



Senate Select Committee on Election Security

Interim Report

December 2018



December 3, 2018

The Honorable Dan Patrick
Lieutenant Governor of the State of Texas
Capitol Building, Room 2E.13
Austin, Texas 78701

Dear Lieutenant Governor Patrick:

You charged the Senate Select Committee on Election Security with reviewing the integrity of elections in our State. We submit this report in response to that charge. In the midst of changing voting technology and evolving threats to election security, we have a fixed and unalterable commitment to preserve the fundamental franchise rights of every Texan. We humbly offer the recommendations contained herein to strengthen the integrity of the ballot box and to give the citizens of our State renewed confidence that they are the makers of their own government.

Respectfully submitted,

Bryan Hughes, Chair

Brian Birdwell

Bob Hall

Don Huffines

Joan Huffman

Borris L. Miles

Judith Zaffirini

CHARGE

In light of recent election irregularities in Texas, review voting security protocols as well as the responsibilities and duties of members of the Electoral College. Specifically, examine the use of electronic voting systems and paper ballots, voting fraud and disenfranchisement occurring inside nursing homes and assisted living facilities, outside interference and manipulation of elections, and the voting requirements of presidential electors. Make recommendations to safeguard the integrity of elections, ensure the confidentiality and security of voting records, and ensure the will of the people is reflected through their ballot and carried out through their presidential electors.

BACKGROUND

In the United States, the states retain significant independence in conducting elections. The Elections Clause of the United States Constitution, Art. I., Sec. 4, cl. 1 provides:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators."

By and large, each state may establish its own electoral process and procedures. The institution of voting in Texas is one of the most decentralized in the nation, operating at the local level in each of the state's 254 counties. This decentralized system itself helps protect voter security, as any error or attack in the elections infrastructure (except the centralized voter registration database) would likely affect only one county at a time. At the same time, it makes widespread updates and improvements difficult to implement across the state. The result is a patchwork of voting systems, practices, and personnel.

Even though states set the general procedures and parameters for elections, Congress may preempt state regulations governing the "Times, Places, and Manner" of holding congressional elections.¹ In practice, these federal regulations affect every election, since the bifurcation of federal and state/local elections is a significant practical obstacle. Accordingly, there are several major federal statutes that govern much of the Texas electoral landscape. The National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA) have the most impact on the operational aspect of elections.

In order to assist the states in enhancing security and facilitating uniformity, the federal government passed the Help America Vote Act of 2002. At the time, Texas received funds for updating voting systems and improving elections infrastructure. This funding is responsible for the purchase of many voting systems still in use across the state today. As that infrastructure ages in Texas and in other states, Congress has authorized more funding for election security and infrastructure. This year Texas received \$23,252,604, which is being used to harden our own electoral infrastructure in ways that are discussed in greater detail below.²

As the Secretary of State works to improve security in the registration process and at polling places, the Office of the Attorney General has increased efforts to enforce existing election law. As of the date of this report, this year alone the elections division has resolved 97 cases through prosecutions, including convictions, deferred adjudications, and diversion programs with a stipulation of guilt. The division has a backlog of 63 open investigations, with 59 election fraud

¹ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, at 4 (2013).

² Letter from Secretary of State Rolando Pablos to Brian D. Newby, Executive Director of the Elections Assistance Commission, July 18, 2018 (<https://www.sos.state.tx.us/elections/hava/cover-letter-Rolando-Pablos-EAC.pdf>).

offenses pending prosecution. These convictions have shed light on a number of election crimes, many leading to high-profile verdicts. The office is limited by budgetary constraints though, and has asked for an additional \$1.9 million with the goal of making all current grant-funded positions permanent and adding a number of additional investigators and prosecutors.

The 2016 elections were fraught with allegations of misconduct by foreign actors and uncorroborated claims of systems interference. Ultimately, while other countries did propagate misinformation and disinformation among voters, there is no evidence of any successful attempt to actually change the outcome of a single vote.³

In response to the committee's charge, this report will examine election security as it applies to both the registration process and list maintenance, as well as the security of the polling place and the front and back end voting infrastructure that voters and public officials use in elections.

VOTER REGISTRATION

THE REGISTRATION PROCESS

Voter registration is fundamental to the integrity of our elections. It is the starting point from which the entire electoral process begins, a process that constantly seeks to balance of the desire to increase voter participation and the need to create and maintain accurate voter rolls.

Voter registration is governed at the state level by Title II of the Texas Elections Code. It is administered at the local level by the Tax assessor-collector of a county, unless the duty is delegated to the county clerk or an elections administrator. Texas law requires that a person be registered in order to be eligible to vote. A person is eligible to register to vote if the person is over 18 years of age, is a citizen, is not mentally incapacitated, is a resident of the county in which the application is made, and is not currently disqualified as a result of a felony conviction for which the person has not fully discharged the sentence, completed the period of probation ordered by the court, or been pardoned or otherwise released from the resulting disability to vote.⁴

The application must be made in writing and signed by the applicant. It must also be delivered by personal delivery, mail, or fax.⁵ While each county is responsible for the maintenance of voter rolls, the Secretary of State maintains a statewide voter registration database known as the Texas Election Administration Management (TEAM) system.

Texas law must comply with federal voting laws as well. Specifically, the National Voter Registration Act of 1993 provides specific requirements for the manner and means of voter registration opportunities that must be available to every American. Section 5 of the NVRA

³ DHS Statement On NBC News Coverage Of Election Hacking, February 12, 2018.

⁴ TEX. Elec. CODE § 13.001.

⁵ TEX. Elec. CODE § 13.002.

requires that a driver's license application must serve as a simultaneous voter registration application.⁶ A change of address form must also serve as a change of address for voter registration purposes.⁷ These requirements apply to an application or change to "any personal identification document issued by a state motor vehicle authority."⁸ Additionally, under Section 7 of the NVRA, any office in a covered state that provides either public assistance or state-funded programs primarily engaged in providing services to persons with disabilities must offer voter registration services.⁹ These requirements create a broad base of opportunity for registration for all Texans.

REGISTRATION DATABASE MAINTENANCE AND SECURITY

Local voter registrars are tasked with completing registrations of voters in their county, with removing registrants from the list who have died, moved, or otherwise indicated that they are no longer eligible to vote, and with coordinating and communicating with the Secretary of State on list maintenance.

These local voter registration efforts are funded under Chapter 19 of the Elections Code. Under Chapter 19, each county registrar receives \$.25 for each initial registration, \$.40 for each cancelled registration, and \$.40 for each updated registration.¹⁰ In even-numbered years, they also get \$.40 multiplied by the difference between the number of registered voters and the number of initial registrations certified for the two previous voting years.¹¹ This funding system is intended to create an incentive for ongoing list maintenance activity. Each county official maintains the roll for that county, which is synchronized with the TEAM system at the state level.

List maintenance is an ongoing process. Every two years the counties send out voter registration certificates that are not forwardable to a new address.¹² If the notice is returned as undeliverable, the voter is placed into suspense. If the voter does not confirm updated information and does not vote in the next two federal elections, their registration is cancelled.¹³ Information on deceased persons comes primarily from the Texas Bureau of Vital Statistics and the Social Security Administration. The Secretary of State cancels only "strong matches," which are those with matching names, dates of birth, and a full nine digits of the social security number.¹⁴ Anything less than this is a "weak match" and requires action at the local level. The Secretary of State receives felon information from DPS and the US attorney's office.

⁶ 52 U.S.C. § 20504.

⁷ *Id.*

⁸ *Id.*

⁹ 52 U.S.C. § 20506.

¹⁰ Tex. Elec. Code § 19.002.

¹¹ *Id.*

¹² *Hearing Before the Senate Select Committee on Election Security*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Keith Ingram, Director, Elections Division, Office of the Secretary of State.).

¹³ *Id.*

¹⁴ *Id.*

The Secretary of State recently began an ongoing process of identifying and removing in-state duplicate registrations. The first run of this program identified almost 100,000 duplicate registrations that were sent to the counties for further action.¹⁵ The Secretary will continue to execute this process annually.

The Secretary of State also maintains the TEAM system, which is the statewide voter database. State law requires the operation and maintenance of a centralized voter registration database that complies with federal law. As the only component of the voting infrastructure that is directly connected to the internet, the voter registration system is uniquely vulnerable. Federal investigators reported that leading up to the 2016 election many states' election websites or voter registration databases were scanned for access or information, but there is no evidence that Texas's system was successfully compromised.¹⁶ Governmental cybersecurity officials report that most public-facing internet-connected government sites are "pinged" daily.¹⁷ This activity alone is not reason for alarm. It does, however, highlight the importance of ongoing best practices to minimize the risk of these scans successfully compromising voter systems.

In many states and large counties, critical elections infrastructure is being outfitted with "ALBERT sensors," which allow for real-time data collection on potential hacking efforts and information-sharing between jurisdictions and the federal government so that all jurisdictions are made immediately aware of efforts to interfere in any jurisdiction.¹⁸ All users of the state's TEAM system must also complete two-factor authentication to access the system, making remote access more difficult for unauthorized users.¹⁹ Coordination between jurisdictions provides pooled resources and expertise and is a primary line of defense in protecting our voter registration database against nefarious online actors.

INTERSTATE CROSSCHECK

The NVRA as well as HAVA require certain list maintenance procedures. Federal law is a floor, though, and states are welcome to impose higher standards of list maintenance practices on their registrars and secretaries if they choose to do so. Among the minimum requirements imposed under federal law, states are required to identify duplicate records on registration lists.²⁰ States must work to identify duplicates within the state, but many also work to identify voters who are registered in the state who are also registered in another state.

There are two main systems in place to allow states to compare voter lists and identify voters who may be registered in multiple jurisdictions. The Electronic Registration Information Center,

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Hearing Before the Senate Select Committee on Cybersecurity*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Brandi Marquez, Commissioner, Texas Public Utility Commission.).

¹⁸ *Supra* note 16.

¹⁹ *Id.*

²⁰ *Id.*

or ERIC, is a group of 24 states who cooperate with one another to compare lists and improve the accuracy of their voter rolls.²¹ ERIC is designed to proactively identify necessary list maintenance actions and incorporate publicly available databases and resources to create monthly reports for state registration officials.²² The Interstate Crosscheck Program includes varying numbers of states and aims to achieve a similar objective.²³

In 2015, the legislature passed and Governor Abbott signed SB 795. This bill was intended to instruct the Secretary of State to opt in to an interstate crosscheck program.²⁴ However, the Secretary of State has not yet done so. Many states that have passed similar legislation have included specific authorization to share identifying information needed to complete the cross check on a limited basis, as well as provided funding for participating in the systems.²⁵ Texas currently does not participate in either of the two major crosscheck systems.

JUROR CARDS

There are several circumstances in which the registrar or Secretary of State will remove a voter from the roll. These include situations in which an individual requests removal, fails to respond to a notice of suspense, confirms the cause for suspense, dies, is a felon, indicates that he or she is not a citizen in response to a jury summons, has a duplicate registration in another county or state, is declared mentally incompetent, or is disqualified for another reason. The Secretary of State's office releases a monthly list of the removals from each county for each cause.

Jury selection offers one point of contact during which an individual who is registered to vote may provide new information that shows that the individual is not in fact eligible to vote. When an individual appears for jury duty, the person fills out an information card and gives it to the clerk of the court. If the card indicates that the individual is not a citizen and thereby ineligible to serve on the jury, the clerk will disqualify the individual, add the individual's name and address to a list of persons excused or disqualified from jury duty, and then monthly transmit the list to the county voter registrar, the county or district attorney, and the Secretary of State.²⁶ The Secretary of State cannot directly remove anyone who is identified as not being a citizen during this process, however. This is entirely up to the local registrar. The local official should send a notice of examination within 30 days, and if the voter does not respond their registration is cancelled for failure to respond. Ideally, the local official will take affirmative steps to confirm the eligibility of the voter. However, the Secretary of State has no enforcement mechanism to confirm that this occurs.

²¹ *Id.*

²² Voter List Accuracy, National Conference of State Legislatures, July 26, 2018 <http://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx>.

²³ *Id.*

²⁴ See Bill Analysis, Tex. S.B. 1151, 85th Leg., R.S. (2017).

²⁵ *Supra* note 22.

²⁶ TEX. GOV'T CODE § 62.113.

According to the Secretary of State, 221 previously registered individuals had been removed from voter rolls through October of this year after self-reporting at jury duty as ineligible to vote.²⁷ In 2017, the number was 444.²⁸ These numbers represent only those individuals who reported their status, received a notice of examination from their local elections official, and either confirmed the status or failed to respond.

POLLING PLACE SECURITY

While accurate voter rolls are critical to ensuring fair participation in elections, securing the polling places, both physically and electronically, is of paramount importance in making sure the votes that are cast are counted fairly and accurately.

VOTING SYSTEMS

Each voting system used in a Texas election must be certified by the federal Elections Assistance Commission, as well as the Texas Secretary of State. This certification process includes a line-by-line review of the software code and a review of the supply chain for the parts used in manufacturing the systems to make sure no bad actors have a place in that chain.²⁹ Texas counties currently use systems manufactured and supported by three different vendors: Hart, Election Systems & Software (ES&S), and Dominion.³⁰ It is a crime to enter into a voting system purchase contract without prior approval by the SOS.³¹

Chapter 125 of the Election Code establishes mandatory guidelines for counties in conducting secure elections at the polling place. Counties use a variety of older and newer systems with varying degrees of security included in each. However, the Secretary of State has assembled a centralized outline of security procedures in Texas that are in place for all counties.³²

Committee testimony further highlighted some of the most critical protections in place across the state. Each system used in an election undergoes public logic and accuracy testing before voting begins, immediately prior to counting ballots, and immediately following the counting of ballots.³³ No voting system is ever connected to the internet, a practice called "air-gapping" that ensures bad actors cannot corrupt a system's vote tally over a network.³⁴ This includes not only

²⁷ Cancellation Trend Reports, Texas Secretary of State, <https://www.sos.texas.gov/elections/team/cancellation-trend-reports/index.shtml>.

²⁸ *Id.*

²⁹ *Supra* note 12.

³⁰ *See* Certification Information by Vendor, Texas Secretary of State <https://www.sos.state.tx.us/elections/laws/certinfovendor.shtml>.

³¹ *Id.*

³² *See* 2018 Texas Election Security Update, <https://www.sos.texas.gov/elections/conducting/2018-security-update.shtml>; Electronic Voting System Procedures Advisory 2014-06, Texas Secretary of State <https://www.sos.texas.gov/elections/laws/electronic-voting-system-procedures.shtml>; Election Advisory No. 2012-03, Texas Secretary of State, <https://www.sos.state.tx.us/elections/laws/advisory2012-03.shtml>.

³³ *Supra* note 12

³⁴ *Id.*

the systems on which a voter casts his or her vote, but also the computers used to build the election and tabulate the results.³⁵ On most systems, the vote tallies on the systems are transported by an external memory drive, like a flash or thumb drive, and only brand new drives are allowed for this task.³⁶ These measures limit the risk of both hardware and software tampering.

Maybe the most promising advance in technological security comes from the state's increasing cooperation in coordinated information-sharing among states and the federal government. This pooling of resources multiplies each state's power to identify and respond to threats to the voting system. The Secretary of State works with DIR to conduct security checks on a regular basis and, along with Travis County, is participating in a pilot program with DHS and MS-ISAC to implement multi-state sharing tools to identify threats as early as possible.³⁷

HUMAN ERROR OR ACTION IN THE POLLING PLACE

Earlier this year, hackers at the DEF CON hackers conference made national news for hacking a voting system, but this task required physical access to the machine that would be very difficult for an intruder to obtain in a real-world elections setting.³⁸ Most errors that occur at the polling place are human errors, and most opportunities for nefarious interference that might occur at the polling place require physical intervention on the part of the bad actor.³⁹ Physically securing the voting systems, both during use and in transit and storage, is critical. Vetting and training the individuals who will be authorized to manipulate the machines and to conduct the elections themselves are just as important as the digital security of the systems and connected infrastructure.

Recognizing this, the Secretary of State used much of this year's HAVA funds to make extensive training available to every county election worker.⁴⁰ This training is called "Securing the Human" and provides practical training to poll workers on how to conduct the election and on what to watch for during voting.

Recruitment, training, and retention of election workers is a significant obstacle at the local level though. Extra training is costly, both in terms of time and money. As the labor market tightens statewide, fewer candidates are available to work in elections. This balance of properly training

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Alix Langone, An 11-Year-Old Hacked Into a U.S. Voting System Replica in 10 Minutes This Weekend, August 14, 2018, Time Magazine <http://time.com/5366171/11-year-old-hacked-into-us-voting-system-10-minutes/>; NASS Statement on DEFCON Voting Machine Hacking Events, National Association of Secretaries of State, August 9, 2018 <https://www.nass.org/node/1511>.

³⁹ *Hearing Before the Senate Select Committee on Election Security*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of John Oldham, Fort Bend County Elections Administrator).

⁴⁰ *Supra* note 2.

election workers and retaining a sufficient workforce is a local problem with statewide implications.

BEST PRACTICES

The Election Assistance Commission and the Center for Internet Security, a non-profit cybersecurity entity that serves as the home for the Elections Infrastructure Information sharing and Analysis Center (or EI-ISAC) both provide a set of best practices for digital and physical security.⁴¹ Texas has implemented many of these practices and continues to work toward complete implementation of practices that will maximize the security of the polling place.⁴² Some of the best practices include:

⁴¹ The Elections Assistance Commission has collected a number of best-practices resources and made each available at <https://www.eac.gov/election-officials/election-security-preparedness/>. This list uses examples found in many of the listed resources. *See also*, Election Management Guidelines, Election Assistance Commission <https://www.eac.gov/election-officials/election-management-guidelines/>; A Handbook for Elections Infrastructure Security, Center for Internet Security, February 2018 <https://www.cisecurity.org/wp-content/uploads/2018/02/CIS-Elections-eBook-15-Feb.pdf>

⁴² *See* 2018 Texas Election Security Update, <https://www.sos.texas.gov/elections/conducting/2018-security-update.shtml>; Electronic Voting System Procedures Advisory 2014-06, Texas Secretary of State <https://www.sos.texas.gov/elections/laws/electronic-voting-system-procedures.shtml>.

- Whitelist which IPS can access a voting system or device
- Regularly scan the network to ensure that only authorized devices are connected
- Only use approved and managed USB devices with appropriate device encryption and authentication
- Deploy Network Intrusion Detection Systems (Albert sensors)
- Ensure that staff is properly trained on cybersecurity and audit procedures
- Require and conduct audits
- Conduct criminal background checks for all staff, including vendors, consultants, and contractors supporting the election process
- Use write-once media for transferring critical system files and updates
- Maintain detailed maintenance record of all system components
- Use multi-factor authentication
- Limit the number of individuals with administrative access to the platform and remove default credentials
- Ensure detailed documentation of action on each device throughout its life cycle
- Maintain chain of custody for all core devices
- Use tamper evident seals on all external ports that are not required for use and electronically deactivate ports where feasible
- Implement a change freeze prior to peak elections periods for major elections
- Conduct in-person site audits to verify security compliance prior to major elections
- Regularly review all user accounts and IDs and revoke system access immediately after termination
- Ensure that user credentials are encrypted or hashed on all platforms
- Ensure that individuals are only given access to the platforms they require
- Ensure all workstations and user accounts are logged off after a period of inactivity
- Conduct mock elections prior to major elections to help eliminate gaps in process

ELECTION SECURITY RECOMMENDATIONS

VOTER-VERIFIED PAPER AUDIT TRAIL

Texas counties use a variety of voting processes in the polling place. Some use an optical or digital scanning device to scan and count paper ballots; some use an electronic voting system that produces and marks a paper ballot for the voter; and some use direct-recording electronic voting systems (DREs), which record votes directly into an electronic computer memory without

any paper component. Some DREs have or can be equipped with a voter-verified paper audit trail (VVPAT), but no such component is currently required under state law.

Five states run their elections exclusively with DREs that have no VVPAT. Texas is one of nine other states that use some systems with VVPAT and some without. A voting system without a paper trail is not subject to a full post-election audit, which is an important tool to confirm to accuracy of elections returns. Kirstjen Nielsen, chief of the Department of Homeland Security, recently called for all states to conduct elections entirely on systems with VVPAT by the 2020 presidential election.⁴³ This timeline may present significant obstacles, but it is critical that Texas encourage counties to move toward the goal of having voting systems with VVPAT as soon as practicable.

AUDITS

Texas currently has a post-election audit system in place. However, because many precincts use DREs that do not have an auditable paper trail, the statewide outlook for audits is mixed. States have a variety of requirements and procedures for post-election audits, but fundamentally the term refers to election validation efforts after the election has occurred, usually by checking paper ballots or records against the results produced by the voting system to ensure accuracy in the electoral process.⁴⁴ Traditional audits usually look at a fixed percentage of voting precincts or systems and compare the paper record to the results produced by the machine. These are generally conducted by hand-counting the paper ballots. Where there is no paper record, this type of audit cannot be conducted.⁴⁵

Current Texas law requires local election officials to conduct manual partial recounts within 72 hours of polls closing, and the recount must be completed no later than the 21st day after the election. However, these audit requirements do not apply to tabulation of DRE systems.⁴⁶ Currently, state law only requires post-election audits for jurisdictions that use paper ballots. The number of ballots included in an audit preset rather than using a statistically significant number tied to the margin of victory in one or more ballot contests. Perhaps most surprisingly, audits are merely instructional. They are not binding on election results and cannot reverse the preliminary outcome of an audited contest even if an error is detected.

These audit methods are helpful where available but are limited in their use and could be further optimized. Risk-limiting audits are an emerging type of audit based on statistical analysis that are designed to require the minimum cost and time in order to effectuate the maximum reliability in assessing the accuracy and validity of electronic voting results. A risk-limiting audit recounts

⁴³ Secretary Kirstjen M. Nielsen Remarks: Rethinking Homeland Security in an Age of Disruption, September 5, 2018, <https://www.dhs.gov/news/2018/09/05/secretary-nielsen-remarks-rethinking-homeland-security-age-disruption>.

⁴⁴ Post Election Audits, National Conference of State Legislatures, October 8, 2018 <http://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx>.

⁴⁵ *Id.*

⁴⁶ TEX. ELEC. CODE §127.201; Election Advisory No. 2012-03.

only as many votes as necessary to statistically ensure that a further and complete hand count would confirm the original outcome.⁴⁷

The extent to which the state can increase the effectiveness of its audit requirements and procedures relies largely on having a paper trail on each system to ensure that audits can be randomized and made as statistically reliable as possible. The legislature should look at all audit procedures now in place in Texas, as well as those in other states, to evaluate how the state can use this valuable tool to build voter confidence.

INTERSTATE CROSSCHECK PARTICIPATION

As discussed above, the legislature has instructed the Secretary of State to cooperate with an interstate crosscheck program.⁴⁸ However, the committee heard testimony that this general instruction might have been insufficient to authorize and fund participation.⁴⁹ The legislature should decide whether the state should participate in the Kansas crosscheck program, which is free but more limited than the alternative, or in ERIC, which has some cost but is more secure and robust. Whichever option the legislature chooses, it should then provide any further authorization needed to share information as well as funding to allow participation.

ELECTORAL COLLEGE

On December 19, 2016, 38 Texans gathered at the capitol to cast their votes as members of the electoral college. Two of them rejected the will of the voters and cast votes for someone other than Donald Trump, who won the popular vote in Texas. While each of Texas's two major political parties require their electoral college candidates to sign a party pledge agreeing to vote for the candidate who wins the most votes in the general election, no Texas law requires such a vote or provides a penalty in the event the elector reneges on this pledge.

Fundamentally designed to protect the influence and sovereignty of states in a republic and to address practical concerns of a pre-industrial, geographically expansive country, the electoral college has persisted into a much different political and technological era. The desire for a national popular vote for president is part of a steady march to undermine the federalist system upon which the US was founded. The electoral college is a pillar of that system, and for it to function properly, the electors must represent the will of the voters of their state.

The electoral college has long been a source of electoral controversy. Three of the last four presidents did not receive a majority of the nationwide popular vote when first elected to the presidency but secured a majority of members of the college. There are currently lawsuits pending in at least four states, including Texas, alleging that the "winner-take-all" system used in

⁴⁷ Mark Lindeman and Philip B. Stark, A Gentle Introduction to Risk-limiting Audits, IEEE SECURITY AND PRIVACY, SPECIAL ISSUE ON ELECTRONIC VOTING, 2012 (<https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf>).

⁴⁸ See *supra* note 24.

⁴⁹ *Supra* note 12.

48 states and the District of Columbia, which allocates all of a state's electoral votes to the winner of the popular vote in that state, unconstitutionally dilutes each individual's vote.⁵⁰ There is also a movement to circumvent the institution through the states, in which state legislatures provide that all of a state's electoral votes will be cast for the candidate who receives the most votes in the national popular vote, irrespective of the votes of that state.⁵¹ Even this workaround tacitly agrees that the electors can, even must, be bound to cast their votes as instructed by the state.

The question with which this committee has been tasked, however, is not one concerning the virtue of the electoral college system, but on the responsibilities and duties of an elector within the existing constitutional framework. The committee heard testimony from multiple witnesses on the strategies states employ to bind electors and on the benefits and detriments of Texas doing the same.

The Constitution sets out the role of electors and the process by which they choose the president:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.⁵²

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.⁵³

⁵⁰ Nate Raymond, Lawsuits challenge Electoral College system in four U.S. states, Reuters (2018), <https://www.reuters.com/article/us-usa-vote-lawsuit/lawsuits-challenge-electoral-college-system-in-four-u-s-states-idUSKCN1G52HY>.

⁵¹ National Popular Vote, NCSL, <http://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx> (last accessed 11/20/2018).

⁵² U.S. CONST. Art. II, Sec. 1.

⁵³ U.S. CONST. amend 12.

This text, obviously, does not on its face require a specific vote from the electors. There is no constitutional instruction on how an elector ought to act in that capacity. That is left up to the states.

Most states use this discretion to require an elector to vote according to the will of the state's voters. At least 30 states and the District of Columbia require an elector to take an oath or pledge to vote for the candidate receiving the majority of the popular vote in that state.⁵⁴ Most of those states (21 plus DC) nonetheless do not provide for any penalty or any mechanism to prevent the deviant vote from counting as cast. Five states provide a penalty of some sort for a deviant vote, and six states provide for the vote to be canceled and the elector replaced (two states do both).

In order to encourage consistency and provide a starting place for other states who wish to provide similar protections to their electorate, the Uniform Law Commission has provided a draft called the Uniform Faithful Presidential Electors Act that provides for electors to pledge to vote for a candidate, and for them to be replaced with an alternate in the event that they do not vote as pledged.⁵⁵ A version of that Act has been adopted by Indiana, Minnesota, Montana, Nebraska, and Nevada.⁵⁶ Under this Act, when an elector attempts to cast a vote for a candidate other than the required candidate, that attempt is treated as the elector's resignation, and he or she is then replaced by an alternate elector. The would-be faithless elector's vote is never cast.

Several states, including Colorado and Washington, have cases pending on the enforceability of penalties for electors who vote for someone other than the candidate they have pledged to vote for or are otherwise required to vote for by law. The Supreme Court has held that the state legislature's power to select the manner for appointing electors is plenary, that they may select the electors themselves and may take back the power to appoint electors.⁵⁷ Binding electors to the outcome of the state's popular vote is a natural outcome of this power. As noted in a recent case still pending in the 10th circuit, the Constitution is silent as to whether there is a distinction between the power to appoint presidential electors and the power to control them, and when the Constitution is silent, "the power to bind or remove electors is properly reserved to the states."⁵⁸ The seminal Supreme Court case on the issue is *Ray v Blair*.⁵⁹ In it, the court refused to recognize a constitutional right for presidential electors to vote their individual preferences. The court went on to say that the electors were chosen "simply to register the appointing power in respect of a particular candidate." Courts in several states have reached similar conclusions, albeit on slightly different versions of state laws concerning elector restrictions.⁶⁰

⁵⁴ The Electoral College, NCSL, <http://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx> (last accessed November 18, 2018).

⁵⁵ Robert W. Bennett, The Uniform Faithful Presidential Electors Act, III Northwestern Law Reporter, 34 (Fall 2014).

⁵⁶ Faithful Presidential Electors Act, Uniform Law Commission, <http://www.uniformlaws.org/Act.aspx?title=Faithful%20Presidential%20Electors%20Act> .

⁵⁷ *Bush v Gore* 531 US 98 (2000).

⁵⁸ Order on Motion to Dismiss, *Baca v. Colo. Dept. of State*, No. 1:16-cv-2986 (D. Colo. April 10, 18).

⁵⁹ 343 U.S. 214 (1952).

⁶⁰ See *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159 (Neb. 1912), *Gelineau v. Johnson*, 904 F. Supp. 2d 742 (W.D. Mich 2012), *Thomas v. Cohen*, 262 N.Y.S. 320 (Sup. Ct. 1933), *Spreckels v. Graham*, 228 P. 1040 (Cal. 1924),

Texas has no such law to bind electors. Texas electors are free to vote however they wish, even if that votes thwarts the will of the majority and disenfranchises millions of voters who have entrusted their vote to that elector. Last session, multiple bills were filed to provide varying degrees of control over electors and punishment for electors who fail to cast their vote as instructed by the people.⁶¹ None of these bills reached the governor's desk.

NURSING HOMES

Last session, the legislature passed a bill with bipartisan support designed to facilitate in-person voting at nursing homes and assisted living facilities and to reduce the risk of fraud associated with voters in those facilities who need assistance in casting their ballots.⁶² The bill required that in a facility where more than five residents requested a ballot by mail, the elections administrator would take a mobile polling location to the facility for residents to vote in person.⁶³ The bill was signed into law but repealed in the special session due to cost concerns and the practicability of widespread implementation in a large election.

However, the law was in place for a pilot run in November 2017 for a constitutional amendment election. Because it was such a limited election, few counties actually executed the mobile polling place plan contemplated in the bill. This experience was fruitful for the experience of those who did establish a polling place in the facility though. The requirement that voters vote while the machines were available at the polling place caused some frustration among voters.⁶⁴ The experience of the counties that participated raised some unforeseen considerations that the legislature should evaluate in crafting new policy options.

While some implementation concerns were evident, the bill also uncovered anecdotes that made the need for a solution even more apparent. At one facility exclusively treating advanced Alzheimer's patients, 100% of residents requested a ballot, but when the clerk attempted to move forward under the bill the facility refused to let them come onsite.⁶⁵ Situations like this illustrate the critical need for a solution to this vexing issue to ensure that seniors' votes count as accurately and securely as voters who can make it to the polling place.

CONCLUSION

The importance of election security can hardly be overstated, and the protection of the ballot box has generally been entrusted to the states and, in Texas, the counties. Texas has advanced well into a new era of electoral technologies, and though the state has done a good job of fending off those who would undermine public confidence in the system, there is always room for improvement.

⁶¹ See Tex. S.B. 394, 85th Leg., R.S. (2017), Tex H.B. 543, 85th Leg., R.S. (2017).

⁶² Tex. H.B. 658, 85th Leg., R.S. (2017).

⁶³ *Id.*

⁶⁴ *Supra* note 12.

⁶⁵ *Id.*