate in a race) of voters on mail ballots cannot be corrected once the ballot is placed in the mail and returned to election authorities. In contrast at a polling place, these types of errors and overvotes and undervotes can be highlighted to the voter by the voting machines, the ballot spoiled by a poll worker, and then corrected by the voter at the polling place with a new ballot.

In a polling place, voting equipment is pre-programmed to warn voters when an overvote or undervote is voted in a particular race and provides an opportunity to the voter to correct it before casting the ballot. Federal law requires that all voting equipment in polling places be programmed to warn a voter of an impending overvote that would result in the race selection not being counted. Once the ballot is placed into the digital paper scan tabulator, the ballot is returned to the voter to either accept the warning or to take action. The older Direct Recording Electronic (DRE) voting machines will warn the voter of both undervotes and overvotes and give the voter the opportunity to correct the ballot or proceed. In comparison, an overvote cannot be resolved by mail voters. Some mistakes or errors such as the total omission of a signature or a signature mismatch in the confirmation process may be corrected in some but not all states.

Problems and Delays with the USPS Mail Process

As with the Carter-Baker Commission, there was much discussion and testimony to the PCEA on the impact of the United States Postal Service (USPS) on the voting experience and potential for over-reliance on the institution for voting where any mistake or delay could result in the disenfranchisement of voters. The performance and future of USPS as a government bureaucracy is being closely monitored by election officials, and increased reliance on it for fundamental aspects of election administration may need to be reviewed as change seems to be in the air.

As with state driver's license agencies such as the Department of Motor Vehicles (DMV), there are many benefits in the institutional interaction with voters for registration and voting, but these responsibilities are not the primary missions of the agencies, and therefore less forgiving to voters than election officials. Common errors or delays that impact timing or processes may be

⁷³ *Id.* at 54-58.

⁷⁴ *Id.* at 56.

⁷⁵ *Id.*

perfectly acceptable in government bureaucracies, but these errors can be a disaster and a recipe for lawsuits in the voting arena.

The USPS has been under strain for a number of years with significant financial losses in the tens of billions of dollars. Many service issues stem from these losses, including the consolidation of mail processing plants across the country. Less customer service is expected except in the context of voting and transmission of mail ballots. The consolidation of processing plants and the fact that mail is not being processed on the weekends has resulted in an increased number of days needed for the transmittal of First-Class mail. Most election mail is sent this way.⁷⁶ With expectations in our society anticipating more speed and efficiency in the delivery of goods (such as Amazon), voters now need to adjust their calendar in determining how long is really necessary to adequately request and meet applicable deadlines for the timely return delivery of ballots. There are efforts by the Election Assistance Commission and state and local election officials to consult with USPS and streamline the process to the maximum extent possible, but it is an ongoing challenge.

One additional twist is what will occur if the USPS is privatized or significantly scaled back in services and what would the resulting impact be on election officials and voters. In April 2018, President Trump signed an Executive Order launching a new task force to assess the USPS and the significant losses experienced over the past decade.⁷⁷ Based on other executive branch reorganization plans issued by the Trump Administration, it was not surprising to see the task force recommend several significant reforms to “fix it” and then eventually privatize the USPS.⁷⁸ The task force found that the USPS can “no longer support the obligations created by its enormous infrastructure and personnel requirements.”⁷⁹ If that finding is accurate, the resulting reorganization or privatization could have significant impact on how absentee and mail voting is conducted, including increasing the cost of mailing ballots and other election literature. Regardless, election officials would need to study and determine the impact on mail voting in the United States, particularly in rural areas, and be prepared to make recommendations to state and federal lawmakers on changes and exceptions for election mail.

Improving the Absentee or Mail Ballot Voting Process

While recognizing some of the shortcomings, the PCEA also made a number of recommendations to improve the mail ballot process for voters and make the process more attractive to voters. For example, voters are often not aware of the transit status of their absentee ballot once it is placed in the mail and they are unsure if the ballot has been returned in time to the election office in order to be counted. This uncertainty of voters has resulted in repeated

⁷⁶ United States Postal Service, Office of Inspector General, *Should the Postal Service continue its consolidation plan?*, Aug. 18, 2014, <https://www.uspsoig.gov/blog/should-postal-service-continue-its-consolidation-plan>; Bipartisan Policy Center, *The New Realities of Voting by Mail in 2016*, June 2016, at 15, <https://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Voting-By-Mail.pdf>.

⁷⁷ Exec. Order No. 13829, 83 Fed. Reg. 17,281 (Apr. 12, 2018), <https://www.whitehouse.gov/presidential-actions/executive-order-task-force-united-states-postal-system/>.

⁷⁸ Eric Katz, *White House's Plan for the Postal Service: Fix It, Then Privatize It*, GOV'T EXECUTIVE, June 21, 2018, <https://www.govexec.com/management/2018/06/white-houses-plan-postal-service-fix-it-then-privatize-it/149195/>.

⁷⁹ *Id.*

phone calls to election offices and absentee or mail voters either voting in person or insisting on returning the mail ballot in person to a secure ballot box or election office.

To mitigate these voter concerns, the PCEA recommended that local and state officials make online portal sites available to voters to easily access their registration and ballot information and formally track their ballot and verify that their absentee ballot request was received by the election office, when the ballot was sent to the voter, and officially delivered back to the election office to be counted.⁸⁰

Online notification is a best practice to better inform voters if there is a problem with the receipt of the official ballot, if the mail ballot was counted or not, and, if not, the reason why it may not have been counted and how to correct it. The data provided by USPS may not reflect real time tracking and the most accurate data. For example, a ballot may be scanned by USPS at a regional center and noted as delivered to the address of voter, but, in reality, the ballot has not yet actually been delivered to mail box of the voter. This can be very frustrating for voters who expect the Amazon experience. While many online portals currently provide voters the ability to go online and check the status of their ballot, in order to provide greater assurance to voters, the states, working in conjunction with USPS, need to provide more detailed tracking information on the status of the ballot in the mail system.

Absentee Ballots Have Higher Rates of Rejection

One major drawback of voting by mail is the greater opportunity for error or mistake that may end up with the ballot not being counted. The voting equipment in a polling place has software that will assist the voter in not marking an overvote and inform the voter that he or she may have voted twice in one race. A mail voter that makes such a mistake may not be able to correct it and the vote will not be counted. Voters do make mistakes such as forgetting to sign the affidavit or return envelope or providing an incorrect or unintelligible address. More states are allowing voters the opportunity to correct such a disqualifying error, but the statistics clearly show that many ballots are not counted for mistakes, errors, and omissions. Of the 1% of returned absentee ballots that were rejected nationwide in 2016, at least 53% were rejected due to an error that would not have occurred or could have been corrected if the voter had voted in a polling place, and an additional 23.1% were rejected due to missing a deadline.⁸¹

Integrity of the Absentee or Mail Ballot Process

The Carter-Baker Commission discussed the impact on confidence in elections due to the lingering perception that mail voting was more vulnerable to election fraud and different counting standards than in-person voting. To reduce those concerns, the Carter-Baker Commission highly encouraged additional safeguards that would confirm the identity of the

⁸⁰ *Id.* at 58.

⁸¹ EAVS, *supra* note 32, at 11.

absentee voter such as signature verification procedures and noted that other states without these measures were more vulnerable to fraud.⁸²

This is not surprising. After the 2000 Presidential Election, there had been a giant spotlight placed on Florida with regard to absentee ballots and the controversy over whether to count a significant number of late-arriving or problematic overseas absentee ballots and the ensuing litigation over what standards should be used in counting or rejecting them. As this paper explores later, many of the most heated controversies that have impacted voter confidence in the past 20 years have been disputes in recounts or close elections involving the appropriate guidelines for counting mail or absentee ballots that may not meet all requirements set by law or regulation. There have been ongoing policy debates to determine whether there is substantial compliance of the absentee voter with existing legal or regulatory requirements in order for the ballot to be counted.

Because of the issues in Florida and other controversies, the Carter-Baker Commission sought to instill and improve voter confidence in the nation's election process, and they were worried whether the perception of vulnerability of absentee ballots to fraud (or not being counted) would be able to withstand the scrutiny of the public, particularly in close elections in states where there may not be adequate safeguards in place such as signature verification.⁸³

Confirmation of Identity of Absentee or Mail Voters

Another concern of many for voting by mail is the increased potential for fraud. While a number of presidential commissions have recommended the expansion of mail voting and it is increasingly popular with many voters, there are some problems and vulnerabilities associated with mail voting that pose unique problems for voters and challenges for election officials.

The perception and often reality in elections is that election fraud is more prevalent and easy to commit in the mail ballot process than with in-person voting. This is not surprising since in-person voting often requires direct interaction with a poll worker and some form of photo or non-photo identification to confirm the identity and address of the voter, along with the signature of the voter under oath attesting to identity while the mail ballot process does not have as rigorous a process to confirm identity.

Fundamentally, the process of confirming the identity of a mail voter is much more difficult than the process inside a polling place where photo or non-photo ID may be used to confirm the identity of the individual on the official poll book of voters, and a poll worker confirms the registration and residence in the poll book with the voter before casting a ballot.

For voters by mail, election poll workers are not available to independently confirm the identity of the person during the check-in process. However, the vote by mail confirmation process may entail a system to process absentee mail ballots by staff, comparing the name, signature, and address with the signature and voter information on file. Many states will also confirm the identity of mail voters by comparing the signature of the voter on the ballot envelope

⁸² Carter-Baker Report, *supra* note 67, at 20, 35.

⁸³ *Id.* at 35, 46-47.

or affirmation with the signature of the person provided during the registration or application process.

The signature verification process has been under legal assault in many states due to the inexact science of the procedure, the lack of uniformity in application among counties in a state, and the lack of training in some jurisdictions. In the end, the verification of signatures is done at the local level in each county so the varying standards among counties in different aspects of voting apply to signature comparison as well. There has been litigation in Florida and Georgia on whether states are required to provide a cure period to voters if the signature does not match or there is no signature at all.⁸⁴

In the absentee or vote by mail process, the voter will normally have to also sign an affirmation of identity or oath under threat of perjury that the voter is the individual for whom the ballot was marked and voted and verifying his or her current residential address. In most states that do not require signature comparison, the voter will often need to provide a copy of an ID or an identifying number attributed to the person such as the individual's driver's license number, the last four digits of the individual's Social Security number, or some other personal ID number provided by the election official at the time of registration. This identifying number allows the local election official to query the voter registration database or other state agency database to confirm that the number is linked to the person registered to vote and voting the ballot.

Some states do not request or use an identifying number or signature of the voter to confirm identify. Rather, many states will require a separate individual witness or notary to witness the signing of the affidavit associated with the absentee mail ballot and envelope.

Election Officials' Absentee or Mail Ballot Procedures

One of the concerns with absentee or mail voting is the increased vulnerability of the process to voter fraud because the chain of custody is often outside that of election officials and in the hands of third parties. Due to handling by non-election officials, there may be other irregularities or mishandling of mail ballots that require improved procedures to reduce the chance for hiccups in the process that will negatively impact confidence in the voting process overall. Professionalism of staff and strict controls over paper mail ballot processes are absolutely necessary; otherwise election administrators open themselves up to charges of incompetency, negligence, or fraud.⁸⁵

The integrity of the procedures to process and tabulate absentee or mail ballots requires a strict chain of custody and ballot security program, including the supervision of a procedure to receive and process ballots received daily from the USPS. This process will usually include a canvassing procedure to match the ballot with the registered voter and conduct a comparison of signatures or some other verification of identifying information provided by the voter. For example, the election office staff may have a process to confirm the registration of the voter, the

⁸⁴ See, e.g., *Florida Democratic Party v. Detzner*, No. 4:16-cv-00607 (N.D. Fla. filed Oct. 3, 2016); *Democratic Party of Georgia v. Crittenden*, No. 1:18-cv-05181 (N.D. Ga. filed Nov. 11, 2018).

⁸⁵ Observation and Interview with Prince William County, Virginia General Registrar Michele White.

signature of the voter, and other required information prior to sending the ballot to be counted. There will often be bipartisan teams of observers or trained staff present to oversee this process of confirmation of identity and other required information, and the comparison of signatures, if applicable, prior to tabulation and counting.

Strict controls and procedures are necessary to maintain control over the potentially voluminous amounts of paper ballots awaiting tabulation and to prevent the mixing of ballots that need further review by a canvassing board or political party representatives, with those ballots ready to be counted. This process is different from the procedures and process for controlling ballots within a polling place where the votes are tabulated directly on the machine after a check-in process where registration and identity are confirmed.

With the exception of provisional ballots that will not be counted unless election authorities approve at a later date, the ballots in a polling place are immediately cast and tabulated with results eventually transmitted or returned to the election office at the close of the polls. From there, these raw results are initially reviewed for accuracy and displayed as unofficial results on the local or state results website.

Most experts would agree that the threat of fraud for absentee votes cast outside a polling place is higher than for in-person voting at a polling place for the simple reason that the individual is not presenting themselves to vote at an official polling place where the voting process is taking place with staff, other voters, an official roster of voters in the precinct or county, documentation to be signed, and perhaps photo or non-photo ID confirmation of identity. There are additional concerns in mail voting that the transmittal of ballots through the postal service is simply not as direct or as secure a means of capturing the vote as when individuals directly cast ballots in a polling place at a voting machine. While relatively low, there is still a greater chance of mail ballots being improperly intercepted at a mailbox or in return to an office by a bad actor or by mistakes that result in delay in transmittal.

Absentee or Mail Ballot Fraud

There are three major means of committing fraud with absentee ballots. Some cases involve the fraud committed by the voter herself, while other incidents involve fraud or defrauding of the innocent voter by third party individuals. The first type of fraud is where there is a request and voting of a mail ballot without the knowledge of the actual registered voter entitled to that ballot. This type of fraudulent vote unlawfully takes the vote of the registered voter otherwise entitled to vote. If that ballot is counted prior to discovery of the fraud, that illegal ballot dilutes the votes of other eligible voters. A second type of mail ballot fraud is when a bad actor inappropriately obtains the absentee ballot from a voter and either fills it in directly and forges the voter's signature or illegally tells the voter who to vote for in a particular race. A third form of voter fraud is the illegal use of absentee ballots in the buying of votes, specifically the third-party payment of voters to cast an in-person or absentee mail ballot for a particular candidate.⁸⁶ There are types of ballot harvesting that are illegal in many states, and improperly

⁸⁶ For examples of specific cases of mail ballot fraud, *see* The Heritage Foundation, A Sampling of Election Fraud Cases from Across the Country, https://www.heritage.org/sites/default/files/voterfraud_download/VoterFraudCases_5.pdf.

disposing or failing to return ballots is a criminal act. There are many close elections across the country. Abuse of voters in the absentee ballot process by bad actors can have an oversized and negative impact on the confidence of elections, particularly in local or county elections.

Some of the perception of absentee and mail ballots' vulnerability to fraud is a result of major scandals that were prosecuted and properly reported by the media. There are cases of absentee or mail ballot fraud prosecuted every election cycle in almost every state, and these are reported in the media.

As the public can see in the recent North Carolina absentee ballot fraud case, the manipulation of the absentee ballot process may not only be technically illegal, but there are victims of the crime and such criminal behavior has impacted the results of a federal congressional race. When the North Carolina State Board of Elections (NCSBE) unanimously agrees not to certify an election for a candidate with a healthy 900-vote margin, there must be significant evidence of brazen illegal behavior that shocked the panel and demanded further investigation.⁸⁷ The trust and confidence of voters in our electoral process is significantly reduced not only in North Carolina but across the country.

Two more examples of significant absentee ballot fraud took place in the 1990's in Georgia and Florida. There were reports of "brazen" and "pervasive" absentee ballot fraud and "evidence of gross irregularities" in rural Georgia that ultimately resulted in the invalidation of two different elections and 21 indictments issued from a federal grand jury. At the time of the crimes, the indictments were of the largest number of citizens ever charged with election crimes.⁸⁸

Similarly in Florida, absentee ballot corruption made headlines statewide for a year when a widespread absentee ballot scandal in Miami mayoral elections was exposed. The massive conspiracy involved over 5,000 absentee ballots and resulted in a lengthy investigation with multiple headlines, dozens arrested, and 36 people indicted.⁸⁹ After Florida Department of Law Enforcement finalized its investigation of the 1997 Miami mayoral election, the results of that election were thrown out, involving over 5,000 absentee ballots, and there were multiple attempts to increase the security and integrity of absentee ballots by the Florida Legislature.⁹⁰

The impact of such large scandalous criminal conspiracies is momentous in that such large-scale fraud confirms that the legendary stories of the past where buying and stealing elections regularly happened may not entirely be a thing of the past. These scandals occurred in an era marked by corruption in the electoral process. We had hoped that our current system was past such brazen corruption of the electoral process.

⁸⁷ Jim Morrill, *NC elections board refuses to certify 9th District race, leaving it in limbo*, CHARLOTTE OBSERVER, Nov. 27, 2018, <https://www.charlotteobserver.com/news/politics-government/election/article222263905.html>.

⁸⁸ Kevin Sack, *Georgia Gets Tough on a County Tradition: Vote-Buying*, N.Y. TIMES, Mar. 23, 1997, <https://www.nytimes.com/1997/03/23/us/georgia-gets-tough-on-a-county-tradition-vote-buying.html>.

⁸⁹ *18 Are Arrested in 1997 Miami Ballot Fraud*, N.Y. TIMES, Oct. 29, 1998, <https://www.nytimes.com/1998/10/29/us/18-are-arrested-in-1997-miami-ballot-fraud.html>.

⁹⁰ Hans von Spakovsky, *Absentee Ballot Fraud: A Stolen Election in Greene County, Alabama*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 31, Sept. 5, 2008, at ii, <https://www.heritage.org/election-integrity/report/absentee-ballot-fraud-stolen-election-greene-county-alabama>.

Over the years there has been a steady drip of fraud highlighted in the absentee mail ballot process in different states. For example, Alabama faced over a dozen instances of fraudulent use of absentee ballots which were prosecuted and the continuation of the problem has perplexed Alabama legislatures on how to successfully deal with it.⁹¹ One significant case in Alabama that received a great deal of attention took place in Greene County where the Birmingham Office of the U.S. Attorney and the Alabama Attorney General led an extensive joint investigation of absentee ballot fraud allegations arising from the 1994 midterm election. By the end of the investigation, multiple defendants had been charged with 43 counts of various election crimes – 11 co-conspirators had pled guilty to successfully fixing elections at the local level for years, and two were later found guilty by a jury.⁹²

The irregularities in Alabama included the same person serving as the “witness” for signatures for a large number of voters and the casting of absentee ballots by voters who were identified as deceased or no longer living in the county. In the end, the fraud appeared to impact a number of close elections with the absentee ballots being the margin of victory.⁹³ The lack of institutional control over the absentee ballot process that resulted in a large-scale prosecution of bad actors shook the public’s confidence in the system.⁹⁴

Texas is another state with a number of absentee ballot irregularities that were investigated and prosecuted. According to The Heritage Foundation, there have been approximately 30 cases of documented absentee ballot fraud in Texas over the past decade.⁹⁵ Recently, there was additional recent evidence of absentee ballot irregularities and fraudulent mail ballots cast in Dallas County’s City Election in May 2017.

Based on multiple complaints, the Dallas County election administrator had identified multiple instances involving the receipt of a number of absentee ballot applications submitted on behalf of deceased individuals and on behalf of individuals who had moved from the county and promptly referred this information to the Dallas County District Attorney. When the election administrator pulled the thread of irregularities involving improper witness signatures, she identified over 700 suspicious mail ballots that needed to be further investigated by authorities.⁹⁶

One impetus for Texas authorities to act quickly was the significant number of citizens who had voiced complaints after receiving absentee ballots in the mail despite having never requested the ballot and receiving ballots addressed to dead relatives. Because members of both political parties believed they had been victimized, the series of events generated rare bipartisan outrage and calls for action. State Rep. Eric Johnson (D-Dallas) quickly acknowledged the problem and promised legislation to only allow relatives and caregivers to assist voters in filling out absentee ballots rather than letting campaign workers or volunteers do so: “I believe there

⁹¹ According to the Heritage Sampling of Election Fraud Cases, *supra* note 65, at 3-9, Alabama had 13 instances of fraudulent use of absentee ballots which were prosecuted as a result of judicial findings.

⁹² von Spakovsky, *supra* note 90, at 3, 8-9.

⁹³ *Id.* at ii.

⁹⁴ *Id.* at 10-11.

⁹⁵ The Heritage Foundation, Election Fraud Cases, <https://www.heritage.org/voterfraud/search>.

⁹⁶ Tasha Tsiaperas, *Bogus voter gets 180 days in Dallas jail for forging mail-in ballot*, DALLAS NEWS, June 20, 2018, <https://www.dallasnews.com/news/courts/2018/06/20/bogus-voter-gets-180-days-dallas-jail-forging-mail-ballot>.

are ballots that probably get taken out of mailboxes before a senior even knows it's arrived. I believe there are people who will go and take a senior's ballot and help them fill it out and by helping them, I mean telling them what to do or unduly influencing them in how they vote. I believe there are people who will let them vote of their freewill, but if they don't like the result, [they] will actually discard the ballot. I think all those things happen."⁹⁷

As a response to these incidents of fraudulent mail ballot activity, Texas Governor Greg Abbott announced that his administration was “cracking down on mail-in ballot fraud” as one of his new priorities for a special legislative session and he specifically called for “[l]egislation enhancing the detection, prosecution, and elimination of mail-in ballot fraud.”⁹⁸ In response, two Texas legislators responded with a number of bills that were enacted⁹⁹ to address absentee ballot irregularities and restrict so-called “ballot harvesting.”

The legislation generally increased the penalties and established election crimes as a higher priority to prosecute. Specifically, the offense of election fraud as Class A misdemeanor would be elevated to a felony if the victim of the crime was 65 years or older or if the defendant has committed the crime in conjunction with other election offenses. The legislation also increased the penalties for violations while engaging in organized vote harvesting operations.¹⁰⁰

From an election administration perspective, the Texas legislation included a more stringent and flexible signature verification process for the canvassing of absentee ballots to allow more of an investigation of the signature if there was no match of the signature or if the legitimacy of the signature was in question. In reforming the signature verification procedure, election officials would not be constrained in the process to simply compare the mail ballot signature with the signature of absentee ballot application. Officials would also be able to compare the signatures on the ballot with any two or more signatures of the voter that had been provided within the last six years on file with the county clerk or voter registrar.¹⁰¹

Contested Standards in Counting Mail or Absentee Ballots

One of the brakes slowing down increased use of mail voting is the lingering distrust between the political parties over past disputes concerning the counting of absentee ballots in close elections where different or malleable standards of whether a ballot is valid or invalid can result in different winners of an election. Absentee ballot fraud may be a part of the reason ballots are ultimately rejected for not meeting ballot standards. However, not complying with legal or regulatory requirements is not necessarily voter fraud, and the rejection may be based on mistakes or legal omissions by the voter.

⁹⁷ *Dead people apply to vote in Dallas County*, WFAA ABC 8, June 7, 2017, <https://www.wfaa.com/article/news/politics/dead-people-apply-to-vote-in-dallas-county/446702144>.

⁹⁸ Office of the Texas Governor, Greg Abbott, Supplemental Call, July 10, 2017, <https://gov.texas.gov/news/post/supplemental-call>.

⁹⁹ S.B. 5, 85th Leg., 1st Spec. Sess. (Tex. 2017), <https://capitol.texas.gov/tlodocs/851/billtext/pdf/SB00005F.pdf>; H.B. 1735, 85th Leg., Reg. Sess. (Tex. 2017), <https://capitol.texas.gov/tlodocs/85R/billtext/pdf/HB01735F.pdf>.

¹⁰⁰ *Id.*

¹⁰¹ S.B. 5, *supra* note 99.

Vivid memories still linger of past nasty electoral battles over the counting standards for absentee ballots in various races, including, for example, the “Bloody Eighth” election in Indiana in the 1980’s, the Alabama Supreme Court in the 1990’s, and more recently, the 2008 Minnesota Coleman versus Franken Senate race. In those cases, the perception of many observers is that raw political and judicial power was exercised to either change or create new standards for the absentee ballot counting process after the fact that changed the results of a very close election. Many political observers argue that important safeguards and requirements for absentee voting were simply waived when it became convenient to add ballots to or delete ballots from official results, and appropriate legal standards for the counting of absentee mail ballots were conveniently discarded when the goal was to grab political power in extremely close and disputed elections instead of upholding the integrity of the electoral system.¹⁰²

For example, in the Indiana Eighth Congressional District’s 1984 election, the Republican was leading in a razor-thin race that was contested in the U.S. House of Representatives controlled by Democrats. When a federal judge did not overturn the controversial decision of local officials to not count certain absentee ballots, the House of Representatives voted on partisan lines to keep the seat vacant until a task force could be created by the House Administration Committee to further examine the “Bloody Eighth” Congressional race and essentially conduct an independent “contest” of the race. A full-blown investigation by the Committee on House Administration was initiated and partisan warfare ensued.

Despite the Republican candidate going into the congressional review up by 418 votes after the recount was completed, the Committee deviated from the existing Indiana ballot counting rules on party line votes and used different standards for the overall counting of absentee ballots, including different standards for two separate groups of absentee ballots that failed to conform to existing state requirements. There were the expected charges of hypocrisy and unfairness, and the outrage of the minority Republicans was palpable.¹⁰³ However, the long lasting damage was the lingering perception that absentee or mail ballot standards could be treated differently depending on the results you were seeking.

Whatever the truth of the matter or real or perceived fairness of the handling of the “Bloody Eighth,” the end result enraged Republicans for years. While the individual facts may fade away, the perception of potentially stealing elections by malleable standards remains and impacts legislation to this day.

One substantive takeaway to observers from the experience was that the wide range of flexibility in how to count absentee ballots in close elections certainly made the standards a new weapon in the voting wars where the counting of ballots was now seen as a partisan contact sport and vote tabulators were not necessarily reaching or applying uniform standards across the board. The battle of the Bloody Eighth in the 1990’s was a precursor to the absolute partisan war in 2000 Florida and beyond.

¹⁰² EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 258 (2016).

¹⁰³ *Id.* at 258-61.

Similarly, in the 1994 election for Alabama Chief Justice, there was another significant vote counting dispute involving absentee ballots, mostly over deficiencies found with the failure of many voters to provide the signature of a witness or a notary public with their returned absentee mail ballot. The major issue in Alabama was whether the ballots should be counted under the theory of “substantial compliance” with legal or procedural requirements for absentee ballots or whether the ballots should not be counted under the theory of strict compliance with regulations that most, if not all counties, had been exercising in processing absentee ballots in Alabama. Again, the shifting standards for counting of absentee ballots appeared to come down to who needed the votes.

The extremely close state Supreme Court race for Chief Justice resulted in the unofficial results switching back and forth between the two candidates at different stages of the counting process, during the ongoing litigation, and even whether the hearing was being held in federal court or in the Alabama Supreme Court.¹⁰⁴ In the judicial fact finding phase to determine what standard had been used and should be used in counting the absentee ballots, the federal trial judge characterized any post-election change in current standards of counting as “abominable under the Constitution of the United States.”¹⁰⁵

The U.S. Court of Appeals for the Eleventh Circuit upheld the ruling, finding that only one county in Alabama had veered from practice of strict compliance, and the court opted for the substantial compliance doctrine. To finalize the unseemly saga, the U.S. Supreme Court refused to hear an appeal of the appellate ruling and the Chief of the Alabama Supreme Court was sworn in a whole year after the election.¹⁰⁶

Two more high profile and recent disputes over the counting of absentee or mail ballots include the 2000 presidential race in Florida and the 2008 Senate race in Minnesota. In Florida, one of the ancillary disputes in *Bush v. Gore*¹⁰⁷ was whether to count absentee mail ballots from absent or overseas military voters that may not have strictly complied with certain requirements, specifically ballots without a witness, without a postmark or dated by Election Day, or with a domestic rather than foreign postmark.¹⁰⁸ While Florida law in the past had required strict compliance in conforming to absentee ballot requirements and Democrats backed away from challenging these specific ballots, the numbers would likely not have made a difference in overcoming a 537-vote margin.¹⁰⁹

In Minnesota, a large part of the controversy in the recount and contest again was whether to count absentee ballots under a standard of strict compliance or substantial compliance with absentee ballot requirements such as witness, address, and other technical requirements. A related controversy was how to address the lack of uniformity among counties in the treatment of absentee ballot requirement failures – a general *Bush v. Gore* equal protection problem in how to

¹⁰⁴ *Id.* at 269-78.

¹⁰⁵ *Roe v. Mobile County Appointing Bd.*, 904 F. Supp. 1315, 1335 (S.D. Ala. 1995).

¹⁰⁶ Foley, *supra* note 102, at 269-78.

¹⁰⁷ 531 U.S. 98 (2000).

¹⁰⁸ Foley, *supra* note 102, at 301.

¹⁰⁹ *Id.* at 301-302

deal with election official errors or standards in counting ballots that should not be counted or in not counting ballots that arguably should have been counted.

Harvesting of Mail Ballots

Ballot harvesting is a practice of the collection and return of absentee or mail ballots by political party operatives or candidates that a number of states have sought to regulate to ensure the privacy of the voter and protect the voter from pressure from paid harvesters. Harvesting, even when legal, can take advantage of the uninformed and elderly. The normal pestering and pressuring of voters to return their absentee ballots has evolved into a practice characterized as ballot harvesting in which many political campaign staff or paid individuals will personally solicit citizens to vote and place possession of their ballot in the hands of a third party with the promise to deliver the ballot to election authorities. From a political perspective, this is the next step to ensuring that all identified registrants for a political party are pushed to vote and return their ballot.

While ballot harvesting has been a growing concern in many parts of the country, the issue was raised to even more prominence in the 2018 mid-term federal elections with the election fraud scandal discovered in the Ninth Congressional District in North Carolina. In that case, a long-term, existing ballot harvesting operation was discovered to have violated multiple state election laws regulating the required witnessing of signatures, the ban on ballot collection and other potential election crimes of discarding ballots or not properly returning collected ballots to election offices in an effort to manipulate absentee vote totals in certain races. With the criminal investigation launched by state and federal authorities, the North Carolina State Board of Elections (NCSBE) refused to certify the relatively close election despite a separation of approximately 905 votes between the Republican and Democratic candidates for Congress. There was no contest of the election filed with state authorities; however, with controversy swirling over whether the extent of the fraud would make a difference in the final results, the NCSBE launched an investigation that included over 10 subpoenas, 186,000 documents, and interviews of over one hundred witnesses by NCSBE investigatory staff.¹¹⁰

The investigation revealed that multiple voters had come forward to say that Leslie McCrae Dowless, the individual at the center of the scandal, allegedly paid them to collect absentee ballots, which is illegal in North Carolina. The Dowless operation apparently paid operatives to go door-to-door with the mission to persuade citizens to request and then hand over their absentee ballots. A number of Bladen County voters also testified that individuals collected

¹¹⁰ North Carolina State Board of Elections & Ethics Enforcement, Re: Emergency Petition to Certify the Election by the Mark Harris for Congress Committee (the “Petition”), Dec. 28, 2018, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Misc.%20Documents/Correspondence_HarrisCommittee_2018-12-28.pdf. Editor’s note: subsequent to the authorship of this paper, the NCSBE threw out the results from November and ordered a new election in the Ninth Congressional District. Amy Gardner, *N.C. board declares a new election in contested House race after the GOP candidate admitted he was mistaken in his testimony*, WASH. POST, Feb. 21, 2019, https://www.washingtonpost.com/politics/candidate-says-new-congressional-election-warranted-in-north-carolina/2019/02/21/acae4482-35e0-11e9-854a-7a14d7fec96a_story.html.

their ballots, sometimes before they were sealed or completed.¹¹¹ The more serious allegations were that Dowless was even seen “throwing absentee ballots in the wastebasket.”¹¹² One affiant in the investigation testified that Dowless admitted to having 800 ballots in his possession, that he was holding the ballots to prevent his political opponents from seeing the totals, and that the affiant was concerned that Dowless would not turn in the ballots to election authorities.¹¹³

As in other states, abuse in ballot harvesting usually includes the voting of ballots without the actual knowledge of the potential voters, or a situation where bad actors request ballots for deceased voters or submit absentee ballot requests for absentee ballots by someone other than the voter or without the knowledge of the voter. Based on this scandal, there is no doubt that North Carolina and other states would take some action to further prohibit the practice of harvesting or collecting ballots and take other regulatory and administrative action to mitigate these abuses. However, in the case of North Carolina, the timing of the ongoing debate over voter identification that had passed statewide as a constitutional amendment allowed the General Assembly to quickly attach an amendment¹¹⁴ to the implementing voter ID bill¹¹⁵ that would require the NCSBE to implement a system of verifying absentee ballot requests consistent with the in-person photo identification requirements, including the reasonable impediment exception.¹¹⁶

Thus far, states have gone in different directions in addressing ballot harvesting. While California changed the law to allow third parties to collect and deliver ballots to be counted,¹¹⁷ about 19 states ban or already tightly restrict who can or cannot return another person’s mail ballot to an election office.¹¹⁸

¹¹¹ Michael Graff, *Distrustful, Desperate and Forgotten: A Recipe for Election Fraud: How a small rural county’s petty political feuds could shape the next Congress*, POLITICO MAGAZINE, Dec. 9, 2018, <https://www.politico.com/magazine/story/2018/12/09/voter-fraud-north-carolina-bladen-county-congress-222855>.

¹¹² Ann McAdams, ‘Person of interest’ in elections fraud investigation was ‘throwing ballots in the wastebasket,’ Democratic party chair says, WECT NEWS 6, Dec. 10, 2018, <http://www.wect.com/2018/12/10/person-interest-elections-fraud-investigation-was-throwing-ballots-wastebasket-democratic-party-chair-says/>.

¹¹³ Chelsea Donovan (@ChelseaDWECT), Twitter (Dec. 11, 2018, 3:05 PM), <https://twitter.com/ChelseaDWECT/status/1072628447229415424>.

¹¹⁴ Amendment 4, passed Dec. 5, 2018, <https://webservices.ncleg.net/ViewBillDocument/2017/7647/0/S824-ATC-202-V-3>, to S.B. 824, 2017-18 Gen. Ass., Sess. L. 2018-14 (N.C. 2018), <https://www.ncleg.gov/BillLookup/2017/S824>.

¹¹⁵ S.B. 824, *supra* note 114.

¹¹⁶ Press Release, Speaker Tim Moore, Absentee Ballots Included in Bipartisan Voter ID Bill Approved by N.C. House (Dec. 5, 2018), <http://speakersmoore.com/absentee-ballots-included-bipartisan-voter-id-bill-approved-n-c-house/>.

¹¹⁷ California’s AB 1921, signed by former Governor Brown, allows voters to give any third party, not just a relative or someone living in the same household, to collect and turn in any voter’s completed ballot. A.B. 1921, 2015-16 Sess., Ch. 820 (Cal. 2016), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1921.

¹¹⁸ *Get to know what’s in the 2018 Montana mid-term ballots*, CHAR-KOOSTA NEWS, Oct. 25, 2018, http://www.charkoosta.com/news/get-to-know-what-s-in-the-montana-mid-term/article_79209f44-d883-11e8-b48b-5b4772ff3db3.html; National Conference of State Legislatures, *Returning Absentee Ballots*, Feb. 27, 2019, <http://www.ncsl.org/research/elections-and-campaigns/returning-absentee-ballots.aspx>. For example, in Indiana, only a member of the voter’s household or a person designated as the voter’s attorney may return the ballot. Ind. Code § 3-11-10-1.

Montana is one state that has continued to see the proliferation of absentee mail ballots used by voters in their elections. For example, in the days leading up to the 2018 midterm election, over 426,354 Montanans voters – just over 60% of registered voters – had requested absentee mail ballots. This was almost 70,000 more than the number of absentee mail voters in 2016, a remarkable increase. Of that total, over 300,000 absentee ballots had been received back by Montana election officials by the Saturday before the election.¹¹⁹ Much of Montana is migrating away from the Election Day experience. For example, in many of the largest counties in Montana, more than two-thirds of registered voters had received absentee ballots. With the heavy mail voting, a number of these counties decided to operate just one polling place on Election Day.¹²⁰

However, the use of absentee mail ballots in Montana has witnessed growing pains with the perceived lack of security of harvested ballots and potential for fraudulent activity. For example, in the 2017 special congressional election, Secretary of State Corey Stapleton alleged there was a ballot in Missoula County that was counted without the signature of the voter and questioned whether harvested ballots had actually been delivered to election offices.¹²¹ That allegation may have only involved one ballot, but there were a number of complaints from voters of dealing with aggressive third-party individuals who were trying to solicit the individual to collect their ballots and return to election authorities.¹²²

As a result of the complaints and concerns, the Montana Legislature narrowly passed a legislative referendum (LR-129), which would, if passed, regulate absentee ballot harvesting, with direction that the referendum question be placed on the 2018 ballot.¹²³ The referendum passed overwhelmingly in the 2018 midterm election,¹²⁴ and now enacted, the new law will prevent any future “ballot harvesting” in which third party individuals unknown to voters would be able to collect absentee ballots and turn them into election officials. Instead, individuals delivering ballots on behalf of a voter would be required to sign a registry before collection of ballots that identifies them in one of permissible categories - a caregiver, a family member, a household member, or an acquaintance of the voter on the ballot. To avoid any confusion, the law would exempt election officials and postal workers from the requirement.¹²⁵

¹¹⁹ Jonathon Ambatian, *Montana absentee votes: 300K collected, turnout already at 43%*, MTN NEWS, Nov. 5, 2018, <https://kbzk.com/news/campaign-2018/2018/11/05/montana-absentee-votes-300k-collected-turnout-already-at-43/>; see also Emily Schabacker, *Requests for absentee ballots grow statewide, despite fears of ‘ballot harvesting’*, MISSOULA CURRENT, Oct. 24, 2018, <https://www.missoulacurrent.com/government/2018/10/montana-absentee-ballots/>.

¹²⁰ These included Phillips, Valley, and the heavily populated Cascade, Gallatin, and Missoula counties. Ambatian, *supra* note 119.

¹²¹ Corin Cates-Courtney, *Montana Secretary of State Alleges Voter Fraud In Missoula County*, MONTANA PUBLIC RADIO, June 16, 2017, <http://www.mtpr.org/post/montana-secretary-state-alleges-voter-fraud-missoula-county>.

¹²² Holly Michels, *Delivering ballots for others isn't illegal, but offers to do so concern voters*, MISSOULIAN, Oct. 17, 2016, https://missoulian.com/news/government-and-politics/delivering-ballots-for-others-isn-t-illegal-but-offers-to/article_182f8ab5-e7f0-53a9-9c2e-dcd745fbb609.html.

¹²³ S.B. 352, 65th Leg., Ch. 238 (Mont. 2017), <https://leg.mt.gov/bills/2017/billpdf/SB0352.pdf>.

¹²⁴ Montana Secretary of State, 2018 General Election Results, Dec. 5, 2018, <http://mtelectionresults.gov/resultsSW.aspx?type=BQ>.

¹²⁵ Schabacker, *supra* note 119.

As the various pieces of ballot harvesting legislation reflect, most legislators are not concerned about family members or caregivers from returning absentee ballots; however, there is more concern that third party individuals without these ties may negligently or intentionally fail to deliver ballots to election officials, or alter ballots or envelopes that may be missing key information before delivery to election officials. There were other concerns expressed that third party groups might collect unsealed ballots, discard ballots to influence the results, or otherwise interfere with a secret ballot or intimidate voters into voting a certain way.¹²⁶

Arizona is another state that has faced complaints and incidents with abuses in ballot harvesting operations that ultimately resulted in the passage of legislation prohibiting the practices and years of litigation. Going back to 2012, the *Coconino Recorder* in Arizona noted that there was evidence of individuals misleading voters fraudulently when staff members of an advocacy group pretended to be from the county's election office when they collected ballots from voters.¹²⁷ Arizona finally addressed the issue by passing legislation (HB 2023) that essentially banned anyone except a family member, householder members, or a caregiver from collecting and returning another person's ballot, with penalties for violating the law of a hefty fine or up to a year in prison.¹²⁸

The proponents said it was designed to preclude fraud, or even the potential of fraud,¹²⁹ while opponents claimed that the bill caused minorities to have less opportunity to participate in the political process than non-minorities, that the harvesting ban was an unnecessary burden on voters, and that it was ultimately an infringement on free speech. Inevitably, litigation ensued and after years of courts adjudicating the issue, the ban on ballot harvesting was eventually upheld by the U.S. Court of Appeals for the Ninth Circuit.¹³⁰ One last attempt to enjoin the law failed in the run-up to the 2018 midterms, as the related First Amendment challenge was rejected by the Ninth Circuit just days before the midterms.¹³¹

Impact of Mail Voting on Political Campaigns and Candidates

A mail ballot program is essential for campaigns in states that are all-mail or no-excuse absentee states that have significant populations which choose to vote by mail. In the final get-

¹²⁶ See, e.g., Eric Eggers, *How Ballot-Harvesting Became The New Way To Steal An Election*, THE FEDERALIST, Dec. 14, 2018, <https://thefederalist.com/2018/12/14/ballot-harvesting-became-new-way-steal-election/>.

¹²⁷ Matt Vasilogambros, *Would You Give Your Ballot to a Stranger?*, PEW STATELINE, Oct. 11, 2018, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/11/would-you-give-your-ballot-to-a-stranger>.

¹²⁸ Mary Jo Pitzl, *Gov. Doug Ducey signs bill banning ballot collection*, AZ CENTRAL, Mar. 10, 2016, <https://www.azcentral.com/story/news/politics/arizona/2016/03/10/gov-ducey-signs-arizona-bill-banning-ballot-collection/81557626/>.

¹²⁹ Howard Fischer, *Federal law supersedes state 'ballot harvesting' law, suit claims*, ARIZONA CAPITOL TIMES, July 5, 2018, <https://azcapitoltimes.com/news/2018/07/05/federal-law-supersedes-state-ballot-harvesting-law-suit-claims/>.

¹³⁰ Howard Fischer, *Federal appeals court upholds Arizona's ban on delivering other people's ballots*, TUSCON.COM, Sept. 12, 2018, https://tucson.com/news/local/federal-appeals-court-upholds-arizona-s-ban-on-delivering-other/article_67448601-a740-574c-aa14-86bd1bd12990.html.

¹³¹ Howard Fischer, *Appeals court rejects another attempt to void Arizona's 'ballot harvesting' law*, TUSCON.COM, Nov. 1, 2018, https://tucson.com/news/local/appeals-court-rejects-another-attempt-to-void-arizona-s-ballot/article_311a7b2d-7592-5215-84e6-ffcf596bda2.html.

out-the-vote (GOTV) period, campaigns have traditionally had an absentee voter phone bank to call absentee ballot voters who have not returned their absentee ballots and remind them to vote before Election Day.¹³² Political parties or candidates will now plan more intensive programs to canvass a campaign's grassroots voters, to monitor absentee ballot requests by their voters, and then communicate by email, phone, or in-person with these potential mail voters, often sending multiple notifications or post cards reminders to voters of their party to request and return their absentee ballot.¹³³ A candidate will seek out potential absentee voters to cast ballots early because if the campaign can ensure a sizeable percentage of their potential turnout is locked in as voted before the campaign turns nasty in the final days, it may gain the overall advantage. These absentee or mail voters will likely make up a sizable portion of the overall electorate and a list of these voters is normally accessible to the campaign. As a result, a campaign can initially focus on these voters before shifting to other voters.¹³⁴ In a competitive district where party registration is close or the candidates well known, get-out-the-vote efforts focused on absentee or mail voters are critical to winning.¹³⁵

Campaigns, political parties, and candidates will have information on what voters are registered to vote and have requested a mail or absentee ballot, and their history of voting. With this information, campaigns will take a number of actions to bank a vote. Not only will candidates robo-call or directly contact potential voters by phone, but will also send a multitude of glossy mailings to households that incorporate absentee ballot requests or get-out-the-vote pleas designed specifically for the voter. To follow up, campaigns will send text messages, email notifications, or knock on neighborhood doors to strongly encourage voters on multiple occasions to request and vote an absentee ballot or to remind them of approaching deadlines to send in their already requested absentee mail ballot.

Why is this new aspect of get-out-the-vote necessary? Because political campaigns and candidates have witnessed the growth of mail voting and learned to exploit any potential advantage of this form of early voting. It is one of the ways that campaigns can attempt to bank the votes of their most active, motivated, and eager voters early in the election process and then focus their remaining campaign energies and dwindling resources on other registered voters who have not cast a ballot and may need some additional encouragement to push them to the polls. While banking votes early may have been the original concept, now the votes of potential mail voters, the last-minute harvest of yet-to-be returned ballots to election authorities could be the difference in winning or losing a close election. As seen in California, these last minute collection efforts may change the trajectory of a race that was not initially going in the direction the campaign had hoped.

The general impact of mail voting on the political parties has been a mixed bag. Mail voting has certainly driven up the cost of campaigns, but this form of voting has given campaigns an extended period to get their voters to the polls. While exhausting, there is more of

¹³² Tom Van Bronkhorst, *Final Countdown: Five-Day GOTV Hour by Hour* in WINNING ELECTIONS: POLITICAL CAMPAIGN MANAGEMENT, STRATEGY & TACTICS 625-28 (John Fauchex, ed., 2012).

¹³³ MICHAEL JOHN BURTON, ET AL., CAMPAIGN CRAFT: THE STRATEGIES, TACTICS, AND ART OF POLITICAL CAMPAIGN MANAGEMENT, 186-88 (2001).

¹³⁴ CATHERINE SHAW, THE CAMPAIGN MANAGER: RUNNING AND WINNING LOCAL ELECTIONS 337-38 (3d ed. 2004).

¹³⁵ CAMPAIGN BATTLE LINES: THE PRACTICAL CONSEQUENCES OF CROSSING THE LINE BETWEEN WHAT'S RIGHT AND WHAT'S NOT IN POLITICAL CAMPAIGNING 25 (Ronald Fauchex & Paul S. Herrnson, eds. 2002).

a chance to adjust, recalculate get-out-the-vote efforts, and push to victory on Election Day. When there was a singular focus on one Election Day, political campaigns created their message and “story line” to reach voters at least four to six weeks prior to Election Day with a closing “sales pitch” made directly to voters in last 10 days before an election. However, with the increase in early mail voting and in-person early voting, at least 25-50% of all voters are now casting their ballots prior to Election Day. Accordingly, political campaigns and candidates are now required to spend more money and time to make the closing “sales pitch” to voters multiple times prior to Election Day.

In states with significant mail voting, political campaigns will engage more often in absentee ballot programs in the weeks prior to Election Day, including organized efforts to follow up on absentee application requests of voters with phone calls, texts, and social media to push voters to cast their vote and return the ballot. Sometimes the organized effort to push voters who have not returned their ballot is very aggressively made in person to encourage the voter to return the cast absentee ballot. There are even mail campaigns with personalized postcards that rank the voter with their neighbors using inaccurate voter history in the hope to motivate the voter through anger or guilt to quickly cast their un-voted absentee ballots or otherwise participate in the election.

Many campaigns and third-party groups will take the next step to personally harvest ballots from voters with a promise to bring the ballots to the appropriate election office for the voter. As a result, some voters will complain about the direct solicitation or abuses in the harvesting of ballots, and a number of states have banned the harvesting of absentee ballots or limited the collection of these ballots to family members or caregivers. Instead of preparing a single get-out-the-vote program for one day of voting on Election Day, now political parties and candidate campaigns need to prepare get out of the vote programs not just for Election Day, but for an extended early vote period, including mail ballot prompting.

Dilution of Election Day Experience

One additional criticism of vote by mail made by many traditionalists is that this method of voting pushes voters to cast their ballot early in the process when there a number of weeks still remaining in the political campaign and that the communal experience of voting in person all on one day is lost. Traditionalists support the in-person voting process for the additional security, secrecy, and integrity of the process. Additionally, once a ballot is cast early in the process and placed in the mail, there is no withdrawing or changing your vote. The vast majority of states do not allow any opportunity to the voter to withdraw the mail ballot and change a selection on the ballot.

It is true that in many states the early voting period for mail ballots begins well before the debates have taken place and the campaigns are still weeks from ending. In presidential primaries, often an early vote by mail for a candidate will be already cast, only to have that candidate drop out of the race before Election Day. There is also the legendary “October surprise,” where a late incident or revelation is made in the final weeks and the voter immediately regrets the already-cast early vote. As more voters cast early ballots by mail or in

person, campaigns will have less incentive to hold onto negative information about their opponents in the last minute hope of gaining an advantage through an October surprise.¹³⁶

Granted, the most motivated and strongly partisan early voters may not be very persuadable regardless of the debates and campaign ads and they will mark their ballots and send back to election offices immediately. However, election administrators often receive requests from voters for an opportunity to change their selections because they regret their choice for some reason.

Many politicians have also witnessed the same phenomenon in which voters hope for an opportunity to change their selections. For example, Independent Senator Angus King of Maine stated that he believes that early voting may create a form of early voting regret in certain situations. At a Senate Rules Committee hearing in February 2014, he described: “a situation in a Maine election recently where we had very early voting. . . . [I]t was a month or more before the election. The dynamics of the election changed in the last several weeks. And we actually had people going into their town offices trying to retrieve their early vote, to change it because of developments in the election.” Senator King continued: “I do think that there's a legitimate issue about how far in advance. Because elections do tend to sometimes come into focus in the last several weeks, and we actually had that experience. I knew people that went to their town office and said, ‘How can I get my vote back? I want to change it,’ and they couldn’t.”¹³⁷

While mail ballots are usually sent at least a month before an election, the voters ultimately still hold the keys to when they actually mark their ballots and send back to authorities.

Recent Vote by Mail Legislation

There has been continued legislative interest in mail or absentee voting with as many as 21 states considering some sort of legislation in the past few years. At the federal level, Senator Ron Wyden of Oregon sponsored legislation (SB 1231) to allow all eligible voters in all 50 states to vote by mail in all federal elections.¹³⁸ In recent years, California and Utah gave its counties the opportunity to choose vote by mail as the method of voting for their elections. In the State of Washington, one interesting area of legislation has been the emergency appropriation and payment of return postage of all mail ballots and increasing the number of ballot return boxes placed throughout the state.¹³⁹ While Colorado and many counties in Washington piloted the concept of returned postage payment, Oregon is now also considering legislation to require pre-

¹³⁶ MIT Election Data, *supra* note 38 (“Empirically, it's important to note that the earliest voters tend to be the strongest partisans, and thus are less likely to be swayed by last-minute information.”).

¹³⁷ *Bipartisan Support for Improving U.S. Elections: Hearing Before the Senate Comm. on Rules and Admin.*, 113th Cong. (Feb. 12, 2014) (statement of Sen. King, Member, Sen. Comm. on Rules and Admin.), *available at* <https://www.rules.senate.gov/hearings/bipartisan-support-for-improving-us-elections> [starting at 1:04:57].

¹³⁸ Vote by Mail Act of 2017, S. 1231, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1231/text>

¹³⁹ Jim Camden, *Washington saw most ballots ever cast in midterm election*, THE SPOKESMAN REVIEW, Nov. 30, 2018, <http://www.spokesman.com/stories/2018/nov/30/washington-saw-most-ballots-ever-cast-in-mid-term/>.

paid postage of absentee ballots, and California will now require pre-paid postage for mail ballots starting in 2019.¹⁴⁰

In the midst of the absentee mail ballot fraud investigation into the North Carolina Ninth Congressional District, legislation was filed to implement the photo identification constitutional amendment approved by voters in the 2018 mid-term elections. One amendment by a Democratic legislator that would require voters to include photo identification with absentee ballots was adopted by the North Carolina General Assembly as long as there remained a “reasonable impediment” affidavit similar to the in-person voting identification requirement.¹⁴¹

In Pennsylvania, despite ongoing litigation, there is potential bipartisan support to move the deadline to receive absentee ballots from the Friday 5 p.m. deadline prior to the Tuesday election to Election Day.¹⁴² One Democratic state Senate candidate who lost her race by 74 votes filed a petition to have at least 216 late absentee ballots counted, arguing “that the U.S. Postal Service budget cuts, among other things, made it impossible for some people to submit their absentee ballots before the deadline.”¹⁴³

To increase the integrity of the absentee mail process, then-Ohio State Senator Frank LaRose, who is the newly elected Secretary of State, filed a bill that would establish a secure online process for voters to apply for an absentee ballot and whereby that application would be verified by existing databases. In a process similar to the online voter registration system, registered voters would be able to submit mail ballot applications electronically as long as the voter provided an identifying number as the confirmation of identity, including the last four digits of the Social Security number, the driver’s license number, or the Ohio identification card number.¹⁴⁴

In California, legislation was also filed to require the Secretary of State to create a system to allow voters to more closely track their mail ballot through the postal system. The legislation would improve the electronic tracking of mail ballots transmitted by election offices and require notifications to the voter when the ballot has been delivered back to the local election office. The system would purportedly require electronic notification to mail voters of approaching deadlines to request mail ballots, provide voters the ability to query the status of the mail ballot,

¹⁴⁰ National Conference of State Legislatures, *Is Vote-by-Mail for Your State?*, THE CANVASS, May 2017, <http://www.ncsl.org/research/elections-and-campaigns/states-and-election-reform-the-canvass-may-2017.aspx>; *California Makes Postage Free On Mail-In Election Ballots Starting In 2019*, CBS SACRAMENTO, July 18, 2018, <https://sacramento.cbslocal.com/2018/07/18/mail-in-ballots-postage/>; *California Bill Requires Free Postage for Mail Ballots*, U.S. NEWS & WORLD REPORT, July 18, 2018, <https://www.usnews.com/news/best-states/california/articles/2018-07-18/california-bill-requires-free-postage-for-mail-ballots>.

¹⁴¹ Paul Woolverton, *Inside Politics: Floyd adds absentee ballots to voter ID bill*, THE FAYETTEVILLE OBSERVER, Dec. 9, 2018, <https://www.fayobserver.com/news/20181209/inside-politics-floyd-adds-absentee-ballots-to-voter-id-bill>.

¹⁴² Julian Routh, *Legislative answer to late absentee ballot problem seems simple but elusive*, PITTSBURGH POST-GAZETTE, Nov. 20, 2018, <https://www.post-gazette.com/news/politics-state/2018/11/20/absentee-ballots-deadline-pennsylvania-aclu-lawsuit-democrats-republicans-elections/stories/201811200183>.

¹⁴³ *Id.*

¹⁴⁴ S.B. 318, 132d Gen. Assem., Reg. Sess. (Ohio 2018), <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-SB-318> (“To enact section 3508.031 . . . to authorize the Secretary of State to establish a secure online process for applying to vote by absent voter’s ballots.”).

and require notification to the voter if the mail ballot cannot be counted and give instructions on ways to correct the deficiency.¹⁴⁵

With mail balloting increasing in the state, the Hawaii Legislature considered a number of proposed bills¹⁴⁶ that would gradually transition the state to all mail balloting over a number of elections.¹⁴⁷ While there seemed to be significant support for the legislation, the legislature tabled the bills in the end. However, the Hawaii Legislature did agree to institute a pilot program for the 2020 primary and general elections on the Island of Kauai only.¹⁴⁸

In Virginia, legislation has been filed on multiple occasions to establish no-excuse absentee mail voting and remove the lengthy list of statutory reasons currently required to vote by absentee.¹⁴⁹ For example, there has been a recent bill filed to provide for no excuse absentee voting for the 21 days prior to Election Day.¹⁵⁰ However, as in the past, concerns have been expressed over whether the existing election infrastructure in localities is able to handle more absentee voting and the high cost of implementation. There is also proposed legislation in

¹⁴⁵ A.B. 2218, 2017-2018 Cal. State Assem., Reg. Sess., 2018 Cal. Stat. 432 (Cal. 2018), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2218 (“[T]he Secretary of State shall establish a system that a county elections official may use to allow a vote by mail voter to track his or her vote by mail ballot through the mail system and as the vote by mail ballot is processed by the county elections official. The system established pursuant to this section shall, at a minimum, allow a voter to register to receive information via email or text message from the county elections official about the status of his or her vote by mail ballot, including all of the following information: (1) A notification when the ballot has been delivered by the county elections official to the United States Postal Service. (2) A notification of the date, based on information from the United States Postal Service, that the voter’s ballot is expected to be delivered to the voter. (3) A notification if the voter’s ballot is returned as undeliverable to the county elections official by the United States Postal Service. (4) A notification when the voter’s completed ballot has been received by the county elections official. (5) A notification that the voter’s completed ballot has been counted, or, if the ballot cannot be counted, a notification of the reason why the ballot could not be counted and instructions of any steps that the voter can take in order to have the ballot counted. (6) A reminder of the deadline for the voter to return his or her ballot if the county elections official has not received a voter’s completed ballot by specified dates as determined by the county elections official.”).

¹⁴⁶ H.B. 1187, 29th Leg., Reg. Sess. (Haw. 2017), https://www.capitol.hawaii.gov/session2018/bills/HB1187_PDF; H.B. 1269, 29th Leg., Reg. Sess. (Haw. 2017), https://www.capitol.hawaii.gov/session2017/bills/HB1269_HTM; S.B. 428, 29th Leg., Reg. Sess. (Haw. 2017), https://www.capitol.hawaii.gov/session2018/bills/SB428_HTM; S.B. 1066, S.D. 1, 29th Leg., Reg. Sess. (Haw. 2017), https://www.capitol.hawaii.gov/session2018/bills/SB1066_SD1_PDF.

¹⁴⁷ *E.g.*, S.B. 2599, 29th Leg., Reg. Sess. (Haw. 2018), https://www.capitol.hawaii.gov/session2018/bills/SB2599_HTM; S.B. 428, *supra* note 146; S.B. 334, 29th Leg., Reg. Sess. (Haw. 2017), https://www.capitol.hawaii.gov/session2017/bills/SB334_SD2_HTM; H.B. 1269, *supra* note 146. The Hawaiian legislature noted that there has been a recent trend in the state toward increased voting by mail, citing the 2014 Hawaii primary election where more ballots were cast early than were cast on Election Day. Fifty-six percent of Hawaii voters chose to vote early during the 2014 primary, with approximately 83% of these early voters voting by mail-in absentee ballot. The legislature further found that “Hawaii’s conversion to elections by mail would significantly reduce the logistical issues related to conducting elections.” The legislature concluded that an incremental implementation of an election by mail voting system was the best approach for the State to transition to elections by mail. *Id.*

¹⁴⁸ H.B. 1401, 29th Leg., Reg. Sess., Act 182 (Haw. 2018), https://www.capitol.hawaii.gov/session2018/bills/HB1401_CD1_pdf.

¹⁴⁹ S.B. 1026, 2019 Reg. Sess. (Va. 2018), <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=sb1026>.

¹⁵⁰ S.B. 136, 2019 Reg. Sess. (Va. 2018), <http://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+SB136>.

Virginia, that would authorize early no-excuse absentee voting by an elector as long as the early voting is conducted in-person in an election office or voting site rather than by mail.¹⁵¹

In previous sessions of the Virginia General Assembly, there have been attempts to establish a multi-year pilot program of vote by mail in participating localities. In this scenario, mail ballots would be sent to all voters in pilot localities who would then return the ballot by mail or by depositing the ballot at a drop-off location. After the elections, the locality would then be required to review how the process worked and issue a report on the pilot program to the State Board of Elections, the Governor, and the General Assembly.¹⁵² To address some of the postal service delivery issues in past elections, Virginia legislators have filed legislation that would require an Intelligent Mail barcode to be placed on all envelopes provided to absentee voters for the return of the ballot to the local election official.¹⁵³

In Indiana, legislation allowing towns to conduct their own municipal election by mail failed.¹⁵⁴ Similarly, legislation to transition from excuse absentee voting (currently 13 authorized reasons to vote by mail) to no-excuse absentee voting failed to win enough support and died at the end of the session.¹⁵⁵

In New Jersey, legislation was filed to permit all registered voters to receive mail ballots automatically if the voter chooses the option of receiving a mail-in ballot for all future elections.¹⁵⁶

In Nebraska, there has been a pilot program of voting by mail in general elections in jurisdictions approved by the Secretary of State. After an initial vote-by-mail pilot project in

¹⁵¹ S.B.254, 2018 Reg. Sess. (Va. 2018), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+SB254> (“Provides that any registered voter may vote by absentee ballot in person in any election in which he is qualified to vote without providing a reason for being unable to vote in person on Election Day. The bill retains the statutory list of reasons allowing a voter to cast an absentee ballot by mail.”)

¹⁵² H.B. 230, 2018 Reg. Sess. (Va. 2018), <http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB230> (“Provides that the Department of Elections shall develop a pilot program for conducting elections by mail. In a vote by mail election, a ballot is mailed to every registered voter and the ballots are returned by the voters by mailing the ballot to the office of the general registrar, by delivering the ballot in person to the office of the general registrar, or by depositing the ballot at a drop-off location. The bill requires participating localities to provide a report on the pilot program in its locality to the State Board by December 1 of each year in which it participates. The bill requires the State Board to submit a report to the Governor, the General Assembly, and the House and Senate Committees on Privileges and Elections on the pilot program, including a recommendation as to whether all elections in the Commonwealth should be conducted by mail.”)

¹⁵³ H.B. 268, 2018 Reg. Sess. (Va. 2018), <http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB268>.

¹⁵⁴ S.B. 427, 120th Gen. Assem., 2d Reg. Sess. (Ind. 2018), <http://iga.in.gov/legislative/2018/bills/senate/427>. The legislation provided that all the municipal primary elections, municipal elections, and special elections for a public question in odd-numbered years may be held by all mail voting.

¹⁵⁵ S.B. 250, 120th Gen. Assem., 2d Reg. Sess. (Ind. 2018), <http://iga.in.gov/legislative/2018/bills/senate/250>; Dan Carden, *Indiana election reforms approved by Senate die in House*, THE TIMES, Mar. 5, 2018, https://www.nwitimes.com/news/local/govt-and-politics/indiana-election-reforms-approved-by-senate-die-in-house/article_fc9b7701-40ca-5cb2-b943-f4080d312e84.html.

¹⁵⁶ A. 1186, 218th Leg., Reg. Sess. (N.J. 2018), <https://www.njleg.state.nj.us/bills/BillView.asp> (“The qualified voter who chooses the option to vote using a mail-in ballot in all future elections shall be furnished with such a ballot by the county clerk without further request on the part of the voter and until the voter requests in writing that the voter no longer be sent a mail-in ballot.”)

Garden County, Nebraska, another three counties – Dawes, Morrill, and Merrick – were approved for mail ballot elections in 2018.¹⁵⁷

In Wyoming, the legislature has been considering legislation for a number of years, similar to legislation in Utah, which would allow counties to move to all-mail elections.¹⁵⁸ In Connecticut, while there has been no legislation approved shifting to vote by mail, the Governor issued an executive order to study the all-mail method of voting.¹⁵⁹

In the 2018 statewide Proposal 2 vote, Michigan voters authorized by initiative “no reason” absentee ballot voting for all voters.¹⁶⁰

Mail Voting Recommendations

To improve the integrity of elections and increase voter confidence in mail or absentee voting, state legislatures should consider the following recommendations to maintain the privacy, security, and accuracy of the voting process.

Recommendation 1:

To confirm the identity of the applicant as the existing registrant, absentee ballot applicants should be required to provide an address, date of birth, signature, and identifying number, including the driver’s license or state identification card number, the last four digits of the social security number, or other identification number provided at registration. Many states are implementing an electronic verification process, similar to online voter registration, which would instantaneously confirm the identifying number of the voter with either the state voter registration database or the driver’s license system in the process of the voter requesting an absentee or mail ballot.

Recommendation 2:

To reduce the number of individuals touching or handling voted or sealed absentee ballots, state legislatures should consider a law or regulation to authorize only family members, household members, or other caregivers to collect the absentee or mail ballot of a voter and return to the election office for counting and tabulation.

Recommendation 3:

¹⁵⁷ Michael Grass, *Nebraska Expands Voting-by-Mail to More of Its Rural Counties*, ROUTE FIFTY, Oct. 17, 2018, <https://www.routefifty.com/management/2018/10/nebraska-voting-by-mail/152117/>.

¹⁵⁸ Ramsey Scott, *Mail-in ballots win over states that make the switch*, WYOMING TRIBUNE EAGLE, Oct. 14, 2018, https://www.wyomingnews.com/news/local_news/mail-in-ballots-win-over-states-that-make-the-switch/article_210bde4a-cf78-11e8-a81e-bbb713e41d82.html.

¹⁵⁹ Exec. Order No. 64, State of Connecticut, Gov. Dannel P. Malloy, Feb. 7, 2018, *available at* https://www.ctnewsjunkie.com/upload/2018/02/EO_64_Voting_1.pdf.

¹⁶⁰ S.B. 1238, 99th Leg., Reg. Sess., Pub. Act No. 603 (Mich. 2018), [http://www.legislature.mi.gov/\(S\(nk5sjgv3mollr5z1dhxi0vte\)\)/mileg.aspx?page=getObject&objectName=2018-SB-1238](http://www.legislature.mi.gov/(S(nk5sjgv3mollr5z1dhxi0vte))/mileg.aspx?page=getObject&objectName=2018-SB-1238).

In addition to comparing the signature of the voter with the signature of the registrant and applicant for absentee or mail ballot, local election officials should find new ways to confirm the identity of the voters, such as the identifying number provided by the voter as the registrant, prior to counting the ballot.

Recommendation 4:

If there is an error or omission by the voter, a signature that does not match the signature on file for the absentee mail ballot voter, or the identifying number does not match the registrant, the election office should make a good faith effort to promptly contact the voter to correct the error, omission, or signature, provide an identifying number, or show identification confirming identity.

Recommendation 5:

The increase in mail ballots that arrive on or near Election Day has resulted in the delay of reporting of results for days and sometimes weeks after Election Day. This delay is often caused by the need to confirm voter identity by signature and research. The deadline to request absentee or mail ballots should be set in advance of Election Day to allow for the mail system to provide voted ballots by Election Night.

Recommendation 6:

The processing of mail absentee ballots by election officials should start well in advance of Election Day, although no tentative or unofficial results should be released to the public or political parties. To speed up the counting and release of unofficial results on election night, the envelopes of mail ballots should be evaluated promptly to confirm identifying or required information, and the canvassed ballots should be scanned prior to Election Night and the first reporting of results. In addition, as the number of mail ballots delivered close to Election Day increases, an election office must be prepared to increase personnel and resources to promptly process and tabulate mail ballots and release results in a timely manner. This process should be transparent while protecting the secrecy of the mail ballots and open to observers representing the political parties or candidates in the election.

Recommendation 7:

To improve voter confidence in voting by mail, state and local election officials should provide online access to mail ballot processing information that will allow a voter to closely track the status of their ballot in all stages of the process - ballot request, ballot transmittal, ballot return, and ballot counting process. Voters want to know if their ballot was received and counted, and if not, how the voter may attempt to remedy the problem. To receive what information is available from the U.S. Postal Service is a bit more complicated, but to provide a best estimate of where the mail ballot may be in the postal system, there are ballot tracking tools that localities can use

to partner with the USPS to provide additional detailed information to voters, similar to tracking a package in the mail system.¹⁶¹

¹⁶¹ Ballot tracking tools such as Ballot Trace and BallotTrax can provide voters with real-time information about where their ballot is, similar to tracking a package at UPS.