



Protecting the Voting Rights of Americans Detained While Awaiting Trial

By Danielle Root and Lee Doyle | August 23, 2018

In November 2017, men residing in an Allen County, Indiana, jail filed a class-action lawsuit against their local sheriff. The lawsuit alleged that the sheriff had denied the men and others their fundamental right to vote during the 2016 general election while they were being held in jail awaiting trial.¹ According to court filings, jail administrators failed to provide them with information about their voting eligibility. Administrators allegedly also failed to assist them in obtaining absentee ballots and did not provide access to the voting booth on Election Day.²

Many Americans held in jail while awaiting trial are legally eligible to vote. Each election cycle, however, countless numbers of them are excluded from participating in the democratic process because of structural barriers to voter registration and voting.³ These individuals—many of whom come from low-income communities and are people of color—are systematically prevented from having their voices heard due to lack of access to voter registration forms, absentee ballots or voting booths, or critical information on voting eligibility.⁴ In other words, voting-eligible Americans are routinely being excluded from participating in U.S. democracy due to avoidable obstacles in the voting process.⁵

Voting rights of people detained in jail while awaiting trial

Americans housed in jail while awaiting trial are legally permitted to vote unless they are ineligible for reasons unrelated to their current detention—such as age, citizenship status, or, in some jurisdictions, a prior felony conviction.⁶ In short, because they have not been convicted of the crime for which they are being detained, people awaiting trial retain the right to participate in elections under the U.S. Constitution.⁷

Taking away the voting rights of an eligible person awaiting trial is not only illegal, but it also violates the foundational norms of the U.S. criminal justice system, particularly the presumption that criminal defendants are innocent until proven guilty. Protecting the right to vote for people detained in jail while awaiting trial is particularly important considering that felony charges can be dismissed or reduced to lesser charges that do not trigger disenfranchisement.⁸

The right to vote is the central pillar of U.S. democracy and embodies the foundational principle of governing by “consent of the governed.”⁹ It is the very basis of representative government. And democracy works best when every eligible American is able to make their voice heard in elections. Yet some Americans held in jail while awaiting trial are being prevented from exercising this fundamental right.¹⁰ This issue brief examines the disenfranchisement of voting-eligible people in pretrial detention and provides policy recommendations to ensure that the voting rights of those awaiting trial—and other eligible but incarcerated people—are fully realized. The brief highlights jurisdictions that are already taking steps to improve voter access.

The de facto disenfranchisement of detained people awaiting trial

In recent years, laws known as felon disenfranchisement laws—which bar people convicted of felonies from voting while incarcerated and in some cases even after they have completed their sentences—have been rightly challenged.¹¹ In 2016, after the Virginia Supreme Court struck down former Gov. Terry McAuliffe’s (D) order to restore voting rights to more than 200,000 formerly incarcerated Virginians, he restored through pardons the rights of 173,000 formerly incarcerated people who completed their sentences.¹² More than 25,000 of those people participated in Virginia’s 2016 elections.¹³ In April 2018, New York Gov. Andrew Cuomo (D) issued an executive order restoring voting rights for an estimated 36,000 formerly incarcerated people on parole.¹⁴

However, the elimination of felon disenfranchisement laws does not help those who are disenfranchised while in jail awaiting trial. An estimated 536,000 individuals are held in local jails awaiting trial; this is more than 20 percent of the United States’ total incarcerated population.¹⁵ Jails make it so that detained people often lack two critical elements necessary for voting: information and access. To be able to participate in elections, one must know when an election is happening; deadlines for voter registration and submitting absentee ballots; and information about voter eligibility. In addition, eligible voters must have access to voter registration forms, applications for mail-in ballots, and/or access to polling places.

With only limited contact with the outside world, detained people must rely on jail administrators to provide them with the information and resources they need.¹⁶ Unfortunately, administrators do not always prioritize election information and accessibility, which vary across jurisdictions.¹⁷ Furthermore, given the complexity of state disenfranchisement laws, administrators may not know about detained people’s eligibility and thus may not seek out relevant materials or provide them upon request.¹⁸

Problems with voting accessibility are even greater for detained people with disabilities, who may need additional assistance completing voting forms and who account for approximately 40 percent of the nationwide jail population.¹⁹ Therefore, it is unsurpris-

ing that voting-eligible Americans detained in jails participate in elections at very low rates. An examination of one Ohio county jail, for example, estimated that only 8 out of 1,600 detained people would vote in the 2016 election.²⁰

The number of people awaiting trial who are disenfranchised during elections has not been widely studied—but disenfranchisement does have the potential to occur. The following are just some of several decades’ worth of court cases brought by detained people alleging violations of their right to vote:

- In 1969, voting-eligible people in pretrial detention in Illinois filed a lawsuit against the Chicago Board of Elections, alleging they had been denied access to absentee ballots. They challenged a state law prohibiting eligible people detained in their county of residence from voting absentee. The U.S. Supreme Court ultimately sided with the state in *McDonald v. Board of Election Comm’rs*, finding there was no evidence the individuals had been absolutely prohibited from voting.²¹
- In the 1973 case *Goosby v. Osser*, the Supreme Court found that people awaiting trial in Pennsylvania were prevented from partaking in the electoral process by a state law barring individuals “confined in penal institutions” from voting by mail. Unlike the law considered in *McDonald*, the Pennsylvania law had explicitly prohibited those detained while awaiting trial from participating in elections.²²
- In 1974, people awaiting trial in a Monroe County, New York, jail, along with others convicted of misdemeanors, sued the county sheriff, alleging that they had been denied the opportunity to register to vote as well as denied access to voting by mail or other means. Under a state law, people detained in their county of residence were not eligible to receive absentee ballots unless they qualified for one of the limited exemptions, such as having an illness or a disability. In *O’Brien v. Skinner*, the Supreme Court found that the individuals’ voting rights had been violated and recognized the right of eligible detained people to vote absentee.²³
- Also in 1974, eligible people detained in Wayne County, Michigan, filed a lawsuit claiming they were prevented from receiving absentee ballots during the 1972 elections. The Michigan court overseeing the case held that voting-eligible people held in pretrial detention must be allowed to vote by mail. In his opinion, Judge Wade Van Valkenburg wrote, “Since these pre-trial detainees are presumed in the eyes of the law to be innocent of the crimes of which they are charged until convicted, due process would seem to demand an adjudication of guilt of those charged with crimes before a prohibition as grave as disenfranchisement may be imposed.”²⁴
- In 1984, a federal court in Mississippi found that in the statewide primary election, correctional officials impeded the voting rights of a person awaiting trial. The detained person had asked a jail official if he was permitted to vote; the official responded that “there was no way an inmate could vote. There were no provisions made for any prisoner of any status to obtain access to a ballot.”²⁵

- A complaint filed in a 2018 case brought by eligible but unregistered voters detained in a jail in Prince George’s County, Maryland, stated that there was no “official local or statewide policy, procedure, or plan to register eligible voters desiring to do so by the October 18, 2016 deadline, or distribute ballots, absentee or otherwise, to pre-trial detainees or convicted misdemeanants who are registered voters wanting to exercise their right to vote.” It also stated that there was no information on “voting, voter eligibility, or voter registration” or “access to the ballot for persons eligible to register and/or vote.” Unfortunately, a district court dismissed the case because the detained people could not identify any specific provisions of Maryland election law that burdened or outright prohibited them from voting under the U.S. Constitution.²⁶

The 2017 Allen County case mentioned above is believed to be the first class-action lawsuit requesting monetary damages, as opposed to injunctions, for systematic disenfranchisement for detained people awaiting trial.²⁷ Once decided, the case will potentially have implications for hundreds of voting-eligible people held in the Allen County Jail during the 2016 election who were allegedly denied absentee ballots or alternative access to the polls.²⁸ Although Indiana regulations require that sheriffs “shall make arrangements with elections officials to facilitate an inmate’s right to vote by absentee ballot,” no ballots were given out, according to the detained people bringing the case.²⁹ The Allen County Election Board confirmed that it had not had any communications with the sheriff’s office since 2012, meaning that eligible voters could have been disenfranchised in other elections as well.³⁰

De facto disenfranchisement’s disproportionate impact on historically marginalized communities

Jail populations are disproportionately comprised of people of color and low-income Americans. According to the U.S. Bureau of Justice Statistics, in 2016, black Americans were incarcerated at a rate 3.5 times higher than that of white Americans.³¹ Nationwide, the rate at which people of color are incarcerated in jails is at least 7 times the rate of white people.³² Moreover, the average income of all males in pretrial detention is approximately \$15,600 per year prior to detainment. This means that low-income people and people of color are at a disproportionately high risk for disenfranchisement while detained. Indeed, detained black Americans earn roughly \$11,000 per year prior to detention, a sum that falls below the federal poverty line.³³

Racial and ethnic disparities in jail populations can also be seen at the local level. In 2015, black or African Americans made up 39 percent of all people detained in Florida jails, despite making up only 17 percent of the state’s population.³⁴ In Cook County, Illinois, black and African Americans made up 68.4 percent of the jail population in 2015, nearly triple the proportion of black and African Americans in the county.³⁵

The overrepresentation of people of color in jails is a product of the discriminatory laws and policing practices that have plagued these communities for decades. Jailing and monetary bail requirements, for example, have historically been used as a proxy for a defendant’s perceived threat to public safety and reliability.³⁶ When combined with racial discrimination, bail practices continue to contribute to the overrepresentation of people of color in America’s jails. A 2016 study of Maryland’s monetary bail practices found that “black defendants were charged \$181 million in premiums, more than double the premiums of all other races combined.”³⁷

How to protect voting rights for eligible detained people awaiting trial

As illustrated above, actual and de facto disenfranchisement of people awaiting trial dates back at least five decades. And the criminalization and over-jailing of communities of color and low-income Americans has an even longer history.³⁸ In this light, jurisdictions can—and should—adopt the following policies to help protect the fundamental right to vote for eligible people detained while awaiting trial.

Invest in and expand election education in detention facilities

Eligible people detained in jail must have access to information about voter eligibility and voting deadlines well before Election Day. This includes information related to voter registration and return dates for absentee ballots. To promote accessibility and convenience, information should be provided verbally; in written form; and, for those with access to it, on the internet. In many places, voting advocacy groups and volunteers are leading the charge in ensuring that eligible Americans held in detention facilities are able to cast their ballots.³⁹ These education campaigns help reduce confusion among jail populations about eligibility. They also facilitate voting by connecting detained people directly to the resources and materials they need. In Los Angeles County, for example, volunteers with the American Civil Liberties Union’s Unlock the Vote campaign are visiting local jails to register voters and provide them with relevant information about voting in the 2018 midterm elections.⁴⁰ Over just one weekend, the volunteers registered more than 300 eligible voters.⁴¹ Similarly, the organization Chicago Votes has registered more than 1,800 voters through monthly voter registration drives at Cook County Jail.⁴²

This work is important and commendable. Ultimately, however, the responsibility of providing information about voting eligibility and the electoral process rests primarily with jail administrators and state and local government officials. Some jurisdictions are already taking steps to meet this responsibility. In Philadelphia, for example, representatives from the Pennsylvania Department of Corrections hold information sessions in jails, guiding detained people through the voting process.⁴³ A bill currently moving through the California State Assembly would require jail administrators to allow organizations to provide voter education for detainees in county jails. The education programs must include “providing affidavits of registration to eligible voters, assisting

eligible voters with the completion of the affidavits of registration, and assisting eligible voters in returning the completed voter registration cards to the county election official.”⁴⁴ And in Washington, D.C., with help from the D.C. Board of Elections, every inmate is given a voter registration card upon admittance to jail.⁴⁵

By simply providing information about voting eligibility and registration, jail officials can help countless voting-eligible detained people exercise their democratic rights.

Ensure access to voting materials

Even with a strong voter education program and comprehensive understanding of the voting process, voting-eligible people detained in jail need access to important materials such as voter registration forms. They also must be able to vote either by absentee ballot or in-person. The latter can be achieved through secure transportation to a local polling place or the installation of temporary polling places in detention facilities.

Some states are already making strides to improve voter access for eligible detained people. In Juneau, Alaska, the Alaska Division of Elections has partnered with volunteers from the League of Women Voters to register eligible voters at two correctional facilities and help them apply for absentee ballots for the upcoming midterm elections.⁴⁶ And in New York City, the Department of Correction, the Campaign Finance Board, and the Legal Aid Society are joining forces to pick up voter registration paperwork and absentee ballots from city jails and deliver them directly to the Boards of Elections to ensure they are received by election deadlines.⁴⁷ As Department of Correction Commissioner Cynthia Brann described, “Even though most people in our custody are here only a short time, it is our duty to help them by ensuring that they have appropriate access to the electoral process.”⁴⁸ The pro-voter initiative, headed by New York City Mayor Bill de Blasio’s (D) office, includes posting signs in jails encouraging people to vote and providing people detained in jail with information about candidates and the voting process.⁴⁹

Meanwhile, on August 17, 2018, Illinois Gov. Bruce Rauner (R) issued an amendatory veto on a bill that had the potential to transform voting for people held in jail while awaiting trial.⁵⁰ As written, the bill would have turned Cook County Jail, the biggest jail in the state, into a temporary polling place on Election Day and directed county election administrators to partner with local jails in order to facilitate voter registration and absentee voting.⁵¹ Counties with populations of or exceeding 3 million inmates would have been required to establish temporary polling places in county jails during voting periods. Moreover, under the bill, all incarcerated people would have received voter registration cards upon release so that they could update and maintain their voter registration.⁵²

Conclusion

Voting-eligible Americans detained while awaiting trial have the right under the law to participate in the electoral process—as much of a right as any other eligible citizen. Unfortunately, the criminal detention system has unnecessarily created and exacerbated barriers to voting. These barriers should not go unaddressed. State and local governments, along with correctional administrators, must work together to eliminate obstacles to representative democracy and help eligible voters detained in jail while awaiting trial access the resources they need to register, cast a ballot, and have a say in their nation’s government.

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Endnotes

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