

Elections in the Time of COVID-19

An Action Plan for Pennsylvania's General Election

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The global spread of COVID-19 is causing massive disruptions to nearly all aspects of normal life. The pandemic's consequences for lives and livelihoods are impossible to predict with any certainty. Yet it is constitutionally imperative that Pennsylvania—and the rest of the United States—hold the election in November.

Bold action is needed on nearly every front here in Pennsylvania, in the United States, and around the world. As health and economic systems feel the strain of this crisis, so too will our democratic systems. With this in mind, we must begin today to plan for a safe, legitimate, accessible, and secure general election in November.

Free and fair elections are fundamental to popular sovereignty and the legitimacy of democratic rule both here and the world over. The United States has long been a leading democracy, and the right to vote and the guarantee of democratic government are not merely suggestions, they are enshrined in the Constitution.

The Constitution requires that the newly elected president and the vice president take office next year on January 20 and the newly elected members of Congress take office on January 3.¹ To uphold this constitutional imperative, federal law requires that the election take place the "the Tuesday next after the first Monday in the month of November" or "the first Tuesday after November 1".² The President has no authority to delay or move our election in November, and any such attempt would be a self-inflicted constitutional crisis with profound consequences for the health of the Republic.

Instead, with the benefit of many months between now and the election, we must seize the initiative and prepare as thoroughly as possible to hold an election while protecting public health. Elections have been held during crises throughout our history,³ and the COVID-19 pandemic should be no exception. Voters should not be forced to choose between exercising their right to vote and risking their own and their community's health and well-being—a choice far too many voters in Wisconsin faced in early April.

States bear much of the responsibility for administering federal elections. Consequently, all fifty states and the District of Columbia must hold free and fair elections to effect a legitimate national election. Pennsylvania is no exception, and perhaps will very much be in the national spotlight given its perennial battleground status in the races for the presidency and control of Congress.

Here in Pennsylvania, the Commonwealth has already taken the precaution of moving its primary day from April 28, 2020 to June 2, 2020,⁴ a necessary (and drastic) measure required to protect public health and the Commonwealth's primary elections. While all hope that the spread of COVID-19 will be contained before the general election on November 3, Pennsylvania and the rest of the country must be

¹ U.S. Const. amend. XX.

² 2 U.S.C. § 1; 2 U.S.C. § 7; 3 U.S.C. § 1.

³ Federal elections were held during World War II, the Spanish flu pandemic and World War I, and the Civil War, for example, albeit with far less expansive suffrage and mass disenfranchisement of many in the country.

⁴ PA LEGIS 2020-12, 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422).

prepared for the possibility that it will not. A hotly contested presidential election, unsterilized machines, short-staffed polling places, and crowds of voters and poll workers in close quarters could all contribute to the spread of coronavirus and undermine orderly election administration.

With shrewd advance planning today and implementation of key policies, we believe that Pennsylvania will be able to hold its general election on November 3 in a way that maximizes democratic participation without undue risk to public health. Wherever feasible, these recommendations should also be implemented for the June primary.

Many of these recommendations are new, expensive, and difficult. This is not the time for half-measures and cost savings. Just as lives are at risk during this crisis, so too is our democracy. We must act accordingly.

Hold the General Election on November 3

Rescheduling the April 28 primary election was sound state public policy amidst a public health crisis requiring decisive action to contain the spread of the novel coronavirus. Additionally, because the primary election in Pennsylvania is but a series of party nominating contests, as opposed to contests by which the voters elect officials to office, it was appropriate to move the primary election without disrupting the general election in November.

Yet the general election in November must take place as scheduled under federal law. Unlike the primary contests where party nominees are selected, the general election in November is the method by which we actually select our elected officials, including the President and every member of the U.S. House of Representatives. It is constitutionally imperative that newly elected officials take office in January as required under the U.S. Constitution,⁵ and the election must occur on November 3, a date set in federal law by Congress.⁶ There is no lawful mechanism for the President to change the date of the election in November absent action from Congress. Moreover, there is ample time between now and then to prepare and to make adjustments to Pennsylvania's election practices and laws to ensure a free, fair, accessible, and secure election while protecting public health.

⁵ See U.S. Const. amend. XX.

⁶ See 2 U.S.C. § 1; 2 U.S.C. § 7; 3 U.S.C. § 1.

Expand Vote by Mail

Fortunately for Pennsylvania voters, the Commonwealth added no-excuse mail-in voting as an option in the election reform package that Governor Wolf signed into law in 2019 (Act 77).⁷ Thus, under current law, Pennsylvania voters may complete an application to receive a mail-in ballot, which they can fill out and mail in lieu of voting in person on Election Day. Voters may also return their mail-in ballots to county election offices. Pennsylvania officials should make every effort to encourage voters to vote by mail to reduce traffic at polling places during voting.

Mail voting should help to reduce pressure on polling places and poll worker staffing. To that end, all Pennsylvania counties should revise the mail-in voting process so that all registered voters receive an application at their registration address for a mail-in ballot in the mail with a postage-paid return envelope. Mail-in ballots should also include postage-paid return envelopes. Allegheny County, for example, has already taken this prudent step for the June primary.⁸ These changes—which counties can take without a revision to current law—would likely lead to an expanded volume of mail-in ballots cast by voters, while preserving for voters the option of voting in person at a polling place, if necessary. Applications should remain available online and in paper form.

This change will require significant investment in resources and staffing—printing costs, postage costs, application and ballot processing, and more—but can rely on existing integrity and security measures in place around mail-in voting in Pennsylvania.⁹

Inactive registered voters—who, under Pennsylvania law, failed to respond to a notice after either being flagged as having moved by USPS change-of-address data or failing to vote or contact election officials during a five-year period¹⁰—should receive applications at their last address of registration. Voters who do not appear as eligible to vote from the address at which they requested a mail-in ballot (for example, those recently purged from the rolls) should receive provisional ballots and information about how to register to vote.

Expanded mail voting should not lead to a partisan advantage for any political party or to an increased likelihood of election fraud. On the former point, researchers from Stanford University who studied this precise issue recently concluded that vote-by-mail does not seem “to affect either party’s share of turnout[or] to increase either party’s vote share” and that vote-by-mail “modestly increases overall average turnout rates, in line with previous estimates.”¹ The Brennan Center for Justice reached a similar conclusion after analyzing 2016 voter file data from Arizona, Florida, Georgia, Minnesota, North Carolina, Ohio, and Wisconsin: “Our analysis of these seven states makes clear that there is little reason to believe that mail voting would uniformly help Democrats in November.”¹ As for election fraud, the editorial board of *The New York Times* recently observed that “states that use vote-by-mail have encountered essentially zero fraud,” noting that Oregon “has documented only about a dozen cases of proven fraud...[out of the] more than 100 million mail-in ballots” it has sent out since 2000.¹ Put simply, “it is still more likely for an American to be struck by lightning than to commit mail voting fraud.”¹

⁷ See 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421); see also “Act 77 Makes Historic Changes to PA Election Code,” Pennsylvania Department of State, <https://www.votespa.com/About-Elections/Pages/Voting-Reforms.aspx>.

⁸ Press Release, Allegheny County (Pennsylvania), “Elections to Send Mail-in Ballot Applications to All Registered County Voters, April 17, 2020, <https://t.co/CZlhFf08G?amp=1>.

⁹ For a more fulsome analysis of Pennsylvania’s election security posture, see “Study and Recommendations,” The Blue Ribbon Commission on Pennsylvania’s Election Security, https://www.cyber.pitt.edu/sites/default/files/FINAL%20FULL%20PittCyber_PAs_Election_Security_Report.pdf.

¹⁰ See 25 Pa. C.S. § 1901(c).

The Department of State should also work to bolster systems around ballot tracking, so that voters can check the status of their application and ballot,¹¹ in light of the surge in mail voting expected this year. This investment and others to mail-in voting and voter registration systems—estimated to cost between \$780,000-\$1.2 million¹²—should also facilitate reconciliation of questions of whether voters have voted via mail-in ballot should they seek to vote in person.

Voters who requested a ballot but nonetheless seek to vote in person should be provided with the option of turning in the uncast mail-in ballot to be spoiled so that they may vote a regular ballot in person. Voters who fail to bring in their mail-in ballot or who may have returned their mail-in ballot but are worried that it will not be received in time should still be offered a provisional ballot (to be counted if the mail-in ballot is not received by the deadline). This is consistent with current Department of State policy.

Pennsylvania's election officials, who face an extraordinary task in administering elections during a public health crisis, would be wise to consult officials in states with more robust histories of relying on mail voting (e.g., Colorado, Oregon, and Washington).

Vote-by-mail options are not realistic for everyone. Many who require an accessible voting option—such as a ballot-marking device in the polling place—will be unable to securely and independently complete mail-in balloting materials. Moreover, those without reliable internet or mail access, those who frequently move, and those with housing instability, for example, could be disenfranchised if expanded vote-by-mail is not coupled with an in-person voting option. Thus, Pennsylvania should preserve an in-person voting option consistent with public health guidance.

Prepare Polling Places and Poll Workers

In-person voting must be made safe for those who require it (such as those who need an accessible voting machine to safely and independently cast a ballot). And, of course, officials must heed public health guidance in the lead-up to November and consider an all-mail election if in-person voting would be unsafe.

To protect public health, polling places will need to be equipped and ready to implement measures to minimize the transmission of the virus. As the Brennan Center for Justice has observed, such preparations should include:

- heeding CDC guidance about poll worker illnesses and polling place cleanliness;
- ensuring adequate supplies to support proper sanitation of polling places;
- where hand-marked paper ballots are used, encouraging voters to bring their own pens for ballot marking; and

¹¹ Voters may track applications and ballot mailings through a Department of State website: <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

¹² Christopher R. Deluzio, Elizabeth Howard, David Levine, Paul Rosenzweig, Derek Tisler, "Ensuring Safe Elections: Federal Funding Needs for State and Local Governments During the Pandemic," Brennan Center for Justice (April 30, 2020), https://www.brennancenter.org/sites/default/files/2020-04/2020_04_5StateCostAnalysis_0.pdf.

- configuring equipment consistent with social distancing guidance.¹³

The Department of States has wisely ordered personal protection kits—"which will include supplies such as masks, gloves, hand sanitizer and other cleaning sanitizers, and tape to mark the floor for distance markers"—for distribution to counties for the June primary.¹⁴

In addition, counties will likely need to recruit new poll workers (likely from outside vulnerable groups in the population for whom COVID-19 infections can carry greater risk). The Department of State and counties should explore options for such outreach, including targeted recruitment of eligible students, non-conflicted government workers in non-essential positions, and furloughed or laid-off workers affected by the public health crisis, as well as potential engagement of temporary staffing agencies to assist.

The package of reforms that the General Assembly passed in March to move Pennsylvania's primary election to June included a provision that empowers counties to close and consolidate polling places for the June primary—without court approval—in response to the COVID-19 pandemic. Counties may even move polling places outside an election district to anywhere else in the county. The provision does not require direct notification of affected voters. The potential for partisan abuse and vote suppression is significant. Moreover, one election official shared concern that the consolidation of precincts could be disastrous for voters and offered the recommendation that every high school gym in each county be outfitted as a vote center, with as many precincts as possible set up in each gym for each of the municipalities in the school district.

Pennsylvania should rein in this broad power should polling place consolidation be extended to the general election in November. At a minimum (if consolidation is to occur in November and, as planned, in June), affected voters should receive direct notification from counties about any changes affecting their polling place—mail notices and, if feasible, text and phone notifications to supplement a mail notice, along with signage and posting on county websites and at other county facilities. Officials would be wise to consider the recommendation to utilize high school gyms—or other large public venues—as vote centers along with other creative ideas to ensure voters are not disenfranchised.

Election officials and policymakers should also consider study of an early voting period as a way to ease congestion in polling places in November. More than forty states and the District of Columbia already (or will soon) offer some period of early voting,¹⁵ so there is ample data for study to determine whether offering early voting would help to alleviate pressure on polling places—especially if the consolidation of polling places will occur again in November.

¹³ Memorandum, "How to Protect the 2020 Vote from the Coronavirus," Brennan Center for Justice, March 16, 2020, <https://www.brennancenter.org/sites/default/files/2020-03/Coronavirus%20Response%20Memo.pdf>.

¹⁴ "Election Operations During COVID-19 (Version 1.1)," Pennsylvania Department of State, April 28, 2020, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_ElectionOperationsDuringCOVID19.pdf.

¹⁵ National Conference of State Legislatures, State Laws Governing Early Voting, August 2, 2019, <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

Implement Measures for Voter Education and Combatting Disinformation

The above recommendations would represent a significant change in the normal functioning of elections and require communication with voters accordingly. Outreach via mail, text, phone, traditional media, and social media should be used to inform as many voters as possible regarding changes to voting rules and procedures to avoid both disenfranchisement and confusion leading to longer exposure at the polls. Examples requiring clear, transparent communication include:

- State and local officials should actively engage in a broadly targeted communications effort to encourage voters to take advantage of vote by mail and early voting, if available.
- Counties should send targeted mailings to any individual whose polling place is moved.
- Counties should provide information for those voting in person about new voting systems in advance to limit confusion in person. For example, counties might share and highlight videos online of how new systems work, perhaps enlisting high-profile citizens such as sports stars to assist.

In addition to communicating with voters on changes to how they vote, Pennsylvania officials should communicate with the public on other consequences of any new measures. For example, it is likely that these new measures could lead to slower than usual reporting of unofficial results. Officials would be wise to communicate with the public before Election Day to set expectations.

Each of these communications efforts also represents a moment to combat disinformation and should include an emphasis on trusted sources of information, such as the Department of State website and county websites. But more will be needed.

The 2020 election was always ripe for manipulation via disinformation by bad actors. Coronavirus adds yet another point of exploitation that federal, state, and local officials will need to be ready to combat. Campaigns that add to confusion, disenfranchise particular groups of voters, and/or exploit political divisions should be anticipated and mitigated.

Avoid Adoption of Online Voting

Online voting is not a feasible solution for Pennsylvania or any state. There is no secure method of online voting.¹⁶ In addition, as the Iowa Caucus demonstrated, online voting has tremendous logistical challenges to overcome.

¹⁶ For a very readable explanation of why, see David Jefferson, "If I Can Shop and Bank Online, Why Can't I Vote Online?," Verified Voting, <https://www.verifiedvoting.org/resources/internet-voting/vote-online/>; "Securing the Vote: Protecting American Democracy," National Academies of Sciences, Engineering, and Medicine, <https://www.nap.edu/catalog/25120/securing-the-vote-protecting-american-democracy>, pp. 101-106.

Revisit Contingency Planning

Coronavirus and the changes it requires to Pennsylvania's voting process will demand a significant review and likely revision of existing contingency planning. We recommend that the Department of State undertake efforts accordingly and work closely with counties to assist them.

Particular emphasis should be placed on changes needed in planning due to public health guidance, expanded mail voting, polling place changes, new voting systems, and staffing shortages, as well efforts to combat dis- and mis-information and to communicate rapidly and transparently with voters.

Prevent Backsliding on Election Security Progress

Pennsylvania has made significant progress in improving its election security since the 2016 election. All counties will be using voter-marked paper ballots in the 2020 election. The state and counties are also making progress on implementing risk-limiting audits to ensure that election officials can detect and recover from attacks or errors affecting the tabulation of votes. This, and progress toward other recommendations from The Blue Ribbon Commission on Pennsylvania's Election Security, should be commended and maintained with temporary adaptations as needed to be consistent with public health guidance.

The new operating environment, however, presents additional occasions for cyber exploitation. In addition to the cyber risks discussed above, more individuals working from home on government business presents additional vulnerabilities that must be mitigated. At a minimum, county election offices should adopt the Department of State's security guidelines for teleworking.

Support Federal Funding and Action

Nearly all of these recommendations are resource intensive—both in terms of staffing and procurement. Pennsylvania can expect to receive roughly \$14 million from the \$400 million allocated for elections in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). While welcome, this will not fully cover the cost of changes needed for Pennsylvania's election, estimated to reach roughly \$90 million for both the primary and general elections.¹⁷ Pennsylvanians should support additional federal funding for safe and fair elections.

¹⁷ See Christopher R. Deluzio, Elizabeth Howard, David Levine, Paul Rosenzweig, Derek Tisler, "Ensuring Safe Elections: Federal Funding Needs for State and Local Governments During the Pandemic," Brennan Center for Justice (April 30, 2020), https://www.brennancenter.org/sites/default/files/2020-04/2020_04_5StateCostAnalysis_0.pdf. The report compiled projected increased costs during the pandemic for the primary and general elections for securing online systems, mail ballot distribution, mail ballot processing and tabulation, in-person voting, public education, and secure remote and off-site infrastructure.

Conclusion

We recognize that these recommendations may be difficult and expensive to implement. They are not a perfect solution set. Yet the cost to our democracy of inaction would be far greater. The political division resulting from an election seen as illegitimate due to disenfranchisement or excessively low turnout—or both—must be avoided.

Pennsylvania Voters, request your ballot by mail here:

<https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>
