



COVID-19 and the 2020 US elections

Government Affairs Alert

COVID-19 Alert

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By: James J. Blanchard | William H. Minor

With the United States general election just 100 days away, the impact of the ongoing coronavirus disease 2019 (COVID-19) pandemic on US electoral systems and procedures has been profound, and significant questions remain about how the November election will be conducted – and whether election officials will be prepared. In modern history, there is no precedent for a nationwide emergency affecting elections and voting. In this alert, we consider the election-related issues raised by COVID-19 in the US and how they are being addressed by elected officials and the courts.

The pandemic has highlighted an important but sometimes overlooked fact that makes elections in the US unique in the world: while the federal government has *jurisdiction* over federal elections, those elections (and all elections in the US) are actually *administered* by state and local governments – approximately 8,000 different jurisdictions. This aspect of federalism means that crucial decisions about the elections this year are being made every day in state capitols and county seats across the country. The policies adopted in the states, and the ways in which they are implemented locally, will result in a confusing patchwork of rules that will play a major role in shaping what happens on November 3 – and thereafter.

One thing that is all but certain is that there will be an election on the first Tuesday following the first Monday of November, notwithstanding speculation that the general election might be postponed, as many primaries were.

Article II of the Constitution delegates the timing to Congress, which established the election date in an 1845 statute and has required that members of the Electoral College submit their votes on “the first Monday after the second Wednesday in December.” Only Congress may change these dates. Moreover, the term of the President is set by the Twentieth Amendment to the Constitution, and in the absence of a clear victor in the election, the Constitution and the Presidential Succession Act would determine who acts as President after the current term ends on January 20.

Impact on primaries

Soon after the pandemic emerged, states scrambled to make adjustments to primary election schedules and procedures, recognizing that the traditional US model of in-person voting would conflict with the spreading stay-at-home orders of mayors and governors. In early April, scenes from Wisconsin, which held the first major in-person election since the pandemic began, were a warning to other jurisdictions, as voters were forced to choose between following public health orders or endangering themselves by standing in line for hours at crowded polling places.

- Ultimately, 25 states postponed at least some scheduled elections, whether presidential primaries, congressional and other primaries, or local elections. Many of the rescheduled elections took place in June or July, although Connecticut will hold its presidential primary on August 11, after two delays and less than a week before the Democratic convention will occur. The Democratic convention was itself delayed and will be held virtually, with only limited attendees in the host city of Milwaukee. The Republican convention to be held in Charlotte, North Carolina was likewise scaled back, and plans to hold some portion of it in Jacksonville, Florida were cancelled in late July.
- Eighteen states revised the requirements for candidates and referenda to be placed on the ballot, recognizing the difficulties inherent in gathering signatures during the pandemic. Some jurisdictions reduced the signature requirements. Others gave campaigns more time to collect signatures. And a few endorsed the use of e-signatures for the first time as an alternative to collecting “wet” signatures by hand and in person.
- Many local election officials took practical steps to modify voting procedures, by establishing social distancing protocols, directing voters and staff to wear face coverings, and relocating polling places away from senior living centers, given the greater vulnerability of the elderly to COVID-19. Counties also sought to hire more workers to assist on election day, anticipating shortages since the average age of poll workers is around 60.
- Perhaps most significantly, a substantial majority of states took steps to make early, absentee, and/or mail-in voting more accessible. All states allow some type of absentee balloting, but rules for these voting alternatives varied greatly from state to state, even before the COVID-19 pandemic. In 2018, nearly a quarter of votes in the US were cast by mail – more than 28 million, a record; five states already conduct their elections entirely by mail. While most states (including the major 2020 battleground states) offer “no-excuse” absentee voting, statutes in 16 states allow such voting only under certain conditions (eg, the voter is ill or disabled or will be outside the jurisdiction on election day). In certain jurisdictions, those seeking to vote other than in-person on election day may require a witness or a notary to request that option. In light of the pandemic, states have this year expanded the use of these options by suspending eligibility requirements, extending deadlines, or simply mailing ballots automatically to all voters.

Litigation regarding election rules

While some of the changes described above were made via legislation and others by executive order or administrative decisions, many were the result of judicial decisions. Observers such as the Election Law Blog and Ballotpedia have identified more than 150 cases brought over election practices in connection with the pandemic, and it looks likely that the 2020 election will be the most litigated in US history. Some instructive examples follow:

- In April, the Wisconsin primary referenced above was conducted only after both the state and federal supreme courts intervened. The day before the election was to take place, the Wisconsin Supreme Court overturned an executive order by Governor Tony Evers that sought to suspend in-person voting, and the same day the US Supreme Court granted, on a 5-4 vote, a stay of a modified absentee-ballot deadline. In dissent, Justice Ruth Bader Ginsberg said the stay “boggles the mind” and would “result in massive disenfranchisement.”
- After New York State cancelled its Democratic presidential primary altogether, a suit by candidate Andrew Yang resulted in a decision forcing the state to reinstate the primary.

- Massachusetts candidates successfully brought suit challenging the state's signature requirements to access the September primary ballot. The judge ordered three forms of relief: dropping the signature requirement by 50 percent; extending the deadline for gathering signatures; and authorizing the use of electronic signatures on nomination papers.
- In Texas, two major cases have focused on the availability of mail-in ballots. In May, the state supreme court unanimously held that the risk of COVID-19 is not a "disability" that would allow voting by mail; the state otherwise allows the elderly and those who will be away on election day to vote by mail. That same month, the state Democratic Party won a preliminary injunction from a federal district court judge to expand vote-by-mail availability, but the injunction was stayed in June by the Fifth Circuit, which criticized the lower court's decision as something "that will be remembered more for audacity than legal reasoning. The federal Supreme Court declined to hear an appeal of the Fifth Circuit's ruling.
- A case brought by the Minnesota Alliance for Retired Americans Educational Fund resulted in a consent decree with the Secretary of State which waived the requirements that mail-in ballots have a witness signature and are received by election day. These provisions apply only to the state's August primary; the general election rules are not yet certain.

Looking ahead to November

Elected officials at all levels continue to grapple with voting during a pandemic, with a focus now on the general election, just 100 days away. And as November approaches, the partisan divide over election issues seems certain to grow.

The underlying conflict in many these debates is between those urging that voting rules must be adjusted to adapt to the current emergency and those who argue that doing so invites fraud into the process. President Trump, although he himself has voted by mail, has taken the latter view, tweeting in June that "Because of MAIL-IN BALLOTS, 2020 will be the most RIGGED Election in our nations history. We voted during World War One & World War Two with no problem, but now they are using Covid in order to cheat by using Mail-Ins."

The public, however, seems to favor greater flexibility. A recent Pew Research poll found that two-thirds of Americans believe the option to vote early or absentee should be available to all voters, even without a documented reason. And studies have shown that there is not a significant partisan impact of vote-by-mail programs, despite such claims.

With partisan rhetoric continuing to increase, we can expect more battles between election authorities of each party and at every level of government as voting procedures are adjusted. For example, a local official who seeks to open more voting centers may face opposition from a state legislature controlled by the other party that seeks to restrict such an expansion.

Issues to watch

In the remaining 100 days before the election, the following will be among the most pressing voting issues:

- Will the federal government make additional funding available to states and localities to help with the upcoming elections? The Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted in March, provided \$400 million in grants for this purpose, but states have argued that the amount is insufficient. The House of Representatives subsequently passed the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act in May, which would direct \$3.6 billion for "contingency planning, preparation, and resilience of" federal elections, but the Senate has not taken up the legislation.
- Will state and local governments be able to identify safer alternatives to traditional polling places? A group led by LeBron James has promoted NBA arenas and other sports venues as new polling venues, with more room for social distancing. Mecklenburg County, North Carolina approved the use of Charlotte's NFL and NBA stadiums for this purpose recently, and other cities have done or are considering the same.
- Will state and local governments, and will the US Postal Service, be prepared for a deluge of mailed ballots? Officials in Texas and other states have said they oppose mail-in voting in part because they fear the election infrastructure cannot handle a surge in such voting. And the Postal Service, already stretched thin, has seen problems this year with mailed ballots in the primaries.

- Will the lack of a quorum at the Federal Election Commission (FEC) impact the enforcement of campaign finance laws? The FEC requires four votes to take action on enforcement matters and to provide advisory opinions to regulated parties but had only three sitting Commissioners out of six slots for more than seven months. After a fourth Commissioner was finally sworn in on June 5, one of the other members announced her departure just three weeks later, leaving the FEC again unable to take action in the months ahead of the election.
- Finally, will American voters, and observers around the world, be prepared for an election night that may not include the declaration of a winner? During the primaries, it became routine for the winners to be announced days later. While the delay in resolving the 2000 election between George W. Bush and Al Gore seemed, at the time, a once-in-a-lifetime anomaly, another delay – and the possibility of litigation over absentee and provisional ballots – would surprise no one in 2020.

For more than four months, COVID-19 has exposed weaknesses in the US healthcare system, the country's education system, and the national economy more broadly. The same is true, unfortunately, for US electoral systems and procedures, and the biggest test is still to come.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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AUTHORS



James J. Blanchard

Partner

Washington, DC | T: +1 202 799 4000

james.blanchard@dlapiper.com



William H. Minor

Partner

Washington, DC | T: +1 202 799 4000

william.minor@dlapiper.com
