



HOUSE OF DELEGATES WEST VIRGINIA LEGISLATURE

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March 22, 2020

via email

The Honorable James C. Justice
Governor
State of West Virginia
1900 Kanawha Boulevard, East
Charleston, WV 25301

Dear Governor Justice:

Thank you for your strong leadership during these difficult times. We know that you and your staff are juggling dozens, maybe hundreds, of issues at once. In this letter, we are asking for your assistance in devising better ways to balance health and safety concerns with constitutional, statutory and practical issues in connection with the upcoming primary election, the general election, and any future call of the Legislature back into session. That last prospect seems likely, because the Legislature normally must appropriate any federal funds that Congress provides to states.

Your office, as well as the offices of the Attorney General and Secretary of State, have clearly given a great deal of thought as to how to safely and legally hold the May 12th primary. Nevertheless, we are alarmed by the prospect of so many people voting in person on Election Day. Our foremost concern is for the thousands of poll workers, the large majority of whom are elderly and therefore in the most at-risk group. We fear holding early voting and the primary election at polling places could dramatically increase the risk of additional infections and possibly deaths.

The plan announced by the Secretary of State to encourage as many voters as possible to request absentee ballots for the primary is positive and should increase protection for voters who choose to request an absentee ballot. However, because absentee ballots are only being sent to those who request them, early voting locations and election day polling sites will still need to be staffed with poll workers.

We spoke with Dr. Clay Marsh, who agrees that from a health standpoint, any solution that allows many people (in this case, hundreds or thousands, albeit in many different locations) to congregate in close quarters and touch machines, pencils, paper, etc. is not an optimal solution. No matter how much training is provided and how many precautions are taken, voters and poll workers risk coming into close contact with others, putting the health of everyone who participates at risk. Poll workers and voters are also likely to spread the virus to many others. It is the opposite of social distancing and sheltering in place.

We also worry that the proposed procedures could deprive many voters of their right to vote, either because they will not have enough information about the new absentee ballot procedure, they will not discover how to do this until after the deadline for requesting absentee ballots, or they will be afraid to go to the polls.

We cannot forget that hundreds of people are dying every day in other countries, especially Italy, where the toll is approaching 1,000 per day. None of us want to be in the position of explaining in late May or June how unfortunate it was that poll workers and voters were put at risk or died because of our decisions.

Not repeating lessons of history is also top of mind. In 1918, the so-called Spanish flu epidemic killed at least 50 million people worldwide. <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/three-waves.htm>. More died from that flu than all of the military and civilian deaths during World War I. There were three different waves of illness during that pandemic, starting in March 1918 and subsiding by summer of 1919. Significantly, that pandemic peaked in the U.S. during the second wave, in the fall of 1918, when most of the U.S. deaths occurred.

Any solutions involving unilateral executive action also present a likely conflict with the constitutional requirement of separation of powers. Changing election or other laws without involvement of the Legislature implicates one of the most crucial checks and balances in our democratic system of government. As the U.S. Supreme Court said in the famous case involving President Truman and his proposed seizure of steel mills, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the constitution vests lawmaking power, in good times and bad, in Congress alone. Similarly, Article V and Article VI of our state constitution vest lawmaking power only in the state Legislature.

Determining the best ways to balance these grave health, safety and constitutional issues is incredibly hard. However, we respectfully request that your office consider taking action to address issues relating to the May 12th primary election, the November general election, and the need for legislative involvement in future decision making. We do not know a perfect solution, but here are some of our thoughts.

1. **Primary election.** We think the best solution to safeguard the health of our citizens for the upcoming primary would be to mail ballots to all eligible voters with clear explanations of new procedures for their return to county clerks. We know there are numerous legal, practical and financial obstacles, as well as timing issues, to overcome with this proposed solution. This solution would necessarily place a very large burden on our county clerks, both in terms of staffing, funding, and protection of staff. These issues would need to be resolved in advance. The Vote at Home Institute provides several specific suggestions for states to quickly ramp up their ability to send and receive ballots by mail, including, for example, centralized statewide operations. https://www.voteathome.org/wp-content/uploads/2020/03/VAHScale_StrategyPlan.pdf. If all of the issues cannot be resolved in the limited time that remains before May 12th, consideration should be given to delaying the primary, which would open up a myriad of additional legal, financial and practical issues. In our opinion, given the enormous risks, the balance should tip in favor of protecting public health in this time of crisis.

If these options are rejected, we think it is critical that there be further safeguards for those at the polls, especially poll workers. We understand the Secretary of State's office is consulting with the CDC, and that is positive. Consulting with our medical infectious disease specialists around the state would also be wise.

2. **Protecting legislators during a special session.** Now is the time to consider how to protect legislators who are called into special session to appropriate funds or pass legislation needed, including changes in election laws, because of the pandemic. Article VI, Section 20 of the West Virginia constitution makes provision for assembling the Legislature at locations other than the seat of government, if public safety or the health of the members requires it. That likely gives sufficient authority for virtual decision making through use of electronic, telephonic, or other methods. There may also be ways to provide social distancing at the State Capitol, for example, by allowing voting machines to be open for a longer period of time and having members come in singly to vote, and/or making provisions to allow members to discuss matters from their offices by phone or electronically. Any alternative solutions would have to allow for discussion, debate, secure voting and scrutiny by the media and the public.
3. **General election.** Because we do not know when the pandemic will be over, now is also the appropriate time to take steps to safeguard the November general election. House Bill 4742, introduced during the 2020 legislative session, is modeled on successful Vote by Mail programs in Oregon, Washington, Colorado and other states, with Delegate Hansen as the lead sponsor. Vote by Mail increases voter participation and reduces the cost per vote. In any future call of the Legislature, we urge you to include legislation that would allow for a true Vote by Mail Program for the general election, using HB 4742 as a starting point. Before the Legislature is called into special session, we recommend that you bring together a Task Force, perhaps with subcommittees, that includes your office, the Secretary of State, the Attorney General, legislators from both houses and both parties, county clerks, and public health officials to prepare a bill that would implement Vote by Mail in West Virginia in time for the November election. Obviously, to protect the members of this Task Force, protective measures such as virtual communications and social distancing should be addressed.

Again, we are extremely grateful for your hard work and commitment, as well as the hard work of your staff, in guiding our state during this time of crisis. Please let us know if there are any additional ways we can contribute towards reaching solutions on these difficult issues.

Respectfully submitted:


Delegate Barbara Evans Fleischauer


Delegate Evan Hansen

Cc: Roger Hanshaw, House Speaker
Tim Miley, House Minority Leader
Mitch Carmichael, Senate President
Roman Prezioso, Senate Minority Leader
Mac Warner, Secretary of State
Patrick Morrissey, Attorney General
Bill Crouch, Secretary, West Virginia Department of Health and Human Resources
Dr. Cathy Slemple, Commissioner, Bureau for Public Health and State Health Officer
Dr. Clay Marsh, WVU Vice President and Executive Dean for Health Sciences