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POLICY OVERVIEW

Vote-by-Mail: Balancing Promise with Prudence

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Introduction

This election year has the potential to be unlike any other. In the shadow of COVID-19, where social distancing mandates require people to avoid large gatherings, there is a major push across the country to adopt vote-by-mail (VBM) election procedures in time for the 2020 general election this November. VBM is generally regarded as a simple, secure, and practical method for registered voters to participate in an election and it is a natural choice for communities committed to physical distancing. Advocates of VBM also tout it as a means to increase voter turnout and reduce instances of disenfranchisement. After all, despite incremental advancements in voter rights throughout America's history, the threat of disenfranchisement remains a perennial source of discouragement for many people of color come election day.

Indigenous people are no strangers to this threat. Native Americans in Arizona were denied the right to vote until 1948, and still today voter suppression efforts continue to aggravate Indian Country as politicians strive to maintain their grip on power in a plurality rules, winner-take-all election system. When presented as an optional voting method, VBM makes the voting process more accessible for many, one of the reasons it increases voter participation. However, the politicization of this process currently playing out in public discourse, can lead to the elimination or reduction of access to in-person voting locations on Election Day. Because it is often Indigenous people and other communities of color who suffer the most in these situations, it is imperative that Indigenous leaders have a meaningful voice in any and all discussions surrounding the implementation of VBM in our elections. In Arizona, individuals in positions of power have consistently sought to suppress the Native vote.¹ While Arizona has already transitioned some of its election processes to vote-by-mail, any further changes made ahead of this November must include input from tribal leaders across the state, lest their communities be left out of the 2020 election.

The Rapid National Adoption of Vote-By-Mail

In states where mail-in balloting was rapidly expanded in response to the COVID-19 pandemic, turnout has ballooned.² Iowa, Montana, South

¹ For historical context, see [Porter v. Hall](#) (1928) or [Harrison v. Laveen](#) (1948). For contemporary examples, see [Navajo Nation Human Rights Commission v. San Juan County](#) (2018) or [Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters](#), NARF (2020) at pages 41, 51-2, 83-4, or 96. See also [The Democratic National Committee v. Hobbs](#) (2020) where a ruling in favor of the DNC protected the voting rights of many in Arizona. According to 9th Circuit U.S. Court of Appeals Judge William A. Fletcher, "the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass" the bill and other factors "cumulatively and unmistakably reveal" that racial discrimination was a motivating factor in pushing the bill through (pg. 4). The "discriminatory intent" with which the law was originally enacted expressly reveals the motivations of Governor Doug Ducey and his administration, and their ongoing efforts to suppress minority voters in the state (pg. 3).

² Max Greenwood, ["Turnout surges after states expand mail-in voting."](#) *The Hill*, June 7, 2020.

Dakota, and New Mexico each saw pronounced increases in voter turnout over 2016 primary numbers. By simplifying the voting process, governments provide their constituents with a painless alternative to in-person voting—which is often associated with standing in line for hours and, because of employment, is both cost and time prohibitive for many.

State adoption of VBM systems has grown steadily since 2000, when Oregon became the first state to conduct its elections entirely by mail.³ Now, the coronavirus pandemic is prompting many states, and even the federal government, to rapidly develop alternatives to in-person voting, especially with an increase in cases expected again in fall 2020.⁴

Across the country, primary elections have been, and will continue to be, complicated by the pandemic. In April, New York became the first state to cancel its primary originally scheduled for June, because New York City was, at the time, a hot spot for the virus.⁵ The Democratic Congressional Campaign Committee in South Carolina is suing the state's election commission to expand absentee voting opportunities ahead of November's general election.⁶ In June, primary elections across the country were marred by malfunctioning machines⁷ and inadequate access to polling locations. Former Georgia gubernatorial candidate Stacey Abrams described the state's primary election as "an unmitigated disaster."⁸ In Nevada, as the state attempted a rapid transition to a predominately mail-in primary election, only one polling place was open in Reno's Washoe County,⁹ with three open in Clark County,¹⁰ the home of Las Vegas. These four in-person polling locations were meant to accommodate the more than 1.6 million registered voters in the state's largest metropolitan areas.¹¹ While Nevada recently passed legislation that will mail all active voters ballots ahead of the general election,¹² the missteps described here demonstrate the need for a measured transition to VBM that protects the right to vote of all constituents, especially those in already underserved or underpolled areas. Our election processes must ensure all Americans are able to vote safely this November.

In recent years, VBM has grown rapidly in popularity and now holds broad public support. According to a national survey conducted by Pew Research Center in early April, seven out of ten Americans favor allowing any voter to vote by mail if they want to, including 44% who strongly support this policy.¹³ More than half of Americans (52%) favor conducting all elections by mail, an increase of 18 percentage points from 2018 polling.¹⁴ In early May, Governor Gavin Newsom of California signed an executive order requiring each county's election officials to send mail-in ballots to all registered voters in the state ahead

³ "Oregon Vote-by-Mail Timeline," Oregon Secretary of State, 2000, <https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf>.

⁴ Faith Karimi et al., "Coronavirus deaths are expected to go down before a sharp rise in September, model shows," CNN, June 12, 2020. See also [Institute for Health Metrics and Evaluation COVID-19 Projections](#). The Institute for Health Metrics and Evaluation (IHME) is an independent global health research center at the University of Washington.

⁵ Kate Sullivan et al., "New York cancels June primary because of coronavirus," CNN, April 27, 2020.

⁶ Emma Dumain, "Citing coronavirus, national Democrats sue South Carolina to run elections by mail," *The State*, April 22, 2020.

⁷ Nathaniel Rakich and Geoffrey Skelley, "Georgia Was A Mess. Here's What Else We Know About The June 9 Elections," *FiveThirtyEight*, June 10, 2020.

⁸ Elena Moore and Michel Martin, "Stacey Abrams Calls Georgia's Primary Election 'An Unmitigated Disaster,'" *NPR*, June 12, 2020.

⁹ Samantha Smerechniak, "Hundreds of people show up this morning to cast an in-person vote for NV primary," *KRNV (NBC)*, June 9, 2020.

¹⁰ "Notice of All-Mail Ballot Election," Clark County, NV Election Department, Mailer Notice. May 1, 2020. <https://www.clarkcountynv.gov/election/Documents/2020/Mailer-Notice-20P-EXPANDED.pdf>.

¹¹ Rakich and Skelley, "Georgia Was A Mess. Here's What Else We Know About The June 9 Elections," *FiveThirtyEight*, June 10, 2020.

¹² "Nevada passes bill to mail all voters ballots amid pandemic," *Associated Press*, August 3, 2020.

¹³ "Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by COVID-19," Pew Research Center, U.S. Politics & Policy, April 28, 2020, <https://www.pewresearch.org/politics/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19/>.

¹⁴ *Ibid.*

of this year's general election.¹⁵ Speaker of the House Nancy Pelosi (CA-12) pushed for nationwide VBM policies and supported the inclusion of a \$3.6 billion earmark in the May 15, 2020 House-approved emergency spending package—the \$3 trillion HEROES Act—to “ensure our democratic elections do not become a casualty of this crisis.”¹⁶

According to the National Conference of State Legislatures (NCSL), five states currently conduct all elections entirely by mail, while another 21 states have policies in place to allow VBM elections at the local level.¹⁷ Arizona is one of those 21 states. As of 2018, a city, town or school district may conduct a mail ballot election, so long as they follow specific guidelines and requirements.¹⁸ Additionally, the State of Arizona employs a Permanent Early Voting List (PEVL), which constituents may request placement on at any time, including during registration. Members of the PEVL receive and return all ballot materials in the mail for all elections. Registered Arizona voters may also request a one-time ballot-by-mail for any election, given they do so before the deadline.¹⁹ Unfortunately, individuals can be placed on the PEVL without their knowledge, making them ineligible to vote when they show up in person on Election Day.²⁰

VBM systems allow more Americans to vote—and do so safely—in future elections, including and especially the general election this November. However, newly implemented VBM processes should not be used as excuses for election officials to eliminate or severely curtail in-person polling locations. Because the benefits of VBM do not necessarily extend to rural tribal communities, it is imperative that tribal leaders across the country help lead the adoption of VBM in their communities to make sure that in-person voting options remain available, provided they can be conducted safely and if they are deemed necessary and/or serviceable. Many of Arizona's Tribal Nations understand far too well the oppressive and suppressive tendencies of the federal and state governments across a broad range of socio-economic issues. New election systems must be established in such a manner that they are resistant to attempts to strip Native Americans of their civic rights to vote in federal, state, and local elections.

Impact on Tribal Communities

A transition to VBM-only systems may create additional opportunities for jurisdictions to manipulate voter rolls and dictate which constituents are eligible to participate in U.S. elections. For example, uncommon address formats on tribal lands can make some reservation residents vulnerable to disenfranchisement through voter purges. In 2012, Apache County, Arizona “purged 500 Navajo voters because the County Recorder claimed their addresses were ‘too obscure’ and the Recorder alleged that they could not be assigned to a precinct.”²¹ Under the National Voter Registration Act of 1993 (NVRA), election officials are required to accept a voter's drawing to identify their precinct and cannot deny a voter registration application or purge an existing application because it uses a non-traditional address or has to be identified on a map by landmarks or geographical features.²² In fact, the NVRA

¹⁵ “Executive Order N-64-20,” State of California, May 8, 2020, <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-text.pdf>.

¹⁶ Danielle Haynes, “Pelosi: \$3.6B a ‘small price to pay’ for vote-by-mail efforts,” UPI, May 21, 2020.

¹⁷ “All-Mail Elections (aka Vote-By-Mail),” NCSL, March 24, 2020, <https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx>.

¹⁸ “2018 Arizona Revised Statutes, Title 16 – Elections and Electors,” Justia, U.S. Law, U.S. Code and Statutes, Arizona Revised Statutes, <https://law.justia.com/codes/arizona/2018/title-16/section-16-409/>.

¹⁹ “Voting by Mail: How to Get a Ballot-by-Mail,” Arizona Secretary of State, <https://azsos.gov/votebymail>.

²⁰ Tucker et al., “Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters,” Native American Rights Fund (June 2020): 94, 101, 114, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

²¹ Tucker et al., “Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters,” Native American Rights Fund (June 2020): 83-4, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

²² “H.R. 2 - National Voter Registration Act of 1993,” Congress.gov, 103rd Congress, May 20, 1993, <https://www.congress.gov/bills/103rd-congress/house-bill/2/text>.

provides only six instances in which states may remove voters. None of these have any relation to “obscure” addresses.²³ Despite presenting the Recorder with a P.O. box and drawing the location of their homes on the registration form, hundreds of Navajo voters were placed on the County’s suspense list—also known as inactive lists in other states—meaning they faced yet another hurdle to casting their ballots.²⁴ While some were able to make it over this barrier, others were stripped of their right to vote. As VBM is expanded, we can expect bad actors to exploit the dearth of traditional mailing addresses on reservations to remove Native voters from their rolls. Internal control measures and oversight policies, such as third party verification, that ensure proper application of the law would help to combat such voter suppression efforts.

These tactics may have lasting negative impacts on individuals’ motivation to vote. Discouragement from successful past efforts to steal their vote may prevent some Native Americans from registering to vote or participating in elections.

Without traditional mailing addresses, many American Indians in Arizona rely on P.O. boxes to receive their mail. The high usage of P.O. boxes opens the door to more potential instances of disenfranchisement. For example, some jurisdictions have simply refused to mail VBM ballots to Post Office boxes.²⁵ This is a blatantly discriminatory act that must be discontinued. Even when a ballot is received in a P.O. box, barriers to casting a ballot still exist. Although one of the major issues VBM hopes to resolve is geographic isolation, in reality, many reservation residents will still need to travel significant distances to pick up, fill out, and then return their ballot. Without mail delivery at home, the “tyranny of distance” is largely replicated under VBM systems on reservations.²⁶ Furthermore, infrequent and/or unreliable mail service is common for rural tribal communities. If participation in American democracy requires a trip to the P.O. box, states must ensure that constituents have sufficient physical and temporal access to their ballots.

Required language assistance further complicates a transition to mail-only ballots. Due in large part to Census undercounts,²⁷ the number of jurisdictions eligible for Section 203 language assistance has declined in recent years. Section 203 of the Voting Rights Act of 1965 (VRA) provides that for covered jurisdictions, “all election information that is available in English must also be available in the minority language so that all citizens will have an effective opportunity to register, learn the details of the elections, and cast a free and effective ballot.”²⁸ In Arizona, only two Indigenous languages are covered under Section 203, down from six in 2011. The Apache and Navajo languages are covered in three counties each. Four Arizona counties were dropped from Section 203 coverage altogether in 2016.²⁹ The State’s most populous county, Maricopa, was among those which lost coverage. All coverage was lost for the Hopi, Tohono O’odham, Yacqui, and Yuman languages. Still, even where language assistance is not required, it is often available at in-person polling locations through community volunteers or election officials.³⁰ If in-person voting locations are removed, it is essential that some form of voter assistance sites are made available for Native language voters on Election Day. For example,

²³ Ibid.

²⁴ Aura Bogado, “Democracy in ‘Suspense’: Why Arizona’s Native Voters Are in Peril,” *The Nation*, October 18, 2012.

²⁵ Tucker et al., “Obstacles at Every Turn,” Native American Rights Fund (June 2020): 96, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

²⁶ Ibid.: 95.

²⁷ Ibid.: see pages 50-1 for a fuller explanation.

²⁸ “About Language Minority Voting Rights,” U.S. Department of Justice, March 11, 2020, <https://www.justice.gov/crt/about-language-minority-voting-rights>.

²⁹ Tucker et al., “Obstacles at Every Turn,” Native American Rights Fund (June 2020): 51, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

³⁰ Ibid.: 53.

polling locations on tribal lands could be converted to support sites to provide language assistance. Many ballot measures are hard enough to understand for English-only speakers. If mailed ballots are not translated into Indigenous languages and no in-person assistance is made available, many Native Americans, especially Elders, will be disenfranchised by a transition to VBM.

Officials in San Juan County, Utah have implemented a number of procedures that have been shown to disenfranchise Native voters. The County, which encompasses the northern border of Navajo Nation, is required to help Navajo voters overcome language barriers as a covered jurisdiction under Section 203. To circumvent this requirement, the County switched to a mail-only voting system in 2014, eventually resulting in a lawsuit filed by the American Civil Liberties Union (ACLU).³¹ In 2018, the case reached a settlement where it was acknowledged that the County did not provide effective language assistance to Navajo-speaking voters and that Navajo voters had unequal voting opportunities in the County.³² Ultimately, as mandated by the courts, the County will comply with Section 203 by providing in-person voter assistance (English and Navajo) at several locations on Navajo Nation during the 28 days before every election, maintaining three polling places on Navajo Nation with Navajo language assistance, and taking various steps to ensure quality interpretation of election information and materials into the Navajo language.³³ While the Navajo Department of Health declared voting an essential activity in May,³⁴ it is unclear what any in-person assistance will look like this November, given the COVID-19 pandemic and the ongoing lockdown on the Navajo Nation. Just weeks ago, the Navajo Nation Council voted 16-4 to override President Jonathan Nez's veto and cancel the Nation's primary election scheduled for August 4, citing coronavirus concerns.³⁵ The primary election would have narrowed the list of eligible candidates for chapter governments, boards and other offices.

With language assistance now enforced in San Juan County by court order, other tactics have been implemented that lead to Navajo voter disenfranchisement. In Navajo Mountain, Utah, just miles from the Arizona border, there is one small post office box in the local Navajo Nation chapter house. Although the P.O. box is in the state of Utah, it uses a Tonalea, Arizona zip code since it is a sub-branch of the post office on the Arizona side of the border. The San Juan County clerk regularly exploits this circumstance to disqualify Navajo voters living in the County, claiming they live in Arizona because of their postal address.³⁶ The County clerk reportedly uses "all sorts of methods like [this] to reduce the number of [Navajo] voters" in the County.³⁷

Given the potentially devastating impact a rapid transition to VBM policies may have on tribal communities, it is important that the issue receive significant attention so that replicable strategies to combat disenfranchisement may develop. Thankfully, Senate Democrats have already taken action³⁸ and many states and organizations have found innovative solutions to protect the Native vote.

³¹ "Order re: Stipulated Settlement and Motion to Dismiss," U.S. District Court, District of Utah, Central Division, Navajo Nation Human Rights Commission v. San Juan County et al, 2018, https://www.acluutah.org/images/PDFs-docs/Legal/Navajo_Nation_Court_Settlement_Order.pdf.

³² Ibid.

³³ Ibid.

³⁴ "Public Health Emergency Order No. 2020-009," Navajo Department of Health, May 14, 2020, <https://www.ndoh.navajo-nsn.gov/Portals/0/COVID-19/News/NDOH%20Public%20Health%20Emergency%20Order%202020-009%20Dikos%20Ntsaigii-19.pdf?ver=GblJa0NLObJb5ZECLatnw%3D%3D>.

³⁵ Noel Lyn Smith, "Navajo Nation primary election canceled as council overrides president's veto," *Farmington Daily Times*, July 23, 2020.

³⁶ Tucker et al., "Obstacles at Every Turn," Native American Rights Fund (June 2020): 71, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

³⁷ Ibid. Witness testimony attributed to James Attakai, Tuba City Transcript, April 25, 2018: 20-21.

³⁸ Ella Nilsen, "Exclusive: Senate Democrats press AG Barr for answers about poll closures on Native American reservations," *Vox*, July 1, 2020.

Recommendations

Principally, it is imperative that any move toward a more robust VBM system in response to the COVID-19 pandemic provide accommodations for Native American voters in order to protect their ability to participate in our elections. These accommodations will not be fought for or won without significant input from tribal leaders. Thus, it is crucial that legislators and tribal leaders work together to develop VBM systems that will improve, not reduce, opportunities for an increased Native voter turnout. In North Dakota, reservation counties worked with tribal governments to secure support for an all VBM primary election in June.³⁹ Although North Dakota employed a restrictive voter ID law meant to disenfranchise reservation Indians without a 'traditional' mailing address as recently as February,⁴⁰ the partnership and inclusion exemplified here is admirable. Native Nations in Arizona could consider approaching Governor Ducey, the State Legislature, and local leaders to establish VBM-adoption working groups empowered with executive and legislative mandates to facilitate the development and implementation of new election processes that would not inhibit any Native Americans in Arizona from casting a ballot. These policymaking bodies could include leadership from both sovereigns to ensure meaningful dialogue and the creation of clear, agreed-upon directives that support VBM-adoption for both urban and reservation-based Indians.

Voting accommodations that VBM-adoption working group members, tribal leaders, and activists should consider seeking include but are not limited to: tribally-designated buildings; translations and in-person, on reservation language assistance; ballot drop boxes; paid postage;⁴¹ mobile (curbside) voting stations and registration; and education campaigns.⁴² In Washington, one of five states already transitioned to all-mail elections, a system of tribally-designated buildings ensures Native Americans in the state have access to voting.⁴³ These buildings are used as a valid address for voter registration and a physical location to pick up and drop off ballots.⁴⁴ Arizona could implement a similar system as the adoption of VBM systems continues as a measure to protect against illegal voter purges and P.O. box manipulation.

Importantly, tribally-designated buildings in Washington contain no-postage-required drop boxes. This is a crucial accommodation as stamps can be cost prohibitive to some and are difficult to come by in many reservation communities. Tribal leaders may want to demand that all VBM ballots include pre-paid postage, if they don't already. If states are unwilling to provide such accommodations, tribal governments should prepare to do so themselves. Activists and allies may be able to support with donations. Still, if any election ballots are not to include pre-paid postage, there must be accessible, on-reservation locations where tribal members can drop off their ballots to have them taken to be counted. Mobile, curbside voting stations represent a potential solution to this problem. The Americans with Disabilities Act of 1990 (ADA) requires election administrators to provide "an alternative method of voting at the polling place," should the location not be accessible to all eligible voters.⁴⁵ As the pandemic rages, there is a strong argument that these provisions should be applied to all voters. Because a safe,

³⁹ Pat Sweeney, "[ND Voters to Receive Voting Applications](#)," *Knox News Radio*, April 23, 2020.

⁴⁰ David Hawkings, "[Tribes secure big voting rights win as North Dakota backs down](#)," *The Fulcrum*, February 14, 2020.

⁴¹ Arizona is one of 17 states with "statutes requiring local election officials to provide return postage for mailed ballots" according to the NCSL at "[States With Postage-Paid Election Mail](#)," July 10, 2020.

⁴² "Vote by Mail," NARF, <https://www.narf.org/vote-by-mail/>.

⁴³ "Senate Bill 5079," State of Washington, 66th Legislature, March 2019, <http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/5079-S.PL.pdf?q=20200326130551>.

⁴⁴ "Vote by Mail," NARF, <https://www.narf.org/vote-by-mail/>.

⁴⁵ "The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities," U.S. Department of Justice, Civil Rights Division, Disability Rights Section, September 2014, https://www.ada.gov/ada_voting/ada_voting_ta.htm.

virus-free polling place will be all but impossible to provide, curbside voting should be expanded to all voters.

Allies will also play an important role in educating both the general public and Arizona's tribal communities of the adoption of VBM systems and its potentially devastating effect. As modifications take place, it is imperative that Native Nations and tribal organizations ensure our communities are aware of and responsive to any rule changes. Robust education campaigns are crucial to alerting hard-to-reach tribal communities of changes in election procedures. In late April, The Leadership Conference on Civil and Human Rights hosted two online events to discuss the ongoing battle for voting rights in tribal communities and how VBM can negatively impact reservation Indians.⁴⁶ While online forums may not always be the best way to reach reservation communities, they do provide a safe space to discuss voting rights concerns amid the pandemic.

Conclusion

There is a real need and desire to progress towards VBM elections in the United States. The transition will almost certainly increase voter turnout across the country, a goal many have been pursuing for decades. The ongoing COVID-19 pandemic provides the impetus to secure changes ahead of the November 2020 general election. Still, given the barriers presented and discriminatory tendencies of election officials highlighted in this policy overview, Native Americans are uniquely positioned to be disenfranchised by what may otherwise be a positive development. Therefore, newly established VBM systems must not be leveraged to limit in-person voting opportunities on reservations, remove Native Americans from voter rolls, or deny those without a 'traditional' mailing address from receiving a ballot. Further, jurisdictions must comply with Section 203 of the VRA to provide language assistance to voters participating in federal, state, and local elections. While in-person language assistance is inevitably complicated by the pandemic, election officials have a responsibility to ensure that voters in their jurisdiction are able to read, understand, fill out, and submit their ballots. Policymakers, tribal leaders, activists, and allies alike each have a role to play in defending the Native vote. Protection of the civic and Constitutional right to vote must remain a paramount objective to ensure equitable participation in American democracy.



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⁴⁶ "Turn Up Tuesdays to Highlight Marginalization of Native Americans in Voting Process," The Leadership Conference on Civil & Human Rights, April 28, 2020, <https://civilrights.org/2020/04/28/turn-up-tuesdays-to-highlight-marginalization-of-native-americans-in-voting-process/>.