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## A PRIMER ON H.R. 1, THE “FOR THE PEOPLE ACT OF 2021”

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### INTRODUCTION

Initially introduced in the 116<sup>th</sup> Congress, H.R. 1, the “For the People Act,” proposed several reforms intended to improve voter access, restrict political spending and instill new ethics rules for the federal government.<sup>1</sup> Democratic lawmakers at the time hailed the bill as a “transformational and comprehensive suite of democracy reforms” that would “drastically alter the balance of power in Washington and make government work for the people.”<sup>2</sup>

In March 2019, H.R. 1 was passed by the Democratic-controlled House of Representatives. Similar measures were introduced in the Republican-controlled Senate but never received a vote.<sup>3</sup>

At the beginning of the 117<sup>th</sup> Congress, the House again introduced H.R. 1—a substantively similar version to its 2019 counterpart—and it is expected to pass.<sup>4</sup> Attention will ultimately turn to the Senate, where the chamber is evenly divided, with Vice President Kamala Harris potentially serving as a tie-breaking vote.

The primer that follows assesses the merits of the various provisions of H.R. 1, finding some promising and important

reforms, but ultimately a proposal that offers far more harm than good.

Though not exhaustive, concerns about the bill fall into three broad categories:

1. It federalizes elections unnecessarily.
2. It places the federal courts into an unnecessary—and perhaps unconstitutional—spotlight.
3. It curtails crucial speech and association rights.

Each of these concerns will be discussed in greater detail followed by a brief overview of the provisions worthy of support or expansion.

### H.R. 1 FEDERALIZES ELECTIONS UNNECESSARILY

The Constitution’s Elections Clause provides that the “times, places and manner” of elections “shall be prescribed” by the states.<sup>5</sup> However, Congress may “make or alter such regulations.”<sup>6</sup> As the Supreme Court has observed, this balance “sprang from the Framers’ aversion to concentrated power.”<sup>7</sup>

With this purposeful balance in mind, today, American elections are largely decentralized. This offers several advantages. For one, local elections inspire local participation.<sup>8</sup> Smooth elections rely on volunteers to train and spend long hours working at poll centers and counting ballots. Indeed, providing local governments enough political autonomy to respond to local challenges is a feature, not a bug. It allows local governments to innovate and try different election practices, some of which may be copied by other states and others that should be ultimately abandoned. It also makes local governments most responsible for their elections. This accountability can inspire positive reforms. For example, during the contested 2000 presidential election, Florida was ridiculed for its slow and ambiguous vote-count system. Soon after, the state legislature passed several reforms, and during the recent presidential election, Florida’s votes were counted on time, despite the highest voter turnout in nearly 30 years.<sup>9</sup>

Decentralized elections also offer a security advantage. Although election threats—through cyber vulnerabilities or other methods—will continue, decentralized elections make these threats less destructive. It is challenging to organize an attack that penetrates thousands of jurisdictions, which mostly operate on different systems or procedures. Indeed, days after the 2020 election, the government’s Cybersecurity and Infrastructure Security Agency (CISA) publicly declared the election “the most secure in American history” with

“no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.”<sup>10</sup>

The COVID-19 crisis provides another example of why decentralized elections are preferable to a large-scale, more federalized approach. Especially in the early months of the pandemic, different regions of the country faced different challenges. States with older populations and more urban areas undoubtedly faced different challenges and considerations than other pockets of the country. As a result, states applied a variety of strategies to prepare for the 2020 election. Throughout the country, state legislatures, governors and election officials implemented state-specific authorities to respond to the pandemic, including delaying primary elections, easing restrictions to absentee and mail voting, and adjusting rules for in-person voting.<sup>11</sup>

This flexibility would have been near impossible with a more federalized election system. Yet, that is what H.R. 1 mandates. Title I of the bill specifies numerous new mandates, including universal rules for internet and same-day voter registration, early voting, voting by mail and voter registration of minors. Section 3701 mandates that states may only use voting machines that were “manufactured in the United States.” However, there is “nothing inherently suspicious about foreign ownership of voting machine manufacturers or software makers,” especially with adequate backups such as paper ballots.<sup>12</sup> H.R. 1 also adds unnecessarily punitive measures like Section 1302, which threatens up to five years in prison for “materially false” information intended to mislead others about voting locations or eligibility.

Those who encourage more federal directives into local elections should take pause, especially those who lament past administrations’ misuse of federal agencies and regulations for partisan advantage or to retaliate against political foes. Fundamentally, it is unwise to hand the keys to our elections to the very same people whose political futures rely on those elections to remain in power.

Moreover, some proponents of H.R. 1 presume that the law would solve nearly all election messes. But as the Congressional Research Service reminds us, the bill’s mandates only “apply to federal elections” and “states could choose not to adopt the new federal requirements for state and local elections.”<sup>13</sup> Whether due to cost, capacity or political machination, some states may choose to bifurcate their election policies, likely confusing voters and upending the entire process.

There are certainly a number of reforms in H.R. 1 that would be good policy. For instance, making it easier to vote by mail, allowing same-day registration and permitting felons to vote are worthy reforms. However, the problem is H.R. 1’s uni-

versal application, which disregards fundamental issues of federalism, differences of state law and local capacity.

A notable example is Title II’s requirements for congressional redistricting. Nonpartisan redistricting is unquestionably preferable to partisan gerrymandering. But H.R. 1 not only forces each state to establish an independent redistricting commission but details precisely how the commission must operate and who may serve. Shockingly, the bill says that if a state fails to follow its micromanaged process—or if it ultimately fails to approve a final plan before a specific deadline—the state loses the opportunity to draw its own district lines. Instead, the offending state’s lines are drawn by three members of a federal district court. Constitutionality questions aside, this process—with its many pitfalls along the way—is an atrocious way to ensure states draw more palatable congressional districts.

Decentralized elections are more appropriate in our federalist system and ultimately make our elections safer and election officials more accountable to voters. Of course, there are several reforms proposed in H.R. 1 that are good policy. But these good-faith reforms are unfortunately outweighed by changes that would unnecessarily federalize elections, slow down local responses to new election challenges, and raise a number of constitutional questions. In short, our elections system does not allow Washington, D.C. to micromanage the administration of local elections.

## **H.R. 1 PLACES FEDERAL COURTS INTO AN UNNECESSARY SPOTLIGHT**

Following a string of bitter judicial confirmation battles and seemingly unending polarized fights surrounding the federal judiciary, there have been some calls to step back and consider ways to lower political temperatures around the federal courts. But H.R. 1—if enacted—would only raise the heat by placing untold election disputes on the judiciary’s lap, defying both the Constitution and common sense.

To begin, H.R. 1 directs any legal challenges to the law to one court—the U.S. District Court for the District of Columbia. Irrespective of whether a rule or regulation is challenged in Maine or Montana, H.R. 1 denies plaintiffs the opportunity offered in nearly any other case against the government—the chance to sue in their home district court. Instead, Section 4 envisions that “any action” must be filed potentially hundreds or thousands of miles away in Washington, D.C., where courts are directed to “expedite” the case “to the greatest possible extent.”

Unsurprisingly, the Judicial Conference of the United States—the federal courts’ national policymaking body—has raised several concerns. In a letter to the House Judiciary

Committee when it was considering H.R. 1's 2019 version, the Judiciary Conference wrote that it "generally has objected to the creation of specialized courts or the concentration of certain subject matter review in one court, recommending that judicial review be provided by a court in the appropriate geographic region."<sup>14</sup> The logic is that no federal district court is more capable of handling legal disputes than any other district court. When it comes to election disputes and potential challenges to H.R. 1, there is no reason why claims should not be filed in the appropriate local federal court.

H.R. 1's "standards for judicial review" are also politically cynical. Irrespective of the bill drafters' intent, it suggests that no local court could possibly resolve a local election dispute fairly or impartially. This is certainly not the case. And this would also surprise the litigants and court observers who followed the dozens of federal suits filed after the 2020 Election, which—to no avail—challenged local election rules and alleged numerous counting errors. Further, many of these cases were quickly dismissed by Republican and Democratic-appointed judges, including judges nominated by President Trump himself.<sup>15</sup>

Another pitfall of placing "any action" in one court is the unnecessary political pressure placed on that court. Today, approximately twenty district and senior judges serve in the District Court for the District of Columbia—compared to the hundreds of judges that serve in the other 93 district courts around the country. By their nature, election cases are closely followed by voters and lawmakers alike. At times, they may determine the fate of any election. With such pressure riding on one court, any future nomination battles in this court will certainly become even more (and unnecessarily) contentious.

Another of H.R. 1's flaws is its flippant attitude toward the Constitution's "cases or controversies" requirement. Article III extends judicial power only to "cases" or "controversies," meaning federal courts cannot offer advisory opinions or hear cases from plaintiffs who do not have standing to sue.<sup>16</sup> But, as mentioned above, if a state fails to timely develop and approve a congressional redistricting plan, H.R. 1 tasks a three-judge panel from either the District Court for the District of Columbia or a district court "in which the capital of the State is located" to create a plan instead. This is not the role of federal courts. In its 2019 letter, the Judicial Conference also raised concerns with this provision, noting that it was "difficult to identify" a constitutionally permissible situation "where H.R. 1 would trigger the court's responsibility to develop a state redistricting [plan]."<sup>17</sup>

Finally, in Title VII, as part of the bill's section on ethics reform, H.R. 1 requires the Judicial Conference to create a "code of conduct" for "each justice and judge of the United States." Unfortunately, despite its good intentions, part of

this requirement is redundant, and the other is impermissible. For starters, a code of conduct already exists for lower federal court judges.<sup>18</sup> And as the Judicial Conference often reiterates, it "does not oversee the Supreme Court and does not have the expertise to craft a code for their use."<sup>19</sup> As such, if Congress wants the Supreme Court to adopt a formal code of conduct, it must encourage the Court to write one or develop one itself.

## H.R. 1 CURTAILS SPEECH AND ASSOCIATION RIGHTS

Of the First Amendment's foundational protections, the freedom of speech is perhaps its most cited. When we consider what speech is protected, we typically find ourselves at the margins.

After all, popular speech and consensus are not what needs protection. Instead, controversial or challenging speech is what the Constitution shields.

Beginning in the 1950s, the Supreme Court also began to consider the freedom to associate. At the time, states were trying to curb the growth and success of the National Association for the Advancement of Colored People (NAACP). In two notable cases, the Supreme Court blocked the forced disclosure of membership lists as it improperly interfered with the members' freedom of association.<sup>20</sup> More recently, the Supreme Court has explained that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."<sup>21</sup>

Regrettably, H.R. 1 takes severe steps to curtail speech and association rights, and threatens to create a chilling effect on policy-oriented nonprofits and others engaged in the political process.<sup>22</sup> Specifically, Division B, "Campaign Finance," poisons the entire legislative vehicle by piling on a number of new laws and regulations that would only stifle speech and limit the free (and protected) exchange of ideas.

It is important to note that many educational and advocacy organizations from across the political spectrum have sounded the alarm on this point. Criticism from the center-right was echoed by groups on the left. When H.R. 1 was originally introduced in 2019, the American Civil Liberties Union (ACLU) wrote that "the bill, in its current form, would still unconstitutionally burden speech and associational rights."<sup>23</sup> For instance, in reference to Subtitle B, otherwise known as the DISCLOSE Act, the ACLU concluded that it "strikes the wrong balance between the public's interest in knowing who supports or opposes candidates for office and the vital associational privacy rights guaranteed by the First Amendment."<sup>24</sup>

Under H.R. 1, certain “campaign-related” communications require the disclosure of donors. Under the bill, “campaign-related” communications are defined to include express advocacy for a candidate’s defeat or election, or “the functional equivalent of express advocacy.”<sup>25</sup> Similarly, vague definitions—scattered throughout the bill—are opaque and serve to chill speech and discourage participation in the news and controversies of the day.

## PROVISIONS WORTHY OF SUPPORT

Rarely are large pieces of legislation that contain many provisions all good or all bad, and H.R. 1 is no exception. While the evidence is clear that the bill on net would create more problems than it would solve, there are a handful of provisions, as mentioned earlier, that are worthy of consideration, particularly at the state level.

More specifically, these provisions include Division A, Title I, Subtitle A, which would expand same-day registration; Title I, Subtitle E, which ensures enfranchisement of most people with felony records; Title I, Subtitle F, which provides for mandatory paper trails for votes; Title I, Subtitle I, which defends mail-in voting; Title I, Subtitle N, which would allow for the use the voter drop boxes and protect federal pre-clearance of changes to voting laws; and Title II, Subtitle E, which provides for non-partisan redistricting. Other provisions that provide federal funds to state-level experiments are also potentially worthy of support.

However, as discussed earlier, a step toward the federalization of elections is generally a step in the wrong direction that would allow for easier abuse of our electoral system in the future. The decentralized structure of the federal election system is one of the biggest deterrents against abuse by malicious political actors, and while many of the voting reforms described in Division A are well-intentioned, implementing them at the federal level would likely weaken election integrity, rather than strengthen it.

## CONCLUSION

It is important to identify pragmatic reforms that encourage electoral accessibility and security. H.R. 1 proposes a number of election changes that indeed should be adopted by states, but in doing so, the bill mistakenly works to federalize our elections—inadvertently slowing down good election reform and adding untold election vulnerabilities.

H.R. 1 also places federal courts in an inappropriate position to draw congressional maps and places unnecessary venue restrictions on plaintiffs, forcing the judiciary into an unnecessary—and likely unconstitutional—political position. Finally, and perhaps most damagingly, H.R. 1 limits speech and association rights by offering untold new regulations

governed by vague and uncertain definitions, all working to chill speech and political association.

The bill’s sponsors would be best suited to discard these more harmful provisions and work to advance more individualized measures at the appropriate levels of government.

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## ENDNOTES

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