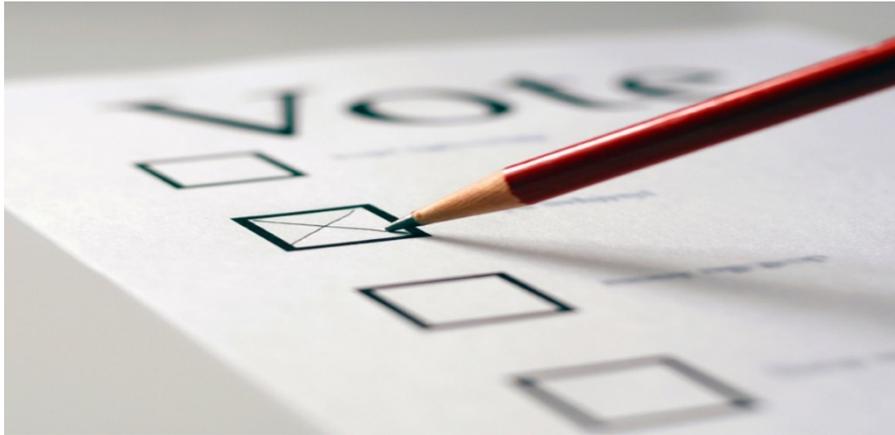


Free to Vote

Virginia Defender Resource Packet



Information About the Changing Landscape
of Voting Rights of Incarcerated Voters in Virginia

Provided by the Youth Justice Clinic
UDC David A. Clarke School of Law
and the Criminal Injustice Reform Network



IN NUMBERS
From the Prison Policy Initiative:

While most people in jail can legally vote, few do.ⁱ

- **On any given day, approximately 700,000 individuals are held in local jails, and many have the right to vote.ⁱⁱ**
- **The vast majority of those held in local jails have not been convicted of the charges on which they are being held.ⁱⁱⁱ**
- **Most people serving time in jail for a conviction have been found guilty of misdemeanor offenses, which very rarely disqualify anyone from voting.^{iv}**
- **Several systemic and structural barriers prevent eligible Americans from voting, such as registration deadlines, voter ID laws, limited access to registration forms, jail mail delays, and fear ballot secrecy will be compromised.^v**

October 26, 2021

Dear Defenders,

We are one week away from election day – a significant date in our representative form of government. Voting is one of the fundamental features of our democracy. However, people who are incarcerated – even if otherwise eligible to vote – are often prevented from exercising their voting rights. This is because barriers to voting in jail can create “*de facto* disenfranchisement.”

The U.S. Constitution permits people to vote unless they are otherwise ineligible due to age or citizenship status. Yet government actors often fail to honor the voting rights of those detained in jails. Many jail superintendents neglect to: disseminate voting rights information, invite registrars to facilitate registration of eligible voters in their facilities, help eligible individuals apply for an absentee ballot, or take other steps to protect the voting rights of all eligible voters in their jails.

This year, 2021, marks the 50th anniversary of the ratification of the 26th Amendment, which extends the right to vote to all citizens age 18 and older. The UDC Youth Justice Clinic is seeking to highlight the impact of this amendment as we engage in public education efforts and join with community partners on justice initiatives.

Problems with voting in jail also disproportionately impact communities of color. The racism inherent in mass incarceration impacts people of all ages – including those between 18 and 21 years old, who were intended to enjoy the promise of the 26th Amendment. We join with others seeking to identify and respond to laws and practices that undermine the voting rights of system-impacted individuals – including emerging adults.

Currently, efforts are underway to encourage policymakers, election officials, and sheriffs to ensure people in jail can vote. This information packet is directed towards defenders to educate them about another potential consequence of pre-trial detention – *de facto* disenfranchisement – and offers some information that might be useful to advocacy efforts at the bail hearing stage and beyond.

Solidarity,

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Virginia: Jail Voting Laws



Several recent developments have shaped the landscape of voting for those who are detained or incarcerated in Virginia. Despite recent efforts to amend the Virginia State Constitution to restore voting rights to nearly 70,000 disenfranchised citizens with felony convictions, those who are incarcerated pre-trial and otherwise eligible to vote may still face barriers to exercising their right to vote.

For instance, up until last year Virginia law provided that any person “confined while awaiting trial or for having been convicted of a misdemeanor” could seek an absentee ballot if their trial or release date was scheduled within three days of an election.^{vi} Additionally, under some circumstances, registered voters awaiting trial could request to be taken to a polling site by jail officials on Election Day.^{vii}

Following the 2020 amendments to Section 24.2-700, Virginia law no longer provides for the option of being taken to a polling place and is generally silent on the other voting rights of detained persons in the state.

Without reference to persons confined pre-trial, the law simply provides that “[a]ny registered voter may vote by absentee ballot...in any election in which he is qualified to vote.” The Virginia Department of Elections indicates that October 22, 2021, was the “[d]eadline to apply for a ballot to be mailed to you.”^{viii}

As a result of this legal landscape, people recently arrested may be denied a mechanism to vote. Anyone detained after October 22 is generally ineligible to apply for an absentee ballot. Election law provisions no longer reference transportation from jail to a local polling place to cast ballots.

While Virginia does have an emergency application provision, its failure to make any reference to pretrial detention as an “emergency” may preclude its use for those arrested and detained. Even if incarceration was considered an emergency that could support a request for a belated absentee ballot, the confusing and cumbersome provisions relating to emergency absentee ballot processing would almost certainly prevent incarcerated persons from successfully casting their votes.^{ix}

More About Incarceration in Virginia

- **Virginia’s incarceration rate is much higher than the incarceration rates of many countries - including Canada, France, Italy, and Denmark combined.^x**
- **It is likely that over 60,000 people from Virginia are currently behind bars^{xi}**
- **Over 20,000 of those people are likely held in local jails^{xii}**
- **111,000 people are booked into local Virginia jails, annually^{xiii}**
- **Black people are overrepresented in Virginia’s jails. In 2015, although they accounted for 20% of the general population, they made up 43% of the state’s jail population.^{xiv}**

Voting-Related Reasons that May Help Support Pre-Trial Release

Constitutional

- Taking away the voting rights of an otherwise eligible person awaiting trial violates the foundational norms of the U.S. criminal legal system, particularly the presumption of innocence afforded to individuals who are accused of a crime.
- Protecting the right to vote for people detained in jail while awaiting trial is particularly important because felony charges can be dismissed or reduced to lesser charges that do not trigger disenfranchisement.
- The Virginia legislature has taken steps to amend the state's constitution to restore voting rights due to felony disenfranchisement. Courts, therefore, should want to protect this right for Virginians who are not yet convicted.
- The vote of someone who is detained is as valuable as any other citizen.

Barriers to Voting in Jail

- Virginia law formerly bestowed a clear duty on sheriffs and superintendents to honor the voting rights of detained persons. While removal of the transportation provision of Section 24.2-700 signals an elimination of the affirmative obligation of Virginia sheriffs to provide poll access to voters awaiting trial and detained in local jails, the 2020 amendments to Section 24.2-700, do not seem to diminish an eligible individual's fundamental right to cast a ballot.
- The last day to seek an absentee ballot during this election cycle was October 22, 2021, absent a legally recognized emergency. Those arrested on or after this date would appear unable to avail themselves of the absentee process.

Maintaining Community Ties

- In addition to protecting personal rights and liberties, voting also allows individuals to remain connected to their communities and enables them to meaningfully engage with the election processes and systems that make decisions about their lives.
- Civic engagement has been promoted to reduce recidivism and support public safety goals.^{xv}

The Federal Model

- A March 7, 2021, executive order issued by President Joseph Biden instructs the U.S. Department of Justice to facilitate voting for eligible voters in federal custody. The order commands agencies to expand access to voting by considering ways to allow citizens to register, get information, and access voting.^{xvi}
 - This order demonstrates a commitment to voting access throughout the federal system. The state-level system in Virginia should, similarly, make efforts to expand voter access.
 - The order targets people who are in the criminal legal system and who are eligible to vote.
 - Failure of localities to follow this order can create differential treatment between those who are in custody for federal charges versus state charges.
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RESPONDING TO QUESTIONS

Many criminal justice stakeholders and others are not familiar with the ways that pretrial incarceration can result in *de facto* disenfranchisement. Here are some questions you may encounter and potential responses.

Question: *Why can't registered voters just vote absentee from jail?*

Response: A voter requesting an absentee ballot must apply within 11 days of an Election, we are within X days of Election Day. That is, the deadline this year to seek an absentee ballot was October 22, 2021.

Question: *Can't they obtain an absentee ballot under emergency excuse rules?*

Response: Virginia law does not expressly mention incarceration as an emergency supporting belated absentee ballot requests. In addition, the onerous requirements for obtaining and casting emergency ballots makes it essentially impossible to comply while in jail.

Challenge: *Why isn't loss of voting an appropriate consequence for the decision to do X?*

Response: The presumption of innocence must be afforded to any person accused of a crime. Those who have only been accused have not yet been convicted.

Question: *Voting occurs on one day. Shouldn't the accused return to custody after voting?*

Response: Election Day does not necessarily end the voting process. A voter may want to make sure their vote is counted and free access to election officials, telephones, and/or websites may help them to do so.

ENDNOTES

- ⁱ Ginger Jackson-Gleich & Rev. Dr. S. Todd, Yearly, Eligible, but Excluded: A Guide to Removing the Barriers to Jail Voting (2020), https://www.prisonpolicy.org/reports/jail_voting.html (last visited Oct. 26, 2021).
- ⁱⁱ *Id.*
- ⁱⁱⁱ *Id.*
- ^{iv} *Id.*
- ^v *Id.*; *see also* Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020 Prisonpolicy.org (2020), <https://www.prisonpolicy.org/reports/pie2020.html#slideshows/slideshow1/2> (last visited Oct. 22, 2021).
- ^{vi} Va. Code §24.2-700 (5) (repealed).
- ^{vii} *Id.*
- ^{viii} Upcoming elections, VIRGINIA DEPARTMENT OF ELECTIONS, <https://www.elections.virginia.gov/casting-a-ballot/calendars-schedules/upcoming-elections> (last visited Oct. 21, 2021).
- ^{ix} Va. Code §24.2-705.
- ^x Prison Policy Initiative, Virginia profile, <https://www.prisonpolicy.org/profiles/VA.html> (last visited Oct. 25, 2021).
- ^{xi} *Id.*
- ^{xii} *Id.*
- ^{xiii} *Id.*
- ^{xiv} Vera, Incarceration Trends in Virginia (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-virginia.pdf> (last visited Oct. 26, 2021); *see also* Jacob Kang-Brown, Chase Montagnet, and Jasmine Heiss, People in Jail and Prison in 2021 (June 2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf> (last visited Oct. 26, 2021).
- ^{xv} *See, e.g.*, Nancy Leong, Felon Reenfranchisement: Political Implications and Potential for Individual Rehabilitative Benefits, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=977280 (explaining that civic engagement through voting facilitates reintegration and may help deter recidivism) (last visited Oct. 25, 2021).
- ^{xvi} *See* Exec. Order No. 14019, 86 FR 13623 §3 (2021).