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## SUMMARY OF 2021 ELECTION LEGISLATION

By Matthew Germer

### INTRODUCTION

In 2021, election legislation is dominating politics to a greater extent than any year in recent memory, as politicians not only rehash the results and processes of the 2020 election but also work to establish policies for the future.

Throughout 2021, legislators across the United States introduced more than 1400 bills that either expand or restrict voting rights, with dozens ultimately making their way to governors' desks and signed into law.<sup>1</sup>

This paper provides a brief overview of some of those enacted laws, with an emphasis on legislation that impacts elections in the following ways:

1. Voter registration, particularly the maintenance of accurate voter rolls, automatic voter registration and voting rights restoration.
2. Early voting, particularly the availability of mail-in absentee ballots, early in-person voting and ballot drop boxes.

3. Election administration, particularly the balance of oversight power between local and state officials as well as harsh punishments for certain election activity.

While these topics are not exhaustive of all election legislation, they do represent some of the most contentious and important election law issues addressed by state legislators in 2021. The legislation summarized in this paper is intended to provide a sense of direction and scope; not every provision contained in these bills will be included in the summaries. Finally, although state legislatures experienced a frenzy of debate and activity in 2021 regarding post-election audits and claims of election fraud, the topic has been handled elsewhere and is not included in this paper.<sup>2</sup>

### VOTER REGISTRATION

Before any votes are cast in an election, voter registration establishes the election landscape. While public attention often focuses on the partisan impact of who registers to vote, legislators should be designing voter registration laws that promote participation by all eligible voters and prevent ineligible or fraudulent voting.

In 2021, the direction of voter registration policy varied across the country. In Republican states, legislators sought to “clean up” the voter rolls, in an attempt to prevent ineligible and multiple voting. Meanwhile, legislators in Democratic states broadly looked to expand access to the ballot, including updates to automatic voter registration and restoring voting rights to convicted felons.

### A FOCUS ON “CLEANING UP” VOTER ROLLS

The list of registered voters in a jurisdiction, also known as the “voter rolls,” regularly become out of date as residents move, become eligible to vote (e.g., by reaching 18 years of age), or become ineligible to vote (e.g., through felony conviction or death).

Typically, inaccuracies in the voter rolls do not amount to large problems. Voters who move to another state or pass away are unlikely to vote in their previous jurisdiction. However, the 2020 election brought with it a surge in absentee voting, including some instances where all voters were proactively sent an absentee ballot in advance of the election. While a high number of absentee ballots does not necessarily lead to worrying increase election fraud, bloated voter rolls necessarily results in too many ballots being circulated among the public. This represents not only a threat to election security but also an inflated cost to election administrators.

In an effort to improve the accuracy of voter rolls, the state legislatures in Arizona, Louisiana, New Hampshire, Okla-

homa, Texas and Utah passed laws to expeditiously remove deceased voters from their lists.<sup>3</sup> Each of these bills passed through their respective legislatures with broad bipartisan support with the lone exception being Oklahoma, where opponents expressed concerns that the bill may lead to unintended disenfranchisement.<sup>4</sup>

In addition to cleaning up voter rolls regarding deceased voters, some states opted to join a multi-state voter list maintenance system, such as the Electronic Registration Information Center (ERIC). ERIC is a non-profit organization comprised of states from across the political spectrum designed reduce inaccurate voter rolls by allowing state election officials to securely share voter registration information between each other.<sup>5</sup> In 2021, Alabama, Nebraska, and Oklahoma each passed legislation paving the way to join ERIC.<sup>6</sup>

While most states focused their voter list efforts on more efficient coordination with state and local governments, Arizona took it a step further. Senate Bill 1819 allows the state legislature to hire a private party to review the state's voter registration database maintenance procedures to determine compliance with federal law.<sup>7</sup> If the contractor finds discrepancies, the bill requires the Secretary of State to work with county recorders to remove ineligible voters from the rolls.

## LIMITED MOVEMENT ON AUTOMATIC VOTER REGISTRATION

The National Voter Registration Act of 1993 (NVRA) required nearly all states to offer citizens the opportunity to register to vote when applying for a driver's license or state ID.<sup>8</sup> Some states have taken the relationship between interactions with state agencies and voter registration a step further by automatically registering citizens to vote when they interact with certain state agencies, such as the Department of Motor Vehicles or Department of Health. This opt-out process is commonly known as "automatic voter registration" (AVR).<sup>9</sup>

AVR is primarily designed to ensure voters are ready for the next election; however, much like the aforementioned voter-rolls clean-up legislation, AVR also updates the voter rolls to include address changes and the addition of new voters.

Since Oregon first implemented the program in 2016, 20 other states have adopted some form of AVR.<sup>10</sup> This year, a new state has been added to the list: Delaware. With the adoption of Senate Bill 5, Delaware is scheduled to implement AVR at state DMV offices by 2023.<sup>11</sup>

## EXPANSION OF VOTING RIGHTS RESTORATION

In the 1974 case *Richardson v. Ramirez*, the Supreme Court found that the Fourteenth Amendment to the U.S. Constitution allows states to revoke the voting rights following the

conviction of certain crimes, often felonies.<sup>12</sup> The policy of felony disenfranchisement began in Kentucky in 1792 and by the time the Fourteenth Amendment was adopted in 1870, a majority of states had felony disenfranchisement laws in place.<sup>13</sup> However, in recent times the trend has shifted toward restoring voting rights after a sentence has been completed, or even more recently, after release from confinement.

According to the National Conference of State Legislatures, three states—Maine, Vermont and Washington, D.C.—allow felons to maintain their voting rights at all times.<sup>14</sup> The majority of states automatically restore voting rights following release from confinement or following full completion of the sentence (including probation or parole). Meanwhile, 11 states do not automatically restore voting rights but instead require some form of review or petition to trigger restoration.

Coming into 2021, three states—Iowa, Kentucky and Virginia—offered no statutory pathway for voting rights restoration. However, in 2021, Virginia advanced HJR 555, which begins the process for moving the majority of states automatically restoring voting rights following the completion of a sentence.<sup>15</sup>

Washington, Connecticut and Louisiana also modified their existing voting rights restoration law with HB 1078, SB 1202 and HB 378, respectively.<sup>16</sup> Under Washington's new law, convicted felons will have their voting rights automatically restored following release from confinement, even if they remain on parole. Louisiana's legislation removes the requirement that convicted felons submit documentation to the registrar of voters and instead allows them to register to vote so long as they have not committed a new crime in the previous five years.

## EARLY VOTING

The 2020 election tested a number of pressure points in states' electoral systems. With high interest in voting resulting in record turnout, and with hygiene and distancing protocols due to the COVID-19 pandemic, election officials across the country encouraged voters to participate in early voting, particularly voting by mail.<sup>17</sup>

In 2021, state legislators on both sides of the aisle took lessons learned from early voting in 2020 and made substantive changes to their election laws. In Republican states, legislation tended to scale back the availability of mail-in voting and ballot drop boxes and to provide more uniform, if not shorter, early voting windows. Meanwhile, in Democratic states, legislators sought to increase the availability of early voting not only by expanded voting windows but also by instating universal vote-by-mail.

## STATES MOVED IN DIFFERENT DIRECTIONS ON ABSENTEE/MAIL-IN BALLOTS

One of the most divisive subjects with election law over the past year is the availability of absentee or mail-in ballots. In the lead-up to the 2020 election, President Donald J. Trump urged his supporters to question the legitimacy of absentee ballots and pushed theories of absentee ballot fraud long after the election.<sup>18</sup> Along with his calls to investigate purported fraud, Trump also leaned heavily on Republican state lawmakers to enact restrictions on absentee voting, and dozens of restrictions were introduced across the country.<sup>19</sup>

Ultimately, nearly a dozen states added restrictions to absentee voting. Some states moved up the due date for submitting an absentee request, such as Alabama's HB 538 and Oklahoma's HB 2663, while others placed restrictions on public officials sending unsolicited absentee request forms, such as Arizona's HB 2905 and Arkansas's HB 1715.<sup>20</sup>

Three bills, in particular, received substantial attention from national media. Each of these three bills functioned as omnibus election legislation, with provisions affecting multiple aspects of the electoral process in their states. This paper will cover many of those provisions in later sections.

The first of the three bills to pass was Georgia's Senate Bill 202.<sup>21</sup> While much of the media coverage focused on the bill's restrictions on Election Day practices, such as the ban on the provision of water and snacks to voters waiting in line, the majority of the bill makes technical changes to the voting process. Regarding absentee ballots, SB 202 shortens the window for absentee ballot applications from 180 days before an election to 78 days and ends the window 11 days before the election. The bill also requires absentee applications to include identification information such as a driver's license number, state ID number, or a bill showing the voter's address. Finally, the bill moves the mailing of absentee ballots from 45-49 days before the election to 25-29 days before the election. While each of these changes reflect a more restrictive set of rules, Georgia's absentee voting laws still remain quite permissive when compared to their peers nationally.

The next bill that passed was Senate Bill 90 in Florida.<sup>22</sup> Much like the Georgia legislation, Senate Bill 90 added a requirement for proof of identification to absentee requests. The bill also limited the duration of an absentee voting request to a two-year, one-general-election cycle, down from a four-year, two-general-election cycle. Finally, like the legislation in Arizona and Arkansas, Senate Bill 90 prohibits government agencies from sending unsolicited absentee applications. Similar to Georgia, the Florida legislation placed greater restrictions on absentee voting, but the state still offers easier access to absentee voting than many others.

The final major bill to pass in 2021 related to absentee ballots was Senate Bill 1 in Texas.<sup>23</sup> Similar to other states, SB 1 added requirements to include identifying information such as a driver's license or ID number on the absentee ballot envelope and prohibited local election officials from distributing unsolicited absentee ballot applications.

Unlike Georgia and Florida, however, Texas has long been one of the more restrictive states when it comes to absentee voting. Texas voters must have a qualifying excuse to receive an absentee ballot, such as a disability, illness, an out-of-town engagement during the entirety of the in-person early voting period, or be over the age of 65. Not only did the Texas legislature place new restrictions on absentee voting through SB 1, but they further limited qualifying excuses in 2021 with HB 3920, which placed greater restrictions on the illness and conflict excuses.<sup>24</sup>

Although many Republican-controlled states placed greater restrictions on absentee voting, a number of states, including both Republican and Democratic legislatures, passed legislation making absentee voting easier, or even ubiquitous.

Among the Republican states to make absentee voting easier, both Utah and Kentucky passed legislation to create online ballot trackers.<sup>25</sup> House Bill 574 in Kentucky, in particular, paved the way for voters to register absentee online as well.<sup>26</sup>

Democratic states, meanwhile, went even further in promoting absentee voting. Oregon passed HB 3291, requiring that ballots be postmarked rather than received by Election Day.<sup>27</sup> This change aligns Oregon with its vote-by-mail neighbor, Washington, and provides more flexibility for late-deciding voters at the expense of definitive Election Night results.<sup>28</sup> Maryland, meanwhile, enacted HB 1048, which created a permanent absentee voter status and required election officials to send absentee applications to all voters in advance of the next two general elections.<sup>29</sup>

In conjunction with efforts to help more voters cast absentee ballots, a number of states passed legislation to allow more absentee ballots to count by creating or strengthening "ballot curing" provisions. "Ballot curing" is a process that allows voters to fix missing or mismatched signatures on absentee ballots, without changing their votes, in order to ensure the ballot can be counted.<sup>30</sup> States led by both Republicans and Democrats made improvements to ballot curing, including: SB 298 in Indiana, HB 574 in Kentucky, SP 450 in Maine, HB 1253 in North Dakota, SB 1 in Texas, HB 1888 in Virginia and SB 15 in Vermont.<sup>31</sup>

Two states passed legislation showing the strongest support of absentee voting, namely by moving to universal vote-by-mail elections. California and Nevada passed SB 37 and AB 321, respectively, bringing the total to eight states that con-

duct all elections by mail, representing roughly 20 percent of the U.S. population.<sup>32</sup>

## EXPANDED EARLY IN-PERSON VOTING WITH VARYING IMPACT

Early in-person voting experienced a variety of changes across the country in 2021. State legislatures, predominantly controlled by Democrats, passed legislation expanding early voting windows, while Republican legislation provided a more mixed result.

Democratic-controlled New Jersey, for instance, passed SB 3203, which expanded early in-person voting using voting machines to nine days for general elections.<sup>33</sup> Prior to this change, New Jersey only offered in-person early voting using absentee ballots. With SB 3203, voters who prefer the assistance of a voting machine now have more than a week to vote in-person.

Similarly, Kentucky and Louisiana each expanded in-person early voting by three additional days with HB 574 and HB 286, respectively.<sup>34</sup> On the other end of the spectrum, Republican-controlled Iowa passed SB 413, reducing the in-person absentee voting period from 29 days to 20 days.<sup>35</sup>

Georgia's SB 202 provides a mixed bag of changes to the early voting window.<sup>36</sup> The bill sets minimum and maximum standards for early voting. This functions as an expansion for rural counties that previously had offered limited early voting opportunities, and a maintenance of the status quo for urban counties, who had previously offered more robust early voting. The bill also requires that, absent an emergency, early voting take place within a building, effectively outlawing the use of mobile voting buses used by Democratic-leaning Fulton County. In the end, the changes provide a directional advantage to Republican-leaning voters; however, Georgia continues to offer greater access to early voting than most other states.<sup>37</sup>

## MIXED RESULTS ON THE USE OF BALLOT DROP BOXES

Prior to the 2020 election, ballot drop boxes maintained a relatively low profile. In states with all-mail elections, ballot drop boxes enjoyed broad support as a convenient and efficient method of returning ballots.<sup>38</sup> However, leading up to the 2020 election, President Trump raised concerns with ballot drop boxes, and they became the subject of partisan debate.<sup>39</sup>

In 2021, a number of states made changes to drop boxes with different ends in mind. Democratic-controlled states, such as Illinois (HB 1871) and Virginia (HB 1888), expanded the

availability of ballot drop boxes in an effort to make their use more convenient.<sup>40</sup>

Meanwhile, Republican-controlled states put greater oversight on the use of drop boxes. The Montana legislature, for instance, passed SB 93, which requires at least one poll watcher from each political party be permitted at each drop box while it is in use.<sup>41</sup>

Both Florida and Georgia made changes to the ballot drop box rules in their omnibus bills.<sup>42</sup> Georgia's SB 202 requires each county to offer access to fully staffed, indoor drop boxes at early voting sites; however, the bill also placed firm prohibitions against the use of 24-hour, outdoor drop boxes employed by some counties during the 2020 election cycle. Meanwhile, Florida's SB 90 requires drop boxes to be placed so as to create "an equal opportunity to cast a ballot" and requires them to be monitored by staff while open. Similar to other changes in the bills outlined above, the effects generally benefit Republican-leaning rural voters while implementing strict rules that will reduce access to drop boxes in more urban areas.

## ELECTION ADMINISTRATION

Elections in the United States have largely been local affairs. Article I, Section 4 of the U.S. Constitution places broad authority for elections in the hands of the states, and the states, in turn, have passed on-the-ground election administration to counties.<sup>43</sup> Following the "Stop the Steal" movement from the 2020 election, Republican state legislatures have sought to rein in the election oversight authority at the county level, opting instead for greater state control. Additionally, Republican legislatures also passed bills to increase the punishments for bad behavior related to an election, with punishments that often dramatically exceed the nature of the offense, in order to send a message in favor of "election integrity."<sup>44</sup>

## INCREASED STATE OVERSIGHT OF LOCAL ELECTION ADMINISTRATION

The decentralized nature of elections in the United States places counties in the driver's seat for election administration. By and large, decentralization adds complexity, with election administrators across the state making decisions that could treat voters differently based on where they live, occasionally resulting in infamous outcomes, as seen in Florida in 2000.<sup>45</sup> At the same time, decentralization can limit errors and create firewalls, as seen in New Hampshire in 2020.<sup>46</sup>

Overlaying this general dynamic are the specific political situations of individual states. Some states that lean Republican statewide, such as Georgia, have concentrated pockets

of strong Democratic voters within its dense, urban counties. The result is an incentive for some Republican state legislatures to create opportunities for the state to take control of election activity traditionally left to the counties. Georgia's SB 202 does just that.

Under Georgia's new law, the state elections board, helmed by a chair selected by the legislature, can initiate a performance review on local election superintendents, ultimately leading to their removal and replacement.<sup>47</sup> While removal may be warranted under certain circumstances, the bill leaves open removal for vague violations left to the discretion of the state board. Republicans in the state legislature have an incentive to take control of Democratic counties' elections, and SB 202 provides the pathway to do so.

### **HARsher Punishments for Certain Election Activity**

Elections are a foundational institution in any democracy, and voters must be able to trust that election workers carry out their duties without bias or malfeasance. In that spirit, a number of state legislatures added increased penalties for election workers who break the law in the performance of their duties. Unfortunately, in an attempt to discourage bad behavior, lawmakers created penalties that far exceed the nature of the offense.

Ballot harvesting schemes, which seek to collect ballots from favorable voters or dispose of ballots from unfavorable voters, provide a threat to the integrity of elections.<sup>48</sup> Unfortunately, Iowa's Senate Bill 413 attacks this problem with a heavy hand by criminalizing the return of another person's absentee ballot, even with the voter's consent.<sup>49</sup> In effect, well-meaning Iowans might find themselves on the wrong side of the law just for helping a friend or neighbor.

Similarly, SB 1 in Texas creates a state jail felony for local election officials who provide unsolicited applications for mail-in ballots.<sup>50</sup> Texas is already one of the most difficult states to obtain an absentee ballot, and providing a voter who qualifies for such a ballot with an application, not even the ballot itself, should not warrant up to two years in jail.

Lawmakers are obligated to set the parameters for how elections in their state will be conducted, but they are also responsible for ensuring the punishments fit the crimes. Legislation in 2021 pushed the limits of that responsibility.

### **CONCLUSION**

In the wake of the 2020 election, which saw record turnout for a contentious election amidst a global pandemic, state legislators across the country made a variety of reforms to their election laws.

Republican states largely made changes pushing toward cleaner voter rolls, limiting access to early and absentee voting, more state control over elections, and tougher penalties on election activity. Democratic states, on the other hand, focused on expanding automatic voter registration, increasing access to early and absentee voting, and restoring voting rights following incarceration.

The lasting impact of the 2020 election is still unclear. Former President Donald J. Trump continues to make "stolen election" claims and urges his supporters to pressure Republican lawmakers to pass bills favorable to his interests. Undoubtedly, Trump's behavior functioned as a lightning rod for attention on election legislation throughout the country, shining a spotlight on meaningful changes in election law. However, this attention also over-politicized relatively benign changes. Given Trump's continued calls for investigations into the 2020 election and the bipartisan appetite for election legislation at the state level, 2022 may bring yet another momentous slate of election legislation.

### **ABOUT THE AUTHOR**

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