

NOTES

ABSENTEE VOTING LAWS IN THE FACE OF A GLOBAL PANDEMIC: CAN THE FRENCH PROXY SYSTEM FIX ABSENTEE VOTING IN INDIANA?

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I. INTRODUCTION

Voting is an integral aspect of democratic governance. Without individual voters, there can be no democratic process. One means of casting a vote and participating in democracy recognized in many countries around the globe is absentee voting. Absentee voting takes many forms, but the essence of all absentee voting is essentially the same: it allows the voter to cast a ballot and to participate in democracy without physical presence at a voting booth on election day. Questions about the necessity of physical presence in order to vote have come to the forefront as the result of a global pandemic amid election season in several democracies around the world. COVID-19 has made physical proximity

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a risk to the continued welfare of many voters, making absentee voting the only realistic option for many to participate in elections. This increased absentee voting coupled with incendiary political rhetoric and collapsing trust in election results, due in part to misunderstood absentee voting, culminated in the January 6th storming of the U.S. Capitol.

All of these factors lead to the conclusion that absentee voting must be reexamined and that perhaps the United States might take inspiration from other democracies in addressing its absentee voting system. This Note will examine absentee voting laws within France and the United States, with a special emphasis on absentee voting in Indiana. This Note will compare the French absentee voting system, known as proxy voting, to Indiana's system of absentee voting, which relies on mail-in voting. This Note will argue that proxy voting alleviates many common concerns about mail-in absentee voting, and, if implemented alongside a mail-in absentee system, it will allow for more enfranchised voters and higher participation while limiting possible impacts of election fraud. This Note will establish that proxy voting is constitutional under both the Indiana and Federal Constitutions in the United States, and it is within the power of a state to launch a pilot program of proxy voting.

II. DEFINING ABSENTEE VOTING AND THE PURPOSE OF ELECTIONS

A. Facets of Absentee Ballot Law

In order to compare French and Indiana absentee voting laws, first, the general facets of absentee voting law must be identified. The facets of absentee voting laws can be defined as the mode of voting absentee, the eligibility requirements to vote absentee, and the submission requirements for absentee votes. Absentee voting in the United States is traditionally associated with schemes allowing for voting by mail prior to election day. This system is not uniformly applied within the United States. It is important to point out that absentee voting elsewhere in the world is not restricted to conceptions of vote-by-mail.

Mail absentee voting, postal absentee, or simply vote-by-mail all generally refer to the same systems. In such a system, a ballot will be mailed to a voter, and it will be returned as an alternative to physically appearing at a polling place on election day. The National Conference of State Legislatures' information regarding absentee voting is restricted to postal voting considerations.¹ The consideration postal voting method as opposed to the absentee voting method is more typical for policy advocacy regarding absentee voting in the United States. Postal voting is strongly associated with absentee voting in the United States, as the two are often conflated despite their differences.

In-person absentee voting is one of the forms of voting that is often

1. *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/7GER-QU6T>].

overlooked due to the focus on postal absentee voting. Many American states have both mail-in and in-person absentee voting options. In-person absentee is also widely referred to as early voting.² Like all election laws, the laws governing early voting vary by state.³ Early voting in Indiana varies down to the county level, including relevant voting locations and hours available to early vote.⁴

In France, an alternative form of absentee voting that is in place is called proxy voting. Proxy voting is a method of absentee voting such that a voter who cannot vote on election day in the place where they are registered can authorize someone else to vote on their behalf.⁵ In practice, as instituted in France, proxy voting means that the proxy goes to the polling place of the designated voter on election day and casts their vote by standing in line and voting as if it was their own polling place on election day.⁶ In France, the proxy must present their identification at the polling place, having been designated as a proxy prior to election day.

Electronic absentee voting is a topic that is often discussed.⁷ It has been attempted in France but was abandoned due to security concerns. Electronic absentee voting has the same appeals as many other methods of absentee voting, namely the potential to increase the turnout of eligible voters by reducing the costs associated with participating in democracy.⁸ Electronic absentee voting has been experimented with in several democracies, with mixed success. The major criticism of electronic absentee voting is that it eliminates none of the main concerns associated with other forms of absentee voting, such as coercion or vote buying, while opening democracies up to new, unique risks.⁹ These new unique risks, such as targeted denial of service, disenfranchisement, or penetration of the voting apparatus without a fallback paper trail, are too great for most democratic governments to consider electronic voting viable for the public at large at this

2. *Absentee Voting*, OFF. OF THE IND. SEC'Y OF STATE, <https://www.in.gov/sos/elections/2402.htm> [https://perma.cc/K398-SG8M] (last visited Jan. 17, 2021).

3. *Early Voting In-Person Voting*, NAT'L CONF. OF STATE LEGISLATURES (Jun. 11, 2021), <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> [https://perma.cc/J5SG-CL9J].

4. *Id.*

5. Nicolas Boring, *Proxy Voting in France*, IN CUSTODIA LEGIS: LAW LIBRARIANS OF CONGRESS (Jun. 19, 2017), <https://blogs.loc.gov/law/2017/06/proxy-voting-in-france/> [https://perma.cc/6B4N-58C6].

6. Direction de l'information légale et administrative, *Procuration: comment voter le jour de l'élection?*, Service-Public.fr, (Apr. 29, 2021) <https://www.service-public.fr/particuliers/vosdroits/F35316?lang=en> [https://perma.cc/MH6K-WYAH] (page available in English, navigate to "Français" dropdown menu to right of the title, above links to share the page).

7. Thad Hall, *Electronic Voting*, in ELECTRONIC DEMOCRACY 153 (Norbert Kersting, Michael Stein, & John Trent eds., Verlag Barbara Budrich 1st ed. 2012).

8. *Id.*

9. *Id.* at 154.

time. Exceptions are made for certain subgroups within the electorate, however.¹⁰

Indiana also enables voters who are confined to their homes or disabled in such a way that they are unable to access their polling location to vote by a novel method that is called a “traveling board.”¹¹ A traveling board consists of election officials that physically visit a voter with limited mobility and allows them to complete their ballot there rather than voting by postal absentee or in person.¹² Statutory law does not provide for the makeup of an “absentee voter board” or the appointing mechanism for the people on that board. The general consensus among Indiana counties, however, expects an absentee voter board to have at least one member representing the Democratic party and one member representing the Republican party to avoid an implication of partisan favoritism.

Indiana requires an excuse to vote by mail. The excuses are established by statute and are relatively broad.¹³ As of the November 2020 presidential election, about a third of states require excuses; some have modified excuses in the face of COVID-19.¹⁴ Indiana’s statutory reasons for absentee eligibility include many specific provisions such as status as an elderly or disabled person, status as a sex offender, service as an election official, unavailability of transportation, work reasons, religious reasons, status as a military member or public safety officer, and finally if “[t]he voter has a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open.”¹⁵

A further distinction with postal absentee voting is whether a voter must specifically request an absentee ballot be sent to them or if one is sent to all registered and eligible voters. Most states require a request for an absentee vote.¹⁶ Several states mailed absentee ballots to all eligible voters for the November 2020 general election to counteract the spread of COVID-19.¹⁷ Some advocates argue for the elimination of absentee ballot requests, arguing certain bills that modify

10. See generally Indiana Secretary of State & Indiana Election Division, *2020 Military and Overseas Voters’ Guide*, (Dec. 2019) <https://www.in.gov/sos/elections/voter-information/files/2020-Military-and-Overseas-Voters-Guideupdate.pdf> [<https://perma.cc/3KNH-GVZG>]. For example, in Indiana, members of the armed forces and their spouses, as well as a category called “overseas voters,” are permitted to vote via email or fax. It is important to note that this class is considerably narrower than the electorate at large, and the results of both of these voting groups’ ballots would likely be unable to sway the result of any statewide election.

11. OFF. OF THE IND. SEC’Y OF STATE, *supra* note 2.

12. IND. CODE § 3-11-10-25 (2021).

13. IND. CODE § 3-11-10-24 (2021).

14. *Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx> [<https://perma.cc/TQ8R-CBMW>].

15. IND. CODE § 3-11-10-24 (2021).

16. Mindy Acevedo et al., *Ensuring Equal Access to the Mail-In Ballot Box*, 68 UCLA L. REV. DISC. 4, 6 (2020).

17. NAT’L CONF. OF STATE LEGISLATURES, *supra* note 14.

statutes “[fail] to lift the burden of having to specially request a mail-in ballot.”¹⁸ As an additional element of unpredictability in American election law, litigation often blurs the status of the law in the lead up to an election.¹⁹

Other states conduct entire elections through postal voting.²⁰ Even prior to the COVID-19 pandemic, the State of Oregon started mailing all ballots to registered voters rather than conducting the election through an in-person, traditional polling place.²¹ Ballots are returned to the county election officials, essentially rendering the entire election a postal absentee election.²²

Like traditional voting, absentee voting will usually require registration. Indiana’s deadline to register is established by statute. Indiana Code section 3-7-13-11 states, “A person desiring to register or transfer a registration may do so at the office of the circuit court clerk or board of registration through the close of business on the twenty-ninth day before the election is scheduled to occur.”²³ In France, registration must occur by the sixth Friday prior to the first round of voting.²⁴

Absentee votes must be submitted to be counted. Ballots cast via early in-person absentee or through proxy voting are received immediately by election officials either on election day or during the early vote window. Two other absentee voting methods, electronic voting and travel boards, also result in votes received instantaneously, or roughly instantaneously, by election officials. The submission requirements for these types of absentee ballots are thus relatively clear, and there is no difference between the casting of the vote, the sending of the vote, and the receipt of the vote by election officials. Postal absentee voting is significantly more complex than any other form of absentee voting discussed here in this respect, with a clear delineation between filling out a ballot, sending a ballot, and receiving a ballot.

Many states require that a postal absentee ballot be postmarked by election day, while others have a requirement such that a postal absentee ballot will not be counted unless it is received by election day.²⁵ Postal absentee voting is the

18. Acevedo et al., *supra* note 16.

19. Tom Davies, *Judge Tells Indiana to Count Ballots Mailed by Election Day*, ASSOCIATED PRESS (Sept. 30, 2020), <https://apnews.com/article/virus-outbreak-election-2020-state-elections-elections-indianapolis-addf3862b71a1266d0639adc83683d03> [<https://perma.cc/B5ZT-JLAJ>].

20. *Oregon Vote-by-Mail*, THE OFF. OF THE OR. SEC’Y OF STATE, ELECTIONS DIV., <https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf> [<https://perma.cc/SMV8-UVGY>] (last visited Nov. 1, 2020).

21. *Id.*

22. *Id.*

23. IND. CODE § 3-7-13-11 (2021).

24. Ministère chargé de l’intérieur, *Listes électorales: nouvelle inscription, République Française* (Aug. 5, 2020) <https://www.service-public.fr/particuliers/vosdroits/F1367?lang=en> [<https://perma.cc/UE52-SVMQ>] (page available in English, navigate to “Français” dropdown menu to right of the title, above links to share the page).

25. NAT’L CONF. OF STATE LEGISLATURES, *supra* note 14.

only form of absentee voting with a clearly discernible ‘send’ period, which is presumably part of the reason postal absentee voting is subject to so much scrutiny. Of the forms of absentee voting here, postal absentee voting is, in theory, the only method that necessitates a period out of control of both election officials and the voter themselves.

Postal absentee ballots must also be defined, in part, by the deadline for election officials to receive them, as was the subject of controversy in Indiana shortly before the November 2020 general election. A recent decision from the Southern District of Indiana ordered the counting of all ballots mailed by election day, but that decision was overturned by the Seventh Circuit.²⁶ Advocates indicated: “[b]efore this ruling, if your ballot was delivered to the Election Office at say 12:10 p.m. instead of the noon deadline on Election Day, your ballot would have been rejected.”²⁷ Since the district court decision was reversed, this is once again true. Receipt deadlines for absentee votes vary widely for American states. Some states allow the receipt of absentee ballots more than two weeks after election day, so long as they were postmarked by election day. Many states though, including Indiana, have deadlines for absentee ballot receipt on election day.

B. The Purpose of Elections

Before advancing, this Note must lay out some fundamental assumptions about the nature and purpose of an election. Two underlying assumptions are that the franchise should be expanded as much as is feasible and that an election need not represent only a single slice in time to best ascertain the will of the electorate.

These assumptions are important because they reach into the core of the absentee ballot question. Regarding the expansion of the franchise, this Note will assume that a higher turnout of eligible voters is a positive outcome for elections and for democracy. That concept finds a home in the case law and administrative guidance of the state of Indiana.²⁸ There is no consensus in the debate between the value of an informed electorate versus a high rate of turnout among eligible voters. Whether the electorate is informed or critical of their sources of information is beyond the scope of this Note.

This Note also assumes that there must be a window in which votes can be cast and received and that casting ballots outside of “election day” is not damaging to the will of the electorate. The timing of elections must be considered because a postal absentee ballot must be cast before election day. Some systems allow for a “change” if a voter chooses to absentee postal vote, but their decision on how to cast their ballot has changed before election day.

Since the purpose of an election is to represent the electorate, the franchise should be expanded to include as many eligible voters as possible. Because it is

26. *Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020).

27. *Davies*, *supra* note 19.

28. IND. CODE § 3-5-8-2.5 (2021) prescribes the “Absentee Voter’s Bill of Rights,” which is discussed further in Section IV.

permissible for the window for submitting ballots to be wider than a single day, it is also consistent with the purpose of an election to increase absentee voting options. One of the options states should consider is proxy voting. Proxy voting avoids the “election day, not election month” criticism that postal voting suffers from.²⁹ Proxy voting may also result in enfranchising different groups than traditional methods of absentee voting in the United States.

III. COVID-19 AND THE STATE OF ABSENTEE VOTING

Before discussing the potential pitfalls and advantages of proxy voting as a system of absentee voting to use in the United States, this Note will examine absentee voting as it exists specifically in Indiana and proxy voting as it exists in France. This section will focus on the apparent weaknesses and strengths of proxy voting and the absentee voting systems already in place.

A. Before the Pandemic

France utilizes an electoral code. Under the French electoral code, different modes of voting are permitted in different types of elections.³⁰ The most recent elections to occur in France were the 2020 municipal elections.³¹ The municipal elections suffered a historically low turnout due to the coronavirus pandemic and because of the trends of lower turnout in local elections versus the French presidential election.³² In this year’s French municipal elections, under the French Electoral Code, the primarily available mode of absentee voting was proxy voting.³³

Postal absentee voting has a complicated status in France today. The practice was outlawed in 1975 due to concerns over fraud, specifically in the Corsica region.³⁴ The French government replaced postal voting with the proxy voting system.³⁵ Prior to being outlawed, the “proportion of postal votes grew to a

29. Romain Brunet, *Telephone Campaigning, Proxy Voting: An Unusual Second Round for France’s Municipal Elections*, FRANCE 24 (English) (May 27, 2020), <https://www.france24.com/en/20200527-telephone-lobbying-and-proxy-voting-an-unusual-second-round-for-france-s-municipal-elections> [<https://perma.cc/8M39-YJKX>].

30. *Id.*

31. Marie Patino, *What it’s Like to Hold an Election in the Middle of a Pandemic*, BLOOMBERG CITYLAB (Mar. 13, 2020) <https://www.bloomberg.com/news/articles/2020-03-13/will-coronavirus-disrupt-local-french-elections> [<https://perma.cc/4SAC-T8MK>].

32. Rym Momtaz, *French Greens Conquer Major Cities in Local Elections*, POLITICO (June 28, 2020), <https://www.politico.eu/article/france-is-split-over-american-mail-in-ballots-2021-regional-election/> [<https://perma.cc/ACJ7-9EMD>].

33. Code électoral [C. élect.] [Election Code] art. 71–80 (Fr.).

34. Jean-Louis Briquet, *Expatriate Corsicans and the Vote Au Village: Mechanisms of Control and Expressions of Sentiment (Nineteenth–Twentieth Centuries)*, 66 REVUE FRANÇAISE DE SCIENCE POLITIQUE (ENG. ED.) 43, 56 (Nov. 5, 2016).

35. *Id.*

disproportionate size (often more than half of the overall number of voters) in certain communes, particularly in the municipal elections, leading most observers to conclude that the great majority of these votes were irregular.”³⁶ Despite this change to the mode of absentee voting prompted by Corsica, rates of absentee voting remain high. Recently, “in some municipalities, more than 50 percent of all votes [were] proxy votes.”³⁷ In other regions of France, the range of proxy votes as a percentage of the total votes cast is between four and ten percent, leaving Corsica as a strong outlier.³⁸

That said, postal voting is not entirely absent from the French system. Like in America, not all elections require the same kind of votes, and not all voters have the same eligibility under certain circumstances. One author notes that “[postal voting] has been abolished in France since 1975 ‘because it lent itself to manipulation’ However, it also remains an option for French citizens abroad during legislative elections.”³⁹ This mirrors patterns observed in Indiana law, where the options for absentee voting will be expanded for certain subgroups only.

In Indiana, as of the November 2020 general election, there were multiple modes of absentee voting available to voters. Options include postal, in-person, traveling board, and electronic absentee voting for its residents, though the electronic options are extremely restricted for eligibility.⁴⁰ Proxy voting is not one of these options, and there is not a close cognate in Indiana law.

B. Virus Response

The COVID-19 pandemic brought new attention to absentee voting in both France and Indiana. Both jurisdictions faced difficult decisions about adapting existing law to cope with risks involved with in-person voting in 2020. During the French Municipal elections of 2020, calls for the restoration of the still outlawed postal voting method were renewed.⁴¹ In Indiana and other American states, courts were tasked with interpreting the law in light of the unprecedented circumstances.

Some states “have expanded these excuses to capture fear of COVID-19 transmission in the last few months, but others have staunchly refused to do so,

36. *Id.*

37. Baptiste Coulmont et al., *You Can Vote Twice! The Many Political Appeals of Proxy Votes in France*, WASH. POST: MONKEY CAGE (Feb. 19, 2014) <https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/19/you-can-vote-twice-the-many-political-appeals-of-proxy-votes-in-france/> [<https://perma.cc/2QL2-PEY9>].

38. *Id.*

39. Brunet, *supra* note 29.

40. OFF. OF THE IND. SEC’Y OF STATE, *supra* note 2.

41. Pierre-Paul Bermingham, *France Split Over ‘American’ Mail-In Ballots for 2021 Regional Elections*, POLITICO (Nov. 16, 2020), <https://www.politico.eu/article/france-is-split-over-american-mail-in-ballots-2021-regional-election/> [<https://perma.cc/2MGP-YWKN>].

even despite litigation.⁴² Indiana is among the states which did not expand reasons to vote absentee, even during the pandemic. In fact, it was never explicitly made clear in Indiana whether COVID-19 was already a valid excuse to vote absentee under Indiana law. In states with similar medical excuse statutes to Indiana, such as Missouri, COVID-19 was found to be a valid excuse to absentee vote. According to one absentee voting law scholar:

[I]n some cases, like that of Missouri, one may not even need a doctor's note; rather, the Missouri Court of Appeals has interpreted the absentee voting statute to 'simply allow the voter to state that he expects to be ill or disabled,' which one could easily state given the nature of the coronavirus's reach.⁴³

Indiana finds itself as one of only sixteen states that required excuses for postal absentee ballots in the 2020 general election.⁴⁴

In Indiana, deadlines have also been challenged, but the statutory deadlines prevailed in a recent court decision.⁴⁵ There is no right to absentee vote, in a legal sense, found in the federal constitution. The Seventh Circuit recently held on certain challenges to absentee voting that:

These claims hinge on one question: what is "the right to vote"? In *McDonald v. Board of Election Commissioners of Chicago*, the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail. And unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake.⁴⁶

Despite this, Indiana has "An Absentee Voter Bill of Rights" and does ensure some absentee voting in law. These laws permitted Indiana's record-high combined absentee voting through both early voting and voting by mail in the November 2020 election. The state had over 700,000 more absentee voters than over the same period during the 2016 election.⁴⁷ In the 2016 presidential election in Indiana, 2,592,470 votes were cast between the two major party candidates.⁴⁸ In 2020, despite the COVID-19 pandemic, 2,971,929 voters cast ballots for the two major party presidential candidates with 100 percent of the expected vote

42. Acevedo et al., *supra* note 16, at 16.

43. Russell Spivak, *Voting With The Virus: Ensuring Democracy Via Bypassing The Excuse Requirements In Absentee Voting*, 88 FORDHAM L. REV. ONLINE 195, 209 (2020).

44. Acevedo et al., *supra* note 16, at 16.

45. *Common Cause v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020).

46. *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) (citations omitted).

47. Casey Smith, *Indiana Preparing Ballot Count After Record Early Turnout*, AP NEWS (Nov. 2, 2020) <https://apnews.com/article/indianapolis-state-elections-elections-voting-2020-indiana-b0434b518f86143805597c28bc389843> [<https://perma.cc/ARZ8-9DXN>].

48. *Indiana Election Results*, IND. ELECTION DIV., <https://enr.indianavoters.in.gov/archive/2016General/index.html> [<https://perma.cc/KP33-CRV2>].

reporting.⁴⁹ This demonstrates that absentee voting mechanisms can overcome serious concerns regarding the costs of appearing in person. It is likely that Indiana voters were motivated by many factors, including a contentious Presidential election at the top of the ticket and having lived with the “new normal” of pandemic life longer than French voters at the time of French municipal elections. Still, this substantial difference highlights the importance of absentee voting mechanisms.

Going ahead with an election amid a pandemic had many consequences. One such consequence was a low voter turnout, as was the case during the March 2020 French municipal elections. One source indicated that “[a]t noon, the participation rate was 18 percent, almost 5 percentage points lower than at the same time during the last local election in 2014.”⁵⁰ These results reflected “the lowest participation rate recorded at noon in a local election since 1971.”⁵¹ Mayoral elections went ahead with low turnout in France. “France held the first round of voting three months ago as coronavirus took hold - a decision President Emmanuel Macron was widely criticized [sic] for. More than half of all voters avoided polling stations entirely.”⁵²

Despite what happened in France, the United States and Indiana experienced some of the highest turnouts in recent memory. There are a few differences to keep in mind when comparing these elections. Of course, the 2020 general election in the United States featured a contentious presidential race at the top of the ticket. Next, Indiana did have options to vote without appearing in person, although most ballots were still cast in public. That said, there are some critical similarities between these jurisdictions.

C. Lessons Learned

The common theme between these jurisdictions is either an inability or unwillingness to significantly alter the law even in the face of a global pandemic. COVID-19 has exposed weaknesses that already existed in rigid systems for voting. COVID-19's exposure of these weaknesses helps make a case for why absentee voting laws should be reexamined. There were radically different results in participation between France and Indiana, even though neither jurisdiction was able to significantly alter their statutes governing voting to adapt for COVID-19. To adapt for the future, absentee voting measures that allow for democracy to occur even during emergencies must be implemented before the emergencies occur.

49. *Indiana Presidential Results*, POLITICO, <https://www.politico.com/2020-election/results/indiana/> [<https://perma.cc/DFS4-S6M2>] (last updated Jan. 6, 2021, 4:41 p.m. EST).

50. Rym Momtaz & Elisa Braun, *France Hits the Polls, Despite Coronavirus Shutdown*, POLITICO (Mar. 15, 2020, 3:29 PM), <https://www.politico.eu/article/coronavirus-france-local-elections/> [<https://perma.cc/VV8N-HH8W>].

51. *Id.*

52. Lucy Williamson, *France's Macron Set for Covid Test in Local Vote*, BBC NEWS (June 26, 2020), <https://www.bbc.com/news/world-europe-53190015> [<https://perma.cc/3ASM-PJW2>].

One means to prepare absentee voting for the future in Indiana and in other jurisdictions is to expand the number of methods available to vote absentee. More options will allow for more absentee voting. A method that Indiana should consider adding to its methods of absentee voting is proxy voting. Proxy voting will expand the franchise and ensure election facilitation during emergencies while not substantially increasing costs of election administration or the enforcement costs of voter fraud prevention laws.

IV. PREVENTING FRAUD

Despite the lack of a federal constitutional right to absentee voting, Indiana has an “Absentee Voter’s Bill of Rights” to be distributed with any absentee ballot mailed to a voter.⁵³ The document is less about articulating or ensuring rights as we think about them for the Federal Bill of Rights and more akin to a set of instructions and warnings regarding election law. That said, the existence of such a document and the insurance of its distribution in Indiana statute solidifies the guarantee of absentee voting as a policy of the State of Indiana. Broadly speaking, the aims of the Absentee Voter’s Bill of Rights are twofold and mirror the aims of election law broadly: to enfranchise voters and to prevent absentee voter fraud.

A. Occurrence of Election Fraud

The primary arguments against the expansion of absentee voting typically revolve around voter fraud. Voter fraud, while a legitimate concern, is not an activity that members of the public should be concerned with, especially on a scale large enough to disrupt the nation’s most consequential elections. The number of votes required to swing the results of large-scale statewide elections, such as the Presidential election, is a small percentage of the overall number of votes cast but still likely too large a number to avoid detection.

Voter fraud, as described by David Schultz:

could include intentional efforts to register falsely to vote or actually to vote falsely. Allegations of voter fraud include claims that illegal immigrants, ex-felons, and impersonators are stealing the identities of others, including the dead, in order to vote illegally. Voter fraud could also take place in several venues, like the election-day polls, in completing absentee ballots, or in completing the paperwork necessary to register to vote.⁵⁴

This Note will focus on the subject of absentee ballot fraud, which necessarily must take place in the form of a fraudulently completed ballot for another voter; an ineligible or deceased voter submitting an absentee ballot; the disruption of the

53. IND. CODE § 3-11-10-25(h) (2021).

54. David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 495 (2008).

arrival of the absentee ballots to either the voters themselves or to the counting facility; the coercion of a voter; or through vote buying. As previously discussed, electronic voting is susceptible to certain unique risks, though those risks will not be discussed here. Additionally, allegations regarding the corruption of or ballot modification by election officials themselves will not be discussed because there is nothing preventing these types of concerns from affecting in-person votes in the same manner.

Since voter fraud is a legitimate concern in the sense that it can and does occur, it is important to examine the scale at which it has occurred. In a recent instance, over the course of the 2020 Presidential election in Texas, a social worker was charged with fraudulently submitting 67 voter registrations.⁵⁵ Presuming that the accusations are true and presuming malicious intent on the part of the accused, 67 votes would prove insufficient to swing any statewide election, including the Presidential election.⁵⁶ Further, the fact that 67 potentially fraudulent applications were identified by the systems in place is evidence that large-scale election fraud is totally impracticable, if not impossible, in the United States. Finally, as this story develops, it may yet prove that this was a member of the public who was attempting to do what they legitimately believed to be both a legal and beneficial thing to society by helping more vulnerable members of the population register to vote, rather than a bad actor attempting to sway elections or to control the votes of the vulnerable.

The above alleged fraud took place at the hand of a citizen, as contrasted with what this Note will refer to as a paid political actor or partisan. Organized, intentional absentee voting fraud is exceedingly rare, but usually, such types of fraud take place at the direction of paid political operatives and not the voters more broadly. One type of organized, intentional absentee voting fraud scheme is known as “ballot harvesting.” Ballot harvesting is “a practice long used by special-interest groups and both major political parties that is viewed either as a voter service that boosts turnout or a nefarious activity that subjects voters to intimidation and makes elections vulnerable to fraud.”⁵⁷ The legality of ballot harvesting, or ballot collection, varies by state, though there is a recent high-profile example of illegal ballot harvesting in North Carolina. Actors working on behalf of a Republican congressional campaign

swept up unsealed or incomplete ballots and returned them in batches to Mr. Dowless [a paid political operative], who was working on behalf of

55. *Limestone County Social Worker Charged with 134 Felony Counts Involving Election Fraud*, ATT'Y GEN. OF TEX. (Nov. 6, 2020), <https://www.texasattorneygeneral.gov/news/releases/limestone-county-social-worker-charged-134-felony-counts-involving-election-fraud> [<https://perma.cc/JB7V-UTDL>].

56. *Unofficial Results*, TEX. SEC. OF STATE, <https://results.texas-election.com/races> [<https://perma.cc/TQ39-ZVfy>] (last visited Nov. 11, 2020).

57. Matt Volz, *Disputed House Race Puts Spotlight on 'Ballot Harvesting'*, AP NEWS (Dec. 7, 2018), <https://apnews.com/article/211109ea75094be396ca9a229f169060> [<https://perma.cc/2RB4-R8K3>].

the Harris campaign. They sometimes filled in ballots or signed as witnesses for voters they never met, in an ink color specifically chosen so it would not arouse suspicion at local elections offices.⁵⁸

The actions described here were serious enough for the North Carolina Board of Elections to order a new election.⁵⁹ The initial election was decided by only 905 votes, and the State Board of Elections determined that the ballot harvesting scheme handled enough votes to warrant another vote take place.⁶⁰

The election fraud here was committed by a campaign operative with the intent to change the result of the election. It is notable that there are even instances of what is considered fraudulent election activity that appeared to have no ill intent but rather to shirk work duties. A controversy in Indiana in 2015 was recounted by the New York Times as follows:

On an October morning four years ago, eight young staff members at the Indiana Voter Registration Project in Indianapolis were planning their final steps before a closely contested presidential election. In recent weeks they had registered 45,000 new voters, most of whom were Black and Latino, and they were on track to enlist 10,000 more before Election Day. Their work had gone smoothly for the most part, but several canvassers had submitted applications with names that appeared to have been made up or drawn from the phone book, most likely to create the appearance that they were doing more work than they had actually done.⁶¹

Here, the voter fraud appears to be taking place through false registration information. The fraud was not part of a grand orchestrated scheme to steal an election, but rather through likely low-paid staff who were hurrying to make deadlines and chose to falsify records without understanding the gravity of their actions. The New York Times continued:

That was illegal — submitting a false registration is a felony under Indiana law — and also frustrating. A made-up name was not going to help anyone vote. The staff members stopped using the suspect canvassers, but they couldn't simply trash the faulty registrations: State

58. Alan Blinder, *Inside a Fly-by-Night Operation to Harvest Ballots in North Carolina*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/north-carolina-voter-fraud.html> [<https://perma.cc/R7KK-356B>].

59. Emery P. Dalesio, *New election ordered in disputed North Carolina House race*, AP NEWS (Feb. 21, 2019), <https://apnews.com/article/nc-state-wire-north-america-north-carolina-ap-top-news-elections-e79854eb724b483a9a2ebbc2672d06d8> [<https://perma.cc/9EGC-YVEX>].

60. *Id.*

61. Jim Rutenberg, *The Attack On Voting: How President Trump's False Claim of Voter Fraud is Being Used to Disenfranchise Americans*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html> [<https://perma.cc/83DW-XEUX>].

law required them to file every application they collected, even if they had false names or serious mistakes.⁶²

No absentee ballots would have been sent without a request, and no made-up person can appear at polls with a photo ID to vote. Therefore, even this recently uncovered fraud likely would have led to no votes cast and, therefore, no changes in an election result.

Absentee voting is one of many avenues of fraud in the electoral process. Other types of fraudulent political activities take place in both the United States and in France, such as campaign finance fraud.⁶³ But concerns over election fraud, while generally legitimate, are different from concerns about absentee ballot fraud, which will specifically relate to the votes themselves.

Like postal absentee voting, proxy voting has been subject to accusations of fraud. But like in the United States, it can be expected that “there is little systematic or widespread voter fraud . . . that is changing the outcome of elections.”⁶⁴ The change in the result of elections is, after all, the key concern that election security laws in Indiana seek to eliminate. Because the state utilizes a first-past-the-post system rather than a proportional system, in order to change an election, enough fraudulent ballots must be counted to overcome the margin of victory of the legitimate winner. In the 2020 general election, the closest statewide race in Indiana was the Attorney General race, with a margin of victory of nearly half a million votes.⁶⁵ The closely contested Fifth Congressional District, which gained national media attention for being evaluated as a toss-up, ended with a margin of 16,986 votes.⁶⁶ At a more local level, the closest state representative race was won by a margin of 427 votes.⁶⁷ It is likely that smaller margins exist for county clerks or other local offices. In Iowa, the Second Congressional District was won by a margin of only six votes in the 2020 general election.⁶⁸ These margins are an important frame of reference because if coordinated election fraud were attempted to change the results of an election, the amount of successfully submitted and counted ballots is extraordinary and incredibly unlikely to survive the scrutiny of election officials. The Iowa result is notable because results with a razor-thin margin are rare in the context of

62. *Id.*

63. See Agence France-Presse, *France’s Far-Right Party Convicted of Fraud*, COURTHOUSE NEWS SERV. (June 16, 2020), <https://www.courthousenews.com/frances-far-right-party-convicted-of-fraud/> [<https://perma.cc/Z2S9-QHMZ>].

64. Schultz, *supra* note 54.

65. Indiana Election Division, *Indiana Election Results*, OFF. OF THE IND. SEC’Y OF STATE, <https://enr.indianavoters.in.gov/site/index.html> [<https://perma.cc/32SP-BG2Z>] (last visited Jan. 1, 2021).

66. *Id.* (navigate to the “U.S. Representative” heading on the left-hand side of the page)

67. *Id.* (navigate to the “State Representative” heading on the left-hand side of the page)

68. *2020 Iowa Election Results*, DES MOINES REGISTER (Jan. 11, 2021, 8:34 AM), <https://www.desmoinesregister.com/elections/results/2020-11-03/state/iowa/> [<https://perma.cc/Z79B-EXRN>].

modern American elections, even hotly contested elections on a much more local scale than a congressional race.

According to some scholars, certain laws meant to lessen election fraud may interfere with ascertaining actual election results. They argue that certain election laws “can convert accurate, nonfraudulent elections into accurate, fraudulent elections; they can convert inaccurate, fraudulent elections into accurate but still fraudulent elections; and so forth.”⁶⁹ This article focuses largely on voter identification laws and specifically indicates that absentee ballot fraud is not properly addressed by voter identification laws, but the premise of modifying election results through suppression is an important one when considering the scope of absentee voting.

Because the goal is ensuring that an election results in a legitimate winner who fairly reflects the political leanings of the voters at the time of the election, it is important to note that laws that increase the cost of voting may cut out large segments of the electorate. Innocent voters should not be punished due to the actions of partisans. In the case of absentee voting, high burdens for excuses to absentee vote are often justified by arguments centered on absentee voter fraud.

B. Fighting Voter Fraud with Criminal Penalties

In addition to proof of organized, intentional voter fraud being rare, criminal penalties are sufficient to disincentivize fraudulent activities. Voter fraud statutes, as they exist today, mostly focus on implementing voter identification laws. Claims of election fraud are often used as evidence supporting the passage of other voter identification laws, which may increase the cost of voting significantly for certain parts of the electorate. Many consider claims of voter fraud to be partisan in nature and used mostly to disenfranchise minority voters.⁷⁰ Indiana has a statute focusing on both voter identification and fraudulent absentee voting. Jocelyn Friedrichs Benson recounts a challenge to Indiana’s voter identification statute:

Indiana’s primary justification for enacting the photo identification law was, in the view of the Court, “in-person voter impersonation at polling places.” Justice Stevens, writing the lead opinion, noted that the factual record before the Court “contained no evidence of any such fraud actually occurring in Indiana at any time in its history,” and acknowledged the petitioners’ argument that, as the Court found decades earlier in *Dunn*, “provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future.”⁷¹

69. Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739 (2015).

70. Rutenberg, *supra* note 61.

71. Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1 (2009).

Justice Stevens' view is persuasive when considering how election fraud might occur. Criminal penalties will dissuade the main actors in electoral fraud: paid political operatives. In the North Carolina case of ballot harvesting fraud discussed above, it is much more likely that the architect of the scheme knew what he was doing was illegal. It is unclear but seems overall unlikely that all of the subordinates knew that what was happening was unlawful. Paid political operatives are much more likely to be aware of penalties for their actions than the general public. The North Carolina ballot harvesting scheme took advantage of people without regard to their public policy preferences by recruiting them to participate in the fraud at the direction of a paid political actor.

As a corollary to preventing fraud, election administration is also largely concerned with the legitimacy of election results. Conspiracy theories and incendiary political rhetoric, much of which is centered around absentee voting being somehow illegitimate, culminated in the form of riots targeted at the United States Capitol. Proxy voting presents an option for absentee voting that minimizes the risk of fraud and eliminates many of the complaints that politicians levy against postal absentee voting. Proxy voting could increase the electorate's perceptions of legitimacy while ensuring that no fraud occurs and enfranchising as many voters as possible.

V. RECOMMENDATIONS

A. Recommended Proxy Voting Statute

If proxy voting were to be incorporated as a new method to vote absentee in Indiana, it should not supplant existing methods but rather should increase access to voting with minimal fraud concerns through concurrent implementation. A statute to implement proxy voting in Indiana might be written as follows:

A person that has a valid reason to vote absentee under Indiana Code § 3-11-10-24 may designate a proxy to vote in their place on election day or early in-person. Such a proxy must be:

- (1) A member of the eligible voter's household;
- (2) A relative; or
- (3) A licensed attorney.

A proxy voter may serve as a proxy for no more than one person per election. A proxy voter designation expires after the general or primary election immediately following designation regardless of whether a vote was cast. A proxy voter is bound to vote in accordance with the instructions of the designating voter. A proxy voter may be designated only through notarized proxy designation forms. Upon designation, and receipt of the notarized form by the voter registration deadline established pursuant to Indiana Code § 3-7-13-11, county election officials will present the designated proxy voter with a certification entitling them to cast a ballot for the designee.

Proxy voting has been subject to accusations of being both a method of fraud⁷² and, in France, a method of voting that favors a particular political affiliation.⁷³ It is not possible to definitively state the political ramifications of proxy voting in Indiana at this juncture, though there are some predictions that can be made.

Any change to voting laws in the United States will be marred by accusations that it is favorable to a certain political party; this is unavoidable. There are accusations that proxy voting favors a certain political affiliation in France, as discussed above. Though not the focus of this Note, acknowledging the political realities of both Indiana and proxy voting helps to emphasize the practicality of the voting method as one that could be adopted in Indiana. Notably, the accusations about political bias in proxy voting are essentially the opposite of those that mar mail-in voting in the United States. In the United States, some have argued that postal absentee voting is somehow unfairly favorable to liberal candidates. For example, on August 23, 2020, President Trump tweeted, “So now the Democrats are using Mail Drop Boxes, which are a voter security disaster,” and that such systems are “A big fraud!”⁷⁴ In France, on the other hand:

The more bourgeois the neighborhood, the more frequent the proxy votes. In local elections, proxy votes favor a better organized party machine. In national elections, they favor the social groups who are already electorally mobilized. Proxy votes are designed as a neutral device: Their aim is to reduce abstention across the board. But in national elections, they are more frequent in places that vote for conservative candidates, and in places with a well-to-do population.⁷⁵

However, it is not predetermined that proxy voting will have the same impact in the United States. In many states, but especially in Indiana, there are large swathes of sparsely inhabited land. These areas would not typically be considered “well-to-do.” The effect may be the same since rural voters are often conservative voters, but proxy voting may be especially useful for rural areas. Acknowledging partisan realities may make proxy voting more palatable to the traditionally conservative Indiana legislature.

A perhaps more politically acceptable and legally simpler method to attempt proxy voting in the United States may be to not introduce such a new method in a critical race, such as a U.S. Senate race or the presidential election, but instead in a local one. Accusations and fears of favoritism to a particular affiliation may be assuaged by any proxy voting pilot coming in the form of nonpartisan elections first. In Indiana, for example, many school board elections are nonpartisan. That said, most nonpartisan elections would occur at the same time

72. Coulmont et al., *supra* note 37.

73. *Id.*

74. Rutenberg, *supra* note 61.

75. Coulmont et al., *supra* note 37.

as partisan ones.

France's proxy voting system is not one that should be adopted en masse by all U.S. jurisdictions, but as the laboratories of democracy, jurisdictions should consider a proxy vote absentee system to combat fears of certain types of fraud and increase voter participation in municipal elections or local ballot initiatives. Therefore, piloting should occur to incentivize turnout in an election with traditionally low participation. If proxy voting is to be piloted, it should be piloted in a "municipal year" in Indiana, when none of the congressional delegation or any of the statewide positions are up for reelection. The Indiana legislature has even recently considered a bill that would authorize the Secretary of State to launch a pilot program for certain new election procedures instead of instituting changes permanently in statute.⁷⁶ The proposed statute read as follows:

Sec. 6.5. (a) The secretary of state may establish a pilot program that designates not more than two (2) counties to participate during the May 5, 2020, primary election. A county election board of a county that wishes to participate in the pilot program must:

- (1) adopt an order by unanimous vote of the entire membership of the county election board to participate in the pilot program in accordance with this section; and
- (2) file a copy of the order under subdivision (1) with the secretary of state.⁷⁷

This bill failed to pass into law, but it did pass both the Indiana House and the Indiana Senate in differing versions. Such a pilot program for proxy voting might take place during Indiana's historical low points in voter turnout during the "municipal year." The municipal year occurs the year prior to the gubernatorial and presidential election year in Indiana. The municipal year features the elections for most mayors and city councils across Indiana. The municipal year has historically featured lower turnout than cycles featuring Senators, Congresspersons, or the Presidential race at the top of the ticket. A proxy voting pilot during the municipal year may be a good way to reduce costs of participation, therefore driving participation up while limiting long-term impacts from the pilot program in "higher" offices. Based on the language of the statute considered by the Indiana General Assembly in 2020, the legislature might authorize the Secretary of State to administer a pilot program of proxy voting while allowing municipalities to opt-in.

In implementing proxy voting in Indiana, there are a few key distinctions from the implementation in France that should be highlighted. An important distinction that should be created if proxy voting was implemented in Indiana, or anywhere in the United States, is to not include police as election officials. Instead, the role of the neutral observer can be performed by a notary. The United States should not ask law enforcement officers to also become election officials, as is the practice in France. There are plenty of reasons not to utilize police as

76. S.B. 178, 121st Leg. (Ind. 2020).

77. *Id.*

election officials. First, that role is significantly outside the scope of traditional law enforcement duties and would require significant investment in training outside the primary mission for law enforcement. Second, it cannot be ignored that certain members of the electorate may find discomfort introducing law enforcement into their election process, possibly eliminating many gains in participation. Finally, the role of reaching voters with limited mobility can be sufficiently fulfilled using remote notarization, potentially eliminating the need for a law enforcement officer or other election officials to travel to the voter's home altogether. In France, a proxy is established as follows:

To establish a proxy, a voter simply has to fill out a form and submit it to the courthouse of his/her place of residence or work or to any police or Gendarmerie station. If a person is unable to physically go to the courthouse or law enforcement station due to a handicap or health problem, that person can request that a police officer come to his/her home in order to establish a proxy (anyone asking for a police officer to come for this purpose must submit a medical certificate to show that the request is not frivolous).⁷⁸

This proposed statute would allow for the coupling of Indiana's new digital notary law to allow for secure proxy voting even during emergencies.

A key question for proxy voting is whether it opens the door for the coercion of people who might otherwise not vote to "give" their vote to a household member or for the voter to be coerced by the proxy into voting in a certain way. It is unrealistic to argue the position that proxy voting, as conceived in the recommendation section, would not allow for voter coercion to some extent. Instead, there would be two checks to ensure that whatever coercion or fraud happens as a result of proxy voting is combatted. First, the notary requirement provides a significant barrier to actors who attempt to acquire the right to proxy vote on behalf of another person in bad faith. In this sense, a notary requirement is more secure from coercion than the currently implemented postal voting system. Second, by allowing for more members of the electorate to vote through an additional absentee voting method, the first-past-the-post system present in American elections will render accurate results the vast majority of the time because legitimate votes will outweigh fraudulent ballots.

Indiana is a national leader in the use of remote notarization, which should be considered as an option to verify the validity of granting a proxy vote.⁷⁹ Information on Indiana's remote notary services indicates that "[o]nce the Notary and signer are connected to each other, the Notary will use traditional identity proofing methods as a third layer of protection. The Notary will also ask questions to verify the signer understands the document and that they're signing

78. Boring, *supra* note 5.

79. *How to Become a Remote Online Notary in Indiana*, NAT'L NOTARY ASS'N, <https://www.nationalnotary.org/knowledge-center/remote-online-notary/how-to-become-a-remote-online-notary/indiana> [<https://perma.cc/LZ8X-DPRK>] (last visited Nov. 11, 2020).

it willingly.”⁸⁰ Determining a person’s status as both a willing signatory and actually being the voter in question should be critical to establishing a proxy vote. A chief concern present for postal and proxy voting is the coercion of the voter. The inclusion of a Notary will allow an additional step that is not present for postal absentee voting to ensure the lack of coercion. Over the course of this pandemic, many more people have become accustomed to real-time video calling, and the infrastructure and knowledge gained to cope with COVID-19 should be used in the future as government institutions continue to adapt to 21st-century modes of communication and doing business. This use of remote notarization importantly does not go as far as electronic voting, which should not be considered at this time, as it does not provide confidence to the electorate and is vulnerable from a security perspective.

While not explicitly part of either the Indiana statute or administrative code, the Indiana Notary Public Guide makes explicit reference to the National Notary Association as a useful resource for notaries in the state.⁸¹ The National Notary Association indicates that the best practice for notaries is to decline notarization when doubts exist about whether a person has been coerced. The organization offers several guidelines and recommendations for determining willingness, including asking directly whether the certifier is willing to sign the document in question.⁸² While not foolproof, the notarization process will offer a substantial barrier to coerced proxy voting designation. Traditional and remote notarization options allow for increased flexibility in the absentee voting system that was missing over the course of the COVID-19 pandemic.

As discussed briefly above, absentee ballot fraud is extremely rare. That said, even when it does occur, there is little possibility for any scheme to change the results of any election. It is doubtful that under the proposed framework, any change to an election result could occur in Indiana. That would require thousands of perpetrators of election fraud to make it past notaries. Since changing a result would typically require hundreds of individual proxy voters, the logistics behind organizing a scheme of that scope would be unlikely to evade authorities.

B. Additional Changes

In addition to the statutory framework for proxy voting itself, the addition of a new voting method requires accompanying and analogous criminal penalties to supplement existing voter fraud activities. In France, proxy voter fraud is taken seriously, and penalties exist. One author notes:

It is unclear whether fraud is a significant problem with regards [sic] to proxy voting. However, it should be noted that the consequences for

80. *Id.*

81. *Indiana Notary Public Guide*, OFF. OF THE IND. SEC’Y OF STATE, BUS. SERV.’S DIV., (Aug. 25, 2020) <https://inbiz.in.gov/Assets/NotaryGuide.pdf> [<https://perma.cc/QK5C-YVVF7>].

82. Kelle Clarke, *Notary Basics: Determining A Signer’s Willingness*, NOTARY BULLETIN (June 3, 2015), <https://www.nationalnotary.org/notary-bulletin/blog/2015/06/notary-basics-determining-signer-willingness> [<https://perma.cc/TM3X-UN8W>].

fraudulent proxy voting are pretty serious: article L111 of the Electoral Code punishes proxy voting fraud with a fine of up to €15,000 (approximately US \$16,780) and up to two years of jail time.⁸³

Indiana's current voter fraud framework says on absentee voter fraud:

Sec. 2.5. A person who does either of the following, knowing that an individual is ineligible to register to vote or to vote, commits absentee ballot fraud, a Level 6 felony:

- (1) Solicits the individual to complete an absentee ballot application.
- (2) Solicits the individual to submit an absentee ballot application to a county election board.⁸⁴

The addition of a third provision to the current statute might read “(3) Submits a proxy vote.” Such an addition would make proxy absentee fraud a Level 6 felony in Indiana. Such a felony is punishable by up to three years in prison and a fine of not more than 10,000 dollars. This level of punishment is comparable to the penalties levied in French law, suggesting the addition of the proxy voting language into existing statutes is appropriate in terms of punishment.

Finally, on the question of fraud perpetrated through proxy voting, it is logical to ask how the state might enforce the requirement that the designating voter's instructions be followed by the designated proxy voter. The enforcement of this requirement can likely be left out of a statutory provision and instead left to county officials to determine a verification method based on their election infrastructure and their ballot preservation policies. If there was a statutory scheme, it should begin with a rebuttable presumption that the proxy has voted in accordance with the wishes of the designator. This is to ensure that no proxy voter may be “entrapped” by a designator that does not document their wishes in some respect.

An issue that courts in the State of Indiana may have to deal with if proxy voting is implemented is the eligibility to vote absentee via proxy or to vote absentee at all. Coupled with a new voting method, in implementing and promoting more absentee voting, Indiana should consider more expansive eligibility for absentee voting, such as the system in place in France. The current model of eligibility in Indiana made it unclear whether the COVID-19 pandemic was a sufficient reason to vote absentee in the November 2020 general election. In France, the eligibility requirement for proxy voting is not stringent. That requirement has also been relaxed during the past twenty years, since

[i]t used to be, until 2003, that a voter could only use a proxy if he/she had a “good reason” to not be able to vote in person, such as being away due to professional obligations, a handicap, health reasons or to take care of a handicapped, sick or elderly person. But the requirements were loosened in 2003, such that it is now possible to vote by proxy even if

83. Boring, *supra* note 5.

84. IND. CODE § 3-14-2-2.5 (2021).

one's absence is due to being on vacation.⁸⁵

Though not the focus of this Note, as a corollary for arguing for the increase of the electoral franchise and for expanded absentee voting, Indiana should also consider loosening requirements for eligibility for absentee voting while keeping eligibility requirements consistent across all forms of absentee voting. In Indiana, absentee voting is restricted to the reasons discussed above. While the French proxy voter framework is broad enough to allow for absentee voting even in cases such as vacation, it is not clear how broad Indiana's absentee excuse requirement is or whether it could capture something like a vacation. It is possible that such an excuse may be "reasonable" under the Indiana Code, but no case law currently exists on the matter.

An additional reason to adopt proxy voting is that expanding the number of options to vote absentee may enfranchise more voters. In France, proxy voting was used by about 1.5 million voters or five percent of the voting population in the 2012 French presidential election.⁸⁶ Even if the method does not significantly increase the size of the electoral franchise or is restricted in use to the "bourgeois" neighborhoods as in France, reducing barriers to voting is in line with the aims of elections. It is generally accepted that voter turnout is a function of the electorate's rational choices. A factor that weighs on a voter's choice to abstain or to vote is the cost of voting.⁸⁷ When the cost of voting exceeds the perceived benefit, voters are more likely to abstain. By introducing a new method of absentee voting, the cost of voting can be reduced for at least some segments of the electorate, potentially inducing voting where it did not occur before.

The recommended proxy voting statute resolves some facets of absentee voting in a manner consistent with traditional voting, making the absentee voting method desirable in that respect. Proxy voting does not need to reckon with submission deadlines or receipt deadlines, which are concerns with postal absentee voting. The scenario posited by the advocates in *Common Cause v. Lawson* is an extreme one, essentially being deprived of voting by virtue of being ten minutes late, but proxy voting allows for more justification of this strict deadline. When more options exist, this deadline seems less absurd since there are more methods to exercise the right to vote while acting in accordance with state law.

The submission requirements of proxy voting are uncomplicated to implement and should not be subject to as much controversy as other forms of absentee voting. Simply, to submit a proxy vote, the vote must be cast in person on election day prior to the closure of polls. In Indiana, this means that pursuant to Indiana Code § 3-5-1-2, a proxy vote must be submitted "on the first Tuesday after the first Monday in November of each even-numbered year."⁸⁸ The existing framework for voting locations should prove sufficient for determining the final

85. Boring, *supra* note 5.

86. *Id.*

87. John H. Aldrich, *Rational Choice and Turnout*, 37 AMER. J. POL. SCI. 246, 251 (1993).

88. IND. CODE § 3-5-1-2 (2021).

deadline for submitting a proxy vote. Indiana Statute provides that:

- c) At the time described in subsection (b), an individual designated by the circuit court clerk shall:
 - (1) determine the end of the line of voters who are waiting to vote; and
 - (2) use one (1) of the following methods to identify the voters in the line who may vote if otherwise qualified to vote according to law:
 - (A) Write down the name of each voter.
 - (B) Stamp each voter's hand.
 - (C) Stand, or designate another individual to stand, immediately behind the last voter who may vote.⁸⁹

These safeguards are commonly observed, and the public is generally well informed that if they hold their place in line even after polls formally close, they must be permitted to vote. Presumably, if a person is in line to cast a proxy vote, they must be permitted to do so just like a traditional voter at the end of the line on election day. A question that remains for the legislature or the courts to resolve if proxy voting were to be implemented is whether a person who is a designated proxy may cast both their ballot and the proxy vote if they are still in line at the conclusion of the voting period on election day.

As a form of absentee voting, there are certain other provisions of the Indiana Code that would apply immediately upon the implementation of a proxy voting statute. For example, Indiana Code § 3-11.5-4-1 provides several provisions that apply to all absentee ballots cast in Indiana. Under one such provision, circuit court clerks are required to “[k]eep a separate absentee ballot record for each precinct in the county,” and certain counties must deliver lists of all voters or votes sent and who have cast absentee ballots.⁹⁰ Presumably, the “marked absentee ballots in person” provision of Indiana Code § 3-11.5-4-1 would capture proxy voting on the day of the election and create further safeguards for the implementation and faithful execution of proxy voting.

VI. PROXY VOTING LEGALITY

The prospect of incorporating proxy voting into Indiana's existing legal framework of options to vote absentee meets the twin aims of franchise expansion and the prevention of voter fraud. There are many reasons why the new framework discussed for absentee voting may be desirable, but its handling in Indiana and federal legal systems are separate inquiries. Proxy voting may present interesting legal questions under American law, many of which have not been addressed before.

The 2020 general election has brought forth concerns about large numbers of voters attempting to absentee vote by mail because there is doubt in the postal

89. IND. CODE § 3-11-10-29.2 (2021).

90. IND. CODE § 3-11.5-4-1 (2021).

service's ability to cope with such an increase in volume and deliver ballots within the legal deadline. Indeed, "[t]he U.S. Postal Service is warning states coast to coast that it cannot guarantee all ballots cast by mail for the November election will arrive in time to be counted, even if mailed by state deadlines, raising the possibility that millions of voters could be disenfranchised."⁹¹ By eliminating the need for a postal carrier, proxy voting can allow for an increased volume of absentee voting without over-burdening the postal system.

The Indiana Constitution has surprisingly little to say about voting. It provides the basic qualifications to register to vote.⁹² Section 1 of Article II of the Indiana Constitution reads in its entirety, "All elections shall be free and equal."⁹³ Other Article II sections indicate that elections should occur by ballot.⁹⁴ Finally, subsection C of Article II Section 14 indicates that "[t]he General Assembly shall provide for the registration of all persons entitled to vote."⁹⁵ None of these provisions, on their face, appear to rule out the possibility of proxy voting as a method of absentee voting in Indiana.

French law, while differing in many respects to the common law system observed in the United States and Indiana, similarly observes a hierarchy of law.⁹⁶ French law must be consistent with law higher in this hierarchy, and at the top of the hierarchy is the French Constitution.⁹⁷ The French Constitution, like the Indiana Constitution, says surprisingly little on voting or elections. It only provides that "[a]ll French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute."⁹⁸

The controlling documents of both France and Indiana largely defer to statutes for the control of election procedure and voting methods. In the United States, election law is largely understood to have remained with the states, but the U.S. Constitution does have a significant role in ensuring the minimum guarantees of voting laws. Therefore, Indiana has another layer of constitutional law with which to contend. Besides offering the system for the election of the U.S. President and dictating the popular election of Senators, there are several constitutional provisions and extensive case law which affect voting. Provisions on voting forbid states from abridging the right to vote "on account of race, color,

91. Meredith Colias-Pete, *Indiana Official Advises Voters to Go Early to Polls as State Adjusts to COVID-19 Pandemic*, CHI. TRIB. (Aug. 27, 2020), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-corona-update-st-0828-20200827-edcphi5o5ngkvl2eyxfic5r4a-story.html> [<https://perma.cc/B6GM-S7BT>].

92. IND. CONST. art. II, § 2.

93. IND. CONST. art. II, § 1.

94. IND. CONST. art. II, § 13.

95. IND. CONST. art. II, § 14.

96. Eva Steiner, *FRENCH LAW: A COMPARATIVE APPROACH* 5 (2010).

97. *Id.* at 6.

98. 1958 CONST. art. 3 (Fr.).

or previous condition of servitude[.]”⁹⁹ “on account of sex[.]”¹⁰⁰ or on the basis of age for citizens over 18.¹⁰¹ Finally, the US. Constitution provides in the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁰²

On their face, none of these provisions appear to outlaw a proxy voting method in elections in Indiana. The due process provisions of the Fourteenth Amendment are worthy of a deeper dive, however, in evaluating the recommended method of proxy voting. The Due Process Clause does not provide on its face anything specifically about elections and voting, but through case law has been understood to ensure “[a]n individual’s constitutionally protected right to cast an equally weighted vote”¹⁰³ The Court differentiates between election laws that actually curtail the right to vote and those that rely on a Fourteenth Amendment equal protection claim in order to substantiate their challenge. The Seventh Circuit, in *Tully v. Okeson*, indicated that Indiana’s current absentee voter framework fell into the latter category, stating that “election laws that do not curtail the right to vote need only pass rational-basis scrutiny.”¹⁰⁴ Therefore, rational-basis scrutiny would likely apply in the event of an equal protection challenge to the recommended proxy voting statute. The recommended statute is likely to survive such an equal protection challenge because the state has a legitimate interest in governing the method, eligibility, and submission requirements of absentee votes—much like the legitimate state interest found to exist in present Indiana absentee voting requirements by the Seventh Circuit.¹⁰⁵

Indiana’s Constitution contains a similar equal protection provision that has been applied to several election laws. That provision read that “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”¹⁰⁶ Voter identification laws have been challenged in Indiana under that provision utilizing a theory that the statute in question created impermissible differences in between categories of voters’ ability to vote. As an analogous example, one might imagine a scenario wherein the recommended statute is

99. U.S. CONST. amend. XV, § 1.

100. U.S. CONST. amend. XIX, § 1.

101. U.S. CONST. amend. XXVI, § 1.

102. U.S. CONST. amend. XIV, § 1.

103. *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736 (1964).

104. *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020).

105. *Id.*

106. IND. CONST. art. I, § 23.

challenged as constitutionally impermissible because it does not create an avenue to proxy vote for registered voters who have no family, household members, or an attorney. On those challenges, the Supreme Court of Indiana has held that

[g]iven the scope of the undertaking embraced in the Voter ID Law's efforts in enhancing the integrity of the electoral process and its attempt to tailor its operation to a significant variety of circumstances, we conclude that the possible absence of precise congruity in application to all voters represents a legitimate exercise of legislative discretion warranting our deference.¹⁰⁷

The deference that the Supreme Court of Indiana affords the state legislature would likely allow the recommended statute to survive an attack based on Indiana's equal privileges or immunities clause.

The largest legal hurdle for proxy voting in the United States will likely be the deeply ingrained "one person, one vote" maxim. That idea is both ingrained in the psyche of the electorate and in the case law. The United States Supreme Court has held that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."¹⁰⁸ Many American observers are tempted to reduce proxy voting to "the ability to vote twice" as in the title of the Washington Post article "You can vote twice! The many political appeals of proxy votes in France."¹⁰⁹ Of course, it is more complex than that. However, the relevant question is whether the recommended statute would survive a legal challenge based on that idea.

The recommended statute calls for keeping the actual voting power with the original voter rather than making the proxy a voter with more voting power. This is analogous to many other forms of absentee voting in Indiana, where a voter with disabilities may be assisted by another individual. None of these methods create a system in which the vote is cast under the power of someone other than the voter. For example, on voting by travel board, the Indiana Secretary of State's website indicates that:

A voter with disabilities may request that another person sign the voter's name on their behalf on the application. The person providing the assistance may not be the voter's employer or union representative and must complete the affidavit of assistance found on the application. If the assistor is the voter's power of attorney (POA), the POA paperwork should be submitted with the application.¹¹⁰

Proxy voting is an extension of voting by traveling board in this respect. The power of the vote ultimately remains with the voter, and any assistance they receive in casting it is just that: assistance.

107. League of Women Voters of Indiana, Inc. v. Rokita, 929 N.E.2d 758, 772 (Ind. 2010).

108. Gray v. Sanders, 372 U.S. 368, 381 (1963).

109. Coulmont et al. *supra* note 37.

110. OFF. OF THE IND. SEC'Y OF STATE, *supra* note 2.

Unconstitutional acts that violate the “one person, one vote” maxim typically revolve around legislative reapportionment in the United States. A person’s vote may be diluted by virtue of living in a certain district which is provided less representation relative to other districts that elect members to the same body. This type of dilution results in an unconstitutional restriction on the right to vote, which the United States Supreme Court has held “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”¹¹¹ As previously argued, though, the proxy is merely carrying the voting power of another individual, not adding weight to their vote or removing weight from another voter’s ability to participate in democracy.

If a court did, however, determine that the system of proxy voting does, in fact, give the ability of one voter to increase the weight of their vote, proxy voting would likely be determined to be constitutionally impermissible on equal protection grounds. Such a determination may present pathways for equal protection challenges to many other types of absentee voting that the United States Supreme Court would be hesitant to curtail. For example, if carrying and casting another person’s vote on election day through proxy presents problems regarding which individual actually controls the weight of the vote, then it is likely that postal absentee voting suffers those same questions due to the uncertainty about the control of the ballot or the coercion of the voter at home.

Even if a Court determined that a proxy voting mechanism was in effect changing the weight of voters’ ability to participate in the electoral process. The United States Supreme Court indicated that:

So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.¹¹²

This rational-basis standard is a relatively low bar for the proxy voting statute to survive, and the facilitation of absentee voting would likely be a rational state policy appropriate for a deviation from the “one person, one vote” rule. Additionally, federal courts would be hesitant to both supersede the will of a state legislature and to upend existing absentee voting entirely by casting doubt on the control of the weight of an absentee vote.

VII. CONCLUSIONS

Absentee voting is worthy of the new attention it has received due to the COVID-19 pandemic. It would be foolish of lawmakers to adopt a belief that there will never again be an event that calls for the widespread use of absentee

111. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

112. *Id.* at 579.

voting in place of traditional in-person choices. The system called proxy voting, as utilized in France, may allow Indiana to adapt its absentee voting laws to be prepared for whatever the future brings. In both France and Indiana, important elections took place during the pandemic with mixed success. Both jurisdictions were unable or unwilling to significantly alter their legal frameworks in time for the relevant election to occur.

The adoption of proxy voting meets the apparent aims of Indiana's electoral policy by enfranchising voters while limiting potential fraud. It does this by reducing costs for rational actors, the voters, to act in their election. Proxy voting also assists in limiting or eliminating fraud by requiring notarization and eliminating the period that a vote is out of the control of either election officials or the voter themselves. The conversation on absentee voting should be expanded with consideration given to other forms of absentee voting, balanced with an appropriate level of respect for the risk of fraud, which seems low. Though other forms of absentee voting may allow for increased voter fraud, the operative concerns with voter fraud should be whether election outcomes are influenced, which is unlikely under the United States' first-past-the-post system.

Proxy voting allows for flexibility. The coupling of Indiana's remote notarization is not just advantageous to voters with limited mobility. It also allows an election to continue in the case of a disaster that disrupts the normal flow of life, such as COVID-19. While another global pandemic is hopefully unlikely to occur, it is easy to imagine flooding or tornadoes damaging infrastructure to a point where all in-person voting may become impracticable for a portion of the state.

Importantly for the implementation of proxy voting, it appears to survive constitutional scrutiny at both the state and federal levels. This means that the necessary change to implement proxy voting in Indiana could come through the state legislature, rather than needing any massive changes in governance structure to do so through a constitutional amendment. That same state legislature may have incentives beyond the positive public policy outcomes. Proxy voting has a reputation of benefitting conservative candidates in France, and even if there is no direct translation, proxy voting may be advantageous to Indiana's largely conservative rural population.

Proxy voting as a method of absentee voting will mirror the submission requirements for in-person voters and the eligibility requirements for existing Indiana absentee voters. These existing statutory schemes, coupled with precedent from the Indiana General Assembly's past regarding pilot programs, demonstrate the relative ease with which proxy voting could slide into the existing framework for absentee voting in Indiana.

The addition of proxy voting alone cannot restore the faith in electoral institutions or absentee voting, which has been recently shaken by inflammatory rhetoric from politicians in the United States. However, proxy voting can help reform election law by confronting weaknesses exposed by COVID-19 while simultaneously addressing the goals of election law policy in Indiana by enfranchising more people and limiting electoral fraud.