
A BULLY PULPIT APPROACH TO ELECTIONS IN THE EARLY BIDEN ADMINISTRATION

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2020 yielded innovation to administer an election during a pandemic, high voter participation, divisive social media maelstroms, and extraordinary doubt cast by the losing presidential candidate on the results, all culminating in a riot at the Capitol during the counting of electoral votes. Election disputes looked bad in 2016,¹ but they appear to have become even worse. Election law has attracted President Joe Biden's attention, but much less in legislative reforms and much more in the bully pulpit to advance his agenda.

The House of Representatives approved H.R. 1, an [omnibus elections bill](#) similar to a bill it approved in 2019. The bill would require independent redistricting commissions, enfranchise ex-felons, increase disclosure requirements in campaign ads, and broaden absentee voting, among its many provisions. Biden [praised](#) the House for passing the bill and anticipated that Congress would continue "to refine" the bill.

But the hang-up, as in 2019, is in the Senate. Democrats hold the tiebreaking vice presidential vote in a chamber currently divided 50-50 along partisan lines. The filibuster effectively requires 60 votes to accomplish anything. So far, Biden remains cool to efforts to abolish or reform the filibuster. Perhaps it stems from loyalty to his past service in the Senate. Or perhaps he faces the reality that some Senate Democrats oppose abolishing it and that efforts to end it would be futile.

While H.R. 1 remains the single most significant piece of election legislation in front of Congress, its long odds mean Biden has moved to other targets. Biden has [appointed](#) a senior policy advisor for democracy and voting rights. He approved an executive order "[Promoting Access to Voting](#)," but these actions are largely symbolic—the order asks agencies to evaluate voter registration access and to modernize the website [vote.gov](#), among other things. The order requests reports about best practices for voting in Native American communities and for

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1. See Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629 (2017).

improving voter registration form accessibility for those with disabilities. But without laws giving effect to these rules, their impact is likely muted at best.

The bulk of legal changes to election laws are occurring in the states. In one sense, that's to be expected, as the Constitution [defaults](#) responsibility for setting election rules to the states, subject to congressional regulation. Congress's power to regulate election is extensive.² But Congress isn't acting.

States routinely alter their election laws, but partisan rancor seems worse after the 2020 election. President Donald Trump repeatedly cast doubt on his loss. Virtually all legal challenges failed—some procedurally, some substantively—but the repeated allegations of fraud have spurred outcry among those disappointed with the loss. Absentee voting became a necessity during the pandemic,³ but it became a scapegoat among Trump's supporters. Late-breaking changes to election laws by secretaries of state, county election administrators, or judges spurred legislative skepticism.

Georgia's newly-enacted election law, [Senate Bill 202](#), has become the [Rorschach](#) for partisan reaction. The law contains dozens of changes to election laws. Some components have [widespread bipartisan support](#), like guaranteed weekend early voting. Other components have prompted bipartisan criticism, like a ban on distributing water to those in line waiting to vote. And still others have divided sharply on partisan lines with allegations of racial disparities, such as barring “mobile voting” sites, which had been used only in Fulton County, with Georgia's largest Black population.

On Georgia's law, the principal presidential response has been rhetorical. Biden [stated](#), “This is Jim Crow in the 21st Century.” He then gave an interview with ESPN indicating that he would “[strongly support](#)” a decision from Major League Baseball to move its All-Star Game from Atlanta, Georgia elsewhere. Shortly after, [MLB announced](#) it would do so. After Georgia-based companies like Coca-Cola and Delta Air Lines criticized the new law, Biden [said](#), “It is reassuring to see that for-profit operations and businesses are speaking up about how these new Jim Crow laws are just antithetical to who we are.” The bully pulpit has been exceedingly effective.

Legal responses, however, remain to be seen. Asked about what the Department of Justice might do, Biden [remarked](#), “We don't know quite exactly what we can do at this point.” The concession of a lack of existing legal options coupled with a lack of urgency to implement any new legal options is something of a surprise.

2. See Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317 (2019).

3. See Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/> [https://perma.cc/2RX5-9PRN].

Commemorating “Bloody Sunday” in Selma, Alabama, Biden urged Congress to “[fully restore the Voting Rights Act](#).”⁴ While Congress considered such legislation in its previous session, it has not yet considered an update to the Voting Rights Act—an update needed to remedy constitutional shortcomings identified by the Supreme Court in 2013,⁵ and an expansion to cover new congressional concerns. Indeed, such a bill hasn’t even been introduced in the House yet.

The existing Voting Rights Act faces new judicial scrutiny. The Supreme Court recently granted certiorari in *Brnovich v. Democratic National Committee*, a pair of challenges to Arizona election laws under the Voting Rights Act. One was a long-standing rule that prohibited counting provisional ballots cast outside of the voter’s precinct. Another was a more recent law limiting third parties who could collect a voter’s ballot, a ban on “ballot harvesting.” The Democratic National Committee challenged both laws. Ultimately, the Ninth Circuit sitting en banc concluded that the laws violated the Voting Rights Act, and that the ballot collection law was intentionally racially discriminatory.

The Supreme Court took the case to interpret Section 2. Given the demise of preclearance under Section 5 of the Voting Rights Act after the Court’s 2013 decision in *Shelby County v. Holder*, civil rights litigants have sought to use Section 2 in increasingly varied ways to address voting rights. Section 2, however, was principally used for redistricting to remedy discrimination among racial minorities who lacked the opportunity to elect the preferred candidate of their choice. How [Section 2](#) applies in vote denial cases remains an issue—are a state’s laws under the “totality of the circumstances” not “equally open to participation” of racial minorities “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”?

Acting Solicitor General Jeffrey Wall filed an [amicus brief](#) for the United States in support of Arizona on December 7, 2020. The brief offered a framework for the how to construe Section 2, a framework different from either petitioners or respondents in the case and a framework that requiring, among other things, a showing of proximate cause before a plaintiff could succeed in challenging a state’s election law.

The Trump administration was soon replaced by the Biden administration. On February 16, 2021, weeks into the Biden administration and weeks ahead of oral argument, the Deputy Solicitor General [updated](#) the United States’ position: “the Department does not adhere to the framework for application of Section 2 in vote-denial cases set forth in the brief.” (Nevertheless, at [oral argument](#), multiple justices expressed interest in the position articulated in the withdrawn brief.)

But intriguingly, the letter added that the Department of Justice “does not disagree with the conclusion in that brief that neither Arizona measure violates

4. See also Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOWARD L.J. 809 (2019) (describing history of race and voting in the United States, including the development surrounding the Voting Rights Act).

5. See Derek T. Muller, *Judicial Review of Congressional Power Before and After Shelby County v. Holder*, 8 CHARLESTON L. REV. 287 (2013).

Section 2's results test." That is, the Biden administration agreed with the Trump administration that Arizona's laws passed Section 2 muster, and that the Democratic National Committee should lose.

The Biden Department of Justice [has not been shy](#) about reversing Trump administration positions before the Supreme Court so far, and it did not hesitate to reverse course on the Section 2 framework that the United States set forth in the original brief. The concession that Arizona's laws pass muster under the Voting Rights Act is a telling concession. It highlights the outer bounds of the Voting Rights Act and the limitations it places on the Justice Department. And it would seem to make updating the Voting Rights Act more urgent to advance the administration's interests.

In decrying Georgia's election law, Biden specifically critiqued the unpopular ban on distributing water to voters waiting in lines—"lines Republican officials themselves have created by reducing the number of polling sites across the state, disproportionately in Black neighborhoods." It's not clear any voters would view a cup of water as an inducement to support a particular candidate, and it remains one of the most perplexing—and most easily vilified—components of the bill.

But it's a critique that in another sense gets at the wrong issue, which Biden alludes to in his statement. Poll lines are rightly a major concern—and, perhaps, the greater concern than a water distribution ban, as short lines obviate the need to pass out water to thirsty voters. President Barack Obama formed the [Presidential Commission on Election Administration](#) in 2013, co-chaired by his former White House counsel, Bob Bauer, and former counsel for George W. Bush and Mitt Romney, Ben Ginsburg, recommend improvements to election administration. It offered [specific guidance](#) on the topic of improving polling locations and reducing wait times. There's no such commission being developed this time around or further guidance being advanced by the White House—perhaps in another executive order.

Biden's first 100 days, then, have been marked with a declining emphasis on law and an increasing emphasis on rhetoric. Faced with a legislative stalemate, the executive understandably has sought alternative tools to accomplish a preferred policy agenda. Private actors—from social media network [banning](#) politicians whose conduct they deem abusive, to corporate actors boycotting states enacting laws they oppose—have taken the lead. It's possible, of course, that lawmaking pressure will rise in the coming months. There's been a [recent push](#) to address the Voting Rights Act in Congress, for one. And it's possible that Justice Department priorities change, or future strategic litigation positions advance the Biden administration's goals. But whether these legal strategies unfold in the years ahead remains to be seen.