



INSTITUTING NO-EXCUSE ABSENTEE VOTING IN NEW YORK

Committee on Election Law

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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Higher voter turnout in New York in the 2008 Presidential Election has renewed the debate regarding how to improve New York's electoral process. Many other states nationwide have instituted election reforms such as no-excuse absentee voting, Election Day registration, and early voting as a means to ease voters' access to the polls, and hopefully increase voter participation. This report addresses no-excuse absentee voting, the reform that has already been enacted by nearly thirty states, which simply removes from the Election Law any requirement that a voter provide an excuse before being issued an absentee ballot. Enactment of no-excuse absentee voting in New York would allow New York registered voters who find themselves unable to appear at their local poll site on Election Day, regardless of the reason for their absence, to vote in advance of the election using an absentee ballot.¹

After reviewing this issue, the Election Law Committee recommends that the legislature pass an amendment to the New York State Constitution to allow for no-excuse absentee voting and, upon successful constitutional amendment, enact legislation implementing no-excuse absentee voting in New York.

1. Current New York Law on Absentee Voting

New York law currently requires voters requesting an absentee ballot to provide an excuse for their inability to vote at their designated polling place. The only acceptable excuses are: unavoidable absence from the county of residence (or from all of New York City for City voters) due to duties, occupation, business, or studies, or accompanying a

¹ No-excuse absentee voting is distinguishable from early voting in that registered voters who have been issued absentee ballots (after completing an absentee ballot application, reviewed by the Board of Elections) may cast such absentee ballots by mail. Early voting, by contrast, involves casting a vote in person prior to Election Day, typically on a voting machine at a centralized polling location. This report addresses no-excuse absentee voting only.

spouse, parent, or child for that person's unavoidable absence; absence due to vacation; inability to vote due to illness or physical disability; status as an inmate or patient at a veteran's administration hospital; and status as an inmate prior to conviction or post-conviction for a crime other than a felony. Election Law § 8-400. Voters must state their excuse on their absentee ballot application, and swear to the truthfulness of the stated excuse. *Id.* Any voter with an excuse to vote absentee other than one of the enumerated excuses, such as child care, unavoidable duties within the county or New York City, or extreme inconvenience, is not entitled to an absentee ballot under current New York law.

2. New York Constitutional Provision on Absentee Voting

A threshold question in the analysis of whether the state legislature should adopt no-excuse absentee voting is whether it may do so consistent with the New York State Constitution. If the legislature does have the power to provide for no-excuse absentee voting, it may do so by ordinary legislative enactment—passage by the Assembly and Senate, followed by approval by the Governor. But if a constitutional amendment is necessary, then the road to such a reform is much longer. A constitutional amendment must be passed by both the Assembly and Senate in two consecutive legislative sessions, followed by approval by the voters via a referendum. Then, depending on whether the amendment itself provides for no-excuse absentee voting or merely empowers the legislature to provide for it, the legislature may still need to enact legislation providing for no-excuse absentee and secure the Governor's signature.

Article II, Section 2 of the New York Constitution provides:

The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the

occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.

In lay terms, this provision empowers the state legislature, at its option, to provide for absentee voting to those who are either (1) absent from their home county (or from New York City for city residents) on Election Day, or (2) physically unable to vote in person. This provision neither expressly allows nor expressly prohibits any form of absentee voting other than these two enumerated reasons.

Thus the Constitution is silent on whether the legislature may provide for absentee voting by voters that are neither absent nor physically unable to vote in person, *i.e.* voters that do not have an “excuse” for voting absentee.² In addition, it appears that this is a case of first impression in that no court has specifically considered whether the legislature may provide for absentee voting in a manner other than these two enumerated reasons. In order to predict whether a court would strike down a no-excuse absentee statute as contrary to Article II, Section 2 of the Constitution, it is necessary to interpret that provision as a court might do.

When interpreting the specific meaning of a specific provision of the State’s Constitution, New York courts apply the same general principles that govern the construction and interpretation of statutes. *Wendell v. Lavin*, 158 N.E. 42, 44 (N.Y. 1927). These principles of statutory construction adopt the maxim *expressio unius est exclusio alterius*, which means that “where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.” *See McKinney’s*

² As discussed later in this report, many voters believe they do have an excuse for absentee voting, even if it is not a constitutionally or statutorily contemplated excuse, such as working long hours or multiple jobs, child care, etc.

Statutes (1971) § 240. In the specific context of legislative silence, New York’s statutory construction rules provide that “when from the language of an act . . . it appears that the Legislature has specified the cases to which it shall apply, the failure to specify a particular case indicates that the Legislature did not intend the act to cover such case.”

Id. § 74.

Applying these rules, it appears that the New York State legislature may not, consistent with Article II, Section 2 of the New York Constitution, provide for no-excuse absentee voting. The language of this constitutional provision indicates that its framers specified the two categories of qualified absentee voters: those absent from their county on Election Day, and those physically unable to appear at the polls. Having provided those two specific cases to which absentee voting shall apply, the failure to provide for absentee voting for other voters indicates that the framers did not intend the provision to cover such voters.

As a result, the Committee finds that a legislature inclined to enact no-excuse absentee voting would be required to amend the Constitution in order to do so. Accordingly, appended to this report is a simple proposed amendment, which removes restrictions on non-Election Day voting to provide to the legislature the flexibility to craft legislation to make voting more convenient. Such an amendment would permit the legislature to provide for no-excuse absentee voting, early voting, or any other measure involving voting on a day other than Election Day.

3. No-Excuse Absentee Voting Laws in Other States

As of October 2008, twenty-eight states had no-excuse absentee voting, allowing citizens to vote by absentee ballot without providing a reason for not voting at the

precinct on Election Day.³ Of these states, Oregon and parts of Washington conduct elections solely by mail-in ballot, and five states – California, Colorado, Hawaii, Montana, and Washington – allow permanent no-excuse absentee voting, which enables voters to sign up once to receive an absentee ballot automatically for all future elections.⁴

According to the Election Assistance Commission, states that have no-excuse absentee voting have more absentee voters than states that require an excuse.⁵ The states with the highest percentages of votes cast or counted absentee (excluding Oregon and Washington) are: Arizona (47%), Colorado (39.6%), and California (35.3%). None of these states requires an excuse to vote absentee.⁶ States that do require an excuse have much lower absentee voting percentages, including Delaware (3.1%), Kentucky (4.6%), and New York (4.6%).⁷

4. Policy Considerations Attendant to Implementing No-Excuse Absentee Voting

As a matter of policy, the Committee believes that voting should be easy and common. As a result, any reform to expand the franchise and make voting more convenient for those who otherwise have difficulty doing so is worthy of serious consideration.

³National Conference of State Legislatures, Report on Absentee and Early Voting, updated Oct. 30, 2008, available at: <http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/AbsenteeandEarlyVoting/tabid/16604/Default.aspx#absent>

⁴ *Id.* It should be noted that New Jersey, which is currently a no-excuse absentee voting state, has passed legislation, which when signed by the governor will institute a mail-in voting system for voters that complete the requisite application requirements. See, Cynthia Henry, *The Philadelphia Inquirer*, June 1, 2009, available at: http://www.philly.com/inquirer/local/nj/20090601_Bill_passed_to_make_voting_by_mail_easier_in_N_J.html

⁵ U.S. Election Assistance Commission, *The 2006 Election Administration and Voting Survey: A Summary of Key Findings* (published December 2007) at 15.

⁶ *Id.*

⁷ *Id.*

With this principle in mind, evaluating whether New York's electoral process would benefit from implementing no-excuse absentee voting requires consideration of the following policy factors: (a) necessity to modernize and ease New Yorkers' voting experience and increase voter participation; (b) impact on poll lines and administrative burden; (c) propensity for fraud; (d) effect of late-breaking news or differential information on voters' choice; (e) effect of no-excuse absentee voting on traditional concepts of campaigning and voting; and (f) effect of no-excuse absentee voting on election litigation.

a. *Necessity to Modernize and Ease New Yorkers' Voting Experience and Increase Voter Participation*

New York's voter turnout has historically ranked among the lowest in the nation – in the 2004 elections it was ranked 46th.⁸ While New York's voter turnout improved in 2008 to fifty-eight percent, New York still lags behind other states with much higher voter turnout.⁹ Instituting no-excuse absentee voting presents an opportunity for New York to address this problem and ease the voting experience. Removing barriers to voting absentee would allow many more New Yorkers to vote in the manner most convenient for the voter, either in advance of the election via an absentee ballot or on Election Day on a voting machine. It would also bring New York in line with the majority of states – twenty-nine to be exact – that do not require voters to provide an excuse in order to vote absentee.¹⁰

An unintended consequence of New York's current absentee voting laws is that they have the potential to disproportionately benefit those with higher socioeconomic

⁸ FairVote, Voter Turnout rankings – available at: <http://www.fairvote.org/?page=2122>

⁹ U.S. Elections Project - http://elections.gmu.edu/Turnout_2008G.html

¹⁰ U.S. Election Assistance Commission, The 2006 Election Administration and Voting Survey: A Summary of Key Findings (published December 2007) at 15.

status, who are more likely to have the means to vote at the polls because, for example, they are better able to afford child care, can afford to take time off from work, or less likely to work two jobs.¹¹ Opening up the electoral process to remove the absentee ballot excuse requirements would help to equalize the playing field for all voters who want the convenience of not having to show up on Election Day to vote, rather than just a subset of the population.

Conceptually, New York law requiring employers to allow their employees time off to vote is a useful tool that allows otherwise busy voters to vote. In practice, however, this law creates pressure on both employers and employees. Employers complying with the law may find themselves understaffed and still required to pay their employees for up to two hours of missed time. Employees may not know about their right to leave work to vote, or they may feel pressure from their employers not to take advantage of that right. Hourly employees who require more than two hours away from work to vote lose their wages for time spent away from work in excess of those two hours. No-excuse absentee voting would provide employees with another voting option and eliminate the stress and confusion surrounding how to deal with work commitments and voting.

Opponents of no-excuse absentee voting argue that the practice would actually negatively impact turnout since it is targeted at already registered voters who may procrastinate and fail to timely return their ballots.¹² This problem, however, can be avoided by proper education by local boards of election regarding no-excuse absentee

¹¹ Hansen, John Mark, Task Force on the Federal Election System (Task Force Report), *Early Voting, Unrestricted Absentee Voting, and Voting by Mail* (published July 2001), at pg. 4.

¹² Committee for the Study of the American Electorate (CSAE), *Making it Easier Doesn't Work: No Excuse Absentee and Early Voting Hurt Voter Turnout; Create Other Problems*, press release September 13, 2004, at pg. 4.

deadlines. At worst, a voter who does not return his or her ballot on time has the option to show up at the precinct on Election Day and cast a ballot on the machine. Moreover, this deadline problem is no different than the current problem for Election Day voters who fail to show up on Election Day prior to the closing of the polls. Instituting no-excuse absentee voting would merely provide voters with another option in advance of Election Day.

b. *Impact on Poll Site Lines and Administrative Burden*

Implementation of no-excuse absentee voting in New York would result in shorter poll lines on Election Day as more voters could cast their votes in a manner other than at the precinct. Fewer voters on Election Day would ease the burden on elections officials because there are likely to be fewer machine breakdowns, fewer misdirected voters in need of attention, etc. Instead, the work of election officials before and after Election Day would increase somewhat, but such increase would be spread over a longer period of time where there is not as much stress on one day. The net impact on election officials under a no-excuse absentee voting system is likely to be a reduction in the administrative burden, with the potential for a decrease in the total cost of administering elections.

c. *Propensity for Fraud*

A significant argument in opposition to no-excuse absentee voting is that it will allow for increased voting fraud and intimidation. Opponents argue that no-excuse absentee voting would eliminate the voter's secret ballot option and allow them to be manipulated by someone who "delivers" them a ballot.¹³ They assert that this pressure is even greater under a no-excuse absentee system than it is under the current system.¹⁴

¹³ *Id.* at. pg. 6

¹⁴ *Id.*

The Committee takes seriously issues of voter fraud and intimidation. To the extent instances of such fraud or intimidation exist under the current system, they should be investigated and prosecuted. It is unclear, however, that no-excuse absentee voting increases opportunities for such wrongdoing. New York law currently allows individuals other than the voter to submit absentee voting applications and to pick up and submit an absentee ballot.¹⁵ Absentee ballot applications are also available online.¹⁶ As a result, there already exists ample opportunity for “special interests” to affect an individual’s vote. Voters susceptible to pressure to apply for an absentee ballot and vote in a certain manner may be just as likely to provide a false excuse on an absentee ballot application under the current system as they are to obtain a ballot when no such excuse is required.

Due to the potential for fraud under both the current system and a no-excuse absentee voting system, the Committee supports incorporating language into no-excuse absentee implementing legislation to limit the number of applications that an individual can pick up at a local board of election office.

d. *Effect of Late-Breaking News or Differential Information on Voters’ Choice*

Critics of no-excuse absentee voting argue that the potential for differential information or late-breaking news negates any benefit of convenience voting options like no-excuse absentee voting because those who vote before Election Day would not be voting based on the most current election information.¹⁷ Research and polling show, however, that many voters, especially those who are strongly partisan, are not influenced

¹⁵ N.Y.S. Election Law Section 8-400(2) (2008).

¹⁶ See, Board of Elections in the City of New York’s website at: <http://www.vote.nyc.ny.us/publications.html>.

¹⁷ See, CSAE at pg. 6.

by late-breaking information.¹⁸ In addition, given the nature of campaigns in the current twenty-four hour news cycle, it is less likely than in years past that pertinent information would not already be publicly available, thereby undercutting the old media campaign problem of late breaking information.

The Committee believes that voting has to occur at some point, and the remote potential in any given race that some voters will have more information than others is a risk worth taking for the expansion of the franchise.

e. *Effects of No-Excuse Absentee Voting on Traditional Concepts of Campaigning and Voting*

An argument related to the effect of differential information is that no-excuse absentee voting could substantially change the nature of campaigning and get out the vote efforts, making it harder for campaigns to target all voters.¹⁹ This argument is difficult to assess because get out the vote efforts are largely driven by those with partisan interests. Campaigns with sufficient monetary and volunteer resources may spread out their voter turnout efforts to ensure that they also target no-excuse absentee voters, while those campaigns without such resources may decide it is not worth the effort.²⁰ Regardless, the Committee believes that the effect of no-excuse absentee voting on campaigns should not preclude efforts to improve access to voting. Instead, campaigns will have to adjust their outreach efforts in order to remain competitive.

Similarly, the Committee does not subscribe to the argument that voting on Election Day is a communal act and that removing the absentee excuse requirement and

¹⁸ *Id.* at pg. 5; *see also*, Task Force Report at pg. 7.

¹⁹ *See* Task Force Report at pg. 7.

²⁰ *Id.*

opening up the process to more voters would harm the civic ritual of voting.²¹ While it may raise a legitimate concern, this argument is premised on antipathy toward changing cultural norms. A political decision to make voting more convenient would be a recognition of the realities of the current world, where there is less of an interest in the communal aspect of voting, and more focus on the convenience of it.

f. Effect of No-Excuse Absentee Voting on Election Litigation

A criticism of no-excuse absentee voting is that the resulting anticipated increase in absentee ballots cast will lead to an increase in post-election challenges and litigation relating to such absentee ballots. However, the opposite result is more likely: removal of the requirement that a voter provide an excuse for not voting at the polls removes the principal basis for challenging absentee ballots, and therefore the number of challenged and litigated ballots will decrease, at least as a percentage of absentee ballots cast. This issue is discussed in greater detail in the case study below.

5. A Case Study: The March 2009 Special Election in New York's 20th Congressional District

The preliminary vote tally in the March 31, 2009 special election in New York's 20th congressional district was very close going into Election Day that a recount-related lawsuit was actually filed on Election Day. On election night, the unofficial count had the two candidates separated by only 65 votes. With at least 6,000 absentee ballots to be counted, it was universally clear that these absentee ballots would decide the election, providing significant incentive for challenges during the counting of these ballots. Approximately 1,800 absentee ballots were challenged and became the subject of litigation.

²¹ See, CSAE at pg. 6.

As in all closely contested elections in New York, the ballot challenges in this election principally fell into three categories: (1) technical issues with the ballot or ballot envelope, such as stray marks on the ballot or a signature on the envelope that does not appear to match that on file with the board of elections; (2) challenges to the voter's qualification to be registered to vote, most often based upon the voter's residency; and (3) challenges based on the absentee ballot application, relating to the excuse provided by the voter.

According to sources familiar with the counting of the absentee ballots in this election, the first two of these categories combined accounted for fewer than one-third of the total challenges to the absentee ballots. The third category, challenges based on the absentee ballot application, accounted for at least two-thirds of the challenges. It is this category of challenges that would be eliminated by the enactment of no-excuse absentee voting.

Many of the challenges to these absentee ballot applications tended to be highly technical, such as failure to provide enough details about a disability, or the failure to provide a doctor's name. Indeed, some counties' absentee ballot application forms do not ask the questions necessary to elicit sufficient information to provide a recognized excuse, such as where a voter is going on vacation.

The most widely reported challenge was to the absentee ballot of Senator Kirsten Gillibrand, whose appointment to the Senate created the vacancy that this special election filled. Senator Gillibrand's absentee ballot was challenged based on the statement on her application that she expected to be out of her home county of Columbia County on Election Day, and the New York Times reported that whether Senator Gillibrand's vote

would be counted could rest on a factual inquiry into where she traveled on Election Day.²²

The Committee believes that the individualized scrutiny of absentee ballot applications that leads to such technical challenges are a significant impediment to the resolution of closely contested elections. Although it is unknown whether the total number of absentee ballot challenges in such elections would be higher or lower as a result of instituting no-excuse absentee voting (in light of the balance between more absentee ballots on the one hand and a lower percentage challenged on the other), the absence of trifling objections to absentee ballot applications would permit more efficient resolution of those remaining challenges relating to residency and to the absentee ballot itself.

6. CONCLUSION

The Election Law Committee encourages the New York State legislature to pass an amendment to the New York State Constitution to allow for no-excuse absentee voting, and to adopt the proposed amendment appended to this report. The Committee further urges the legislature, upon adoption of such an amendment, to enact legislation implementing no-excuse absentee voting in New York.

²² “Senator’s Ballot in Upstate Race Disputed,” *The New York Times*, April 14, 2009. In fact, under settled law, the only relevant question would be whether Senator Gillibrand believed in good faith, at the time that she completed the application, that she would not be in Columbia County on Election Day. *See In the Matter of Richard J. Sherwood v. Albany County Board of Elections*, 265 A.D.2d 667, 696. N.Y.S. 2d 287 (App. Div. 3d Dept. 1999). However, for purposes of considering the relative merits of no-excuse absentee voting, it is relevant that there was a challenge subject to litigation.

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

Proposing an amendment to section 2 of article 2 of the constitution, in relation to eligibility for absentee voting

Section 1. Resolved (if the Assembly concur), That section 2 of article 2 of the constitution be amended to read as follows:

§ 2. The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters [who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability,] may vote other than on the day designated for an election and other than by personal appearance at the polling place, and for the return and canvass of their votes.

Section 2. Resolved (if the Assembly concur), That the foregoing amendment be referred to the first regular legislative session convening after the next succeeding general election of members of the assembly, and, in conformity with section 1 of article 19 of the constitution, be published for three months previous to the time of such election.

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*Though agrees with the goal of "no-excuse" absentee voting, recused himself with respect to the analysis requiring a constitutional amendment.