

Special Session Elections Legislation

Issue Summary
Catherine Yenne
Idaho Law Review

Idaho legislators convened in person at the Statehouse in August 2020 for an Extraordinary Legislative Session to discuss bills related to the 2020 election and COVID liability measures.¹ One such bill, HB 1, called for the requirement of a physical polling place during each election, regardless of a state of emergency²—a direct response to Governor Little’s emergency declaration and the subsequent all-mail election that occurred in May.³ The bill amended Section 34-1006 of the Idaho Code, which requires county clerks to provide “the opportunity to vote in person”⁴ notwithstanding future emergency declarations.⁵ However, the bill did not mandate that the polling place be in a convenient location for the public – just that it exists in the county.⁶ The fiscal impact of this requirement is unknown and will likely vary throughout the state.⁷ The bill did not alter the standard mail-in voting process for precincts with fewer than one hundred forty registered voters.⁸

Representative Priscilla Giddings sponsored HB 1 after hearing constituent concerns regarding troubles receiving their mail-in ballots or subsequent findings that their vote was never recorded.⁹ She also stated that her constituents asked her “to oppose universal vote by mail.”¹⁰ This was echoed in the testimony to both the House and Senate State Affairs Committees where members of the public expressed fear of voter fraud¹¹ and said “it is unsafe to do it any other way.”¹²

¹ Ruth Brown, *COVID-19 precautions scarce as lawmakers open special session for election, liability issues*, IDAHO STATESMAN (Aug. 24, 2020, 3:52 PM), <https://www.idahostatesman.com/news/politics-government/state-politics/article245194280.html>.

² H.B. 1, 65th Leg., 1st Extraordinary Sess. (Idaho 2020).

³ Betsy Z. Russell, *Governor signs HB 1 on in-person voting*, IDAHO PRESS (Sept. 1, 2020), https://www.idahopress.com/news/local/governor-signs-hb-1-on-in-person-voting/article_24ce2c61-2783-5027-a105-01e6e83d56de.html.

⁴ H.B. 1.

⁵ David Rauzi, *HB1 a ‘voter’s insurance policy’ says Rep. Giddings*, IDAHO COUNTY FREE PRESS (Sept. 16, 2020), https://www.idahocountyfreepress.com/news/hb1-a-voter-s-insurance-policy-says-rep-giddings/article_baeb6f76-f7d0-11ea-80b3-3b40c8a3e2cc.html.

⁶ *Id.*; *Idaho Legislature wraps up special session, sends 3 bills to governor’s desk*, KTVB (Aug. 26, 2020, 9:45 PM), <https://www.ktvb.com/article/news/local/capitol-watch/idaho-legislature-wraps-up-special-session-sends-three-bills-to-governors-desk/277-56793cb0-922b-4a8a-bee7-f89fd01d27d0>.

⁷ *Relating to Elections: Hearing on H.B. 1 before the S. State Affairs Comm.*, 65th Leg., 1st Extraordinary Sess. (Idaho 2020) (statement of Rep. Giddings).

⁸ IDAHO CODE § 34-308 (2019); H.B. 1.

⁹ Rauzi, *supra* note 5.

¹⁰ Rauzi, *supra* note 5.

¹¹ *Relating to Elections: Hearing on H.B. 1 before the H. State Affairs Comm.*, 65th Leg., 1st Extraordinary Sess. (Idaho 2020) (statements of Monica McKinley and Wendy Blanton); *Relating to Elections: Hearing on H.B. 1 before the S. State Affairs Comm.*, 65th Leg., 1st Extraordinary Sess. (Idaho 2020) (statement of Nikki Schumacher).

¹² *Relating to Elections: Hearing on H.B. 1 before the H. State Affairs Comm.*, *supra* note 11, (statement of Monica McKinley). It is worth noting that fears of voter fraud leading up to the November 2020 election were not realized

In her testimony to the Senate State Affairs Committee, Representative Giddings explained that Sections 46-1008 and 46-601 of the Idaho Code empower Governor Little to suspend certain statutes and regulations during states of emergency, unless otherwise provided in the statute or regulation.¹³ The purpose of the bill was to so provide. Generally, the governor may suspend certain procedural regulations that “prevent, hinder, or delay necessary action” when dealing with an emergency,¹⁴ which he did when he required an all-mail election.¹⁵ Representative Giddings further explained, “we really value in-person voting,” and the bill is necessary to “uphold our traditional voting practices.”¹⁶

Committee member Senator Souza distinguished between requesting an absentee ballot (which would still be permitted after the passage of this bill) and universal mail-in voting (which is not allowed in Idaho).¹⁷ Other states, like Washington and Oregon, automatically mail ballots to all registered voters,¹⁸ eliminating the need for in-person polling places and to request an absentee ballot from the Secretary of State’s Office.¹⁹ The only other comment came from Senator Stennett who asked what would happen if a polling place was flooded or otherwise unusable.²⁰ Representative Giddings explained that the response would depend on the emergency, and there may be another polling place that the voter could use.²¹

in Idaho where the Secretary of State’s Office reported after the election “14 or 15 reports of potential fraud,” nearly all of which “will end up not being fraudulent.” *Election Official: Barely a hint of voting fraud in Idaho*, KTVB (Nov. 25, 2020, 7:07 AM), <https://www.ktvb.com/article/news/politics/elections/voter-fraud-idaho-ballots-election-officials/277-74003229-3963-4bf6-8769-11553ed7ccc3>. This figure is from a total of 880,000 ballots cast, making questionable .00001705% of ballots. *Id.*

¹³ *Relating to Elections: Hearing on H.B. 1 before the S. State Affairs Comm.*, *supra* note 11, (statement of Rep. Giddings).

¹⁴ IDAHO CODE § 46-1008(5)(a) (2016). Section 46-601 is a similar provision, but governs exclusively the governor’s authority to enact martial law during states of emergency. IDAHO CODE § 46-601 (2009).

¹⁵ *Idaho’s primary election to remain on May 19, will be conducted by mail*, OFFICE OF THE GOVERNOR (Mar. 30, 2020), <https://gov.idaho.gov/pressrelease/idahos-primary-election-to-remain-on-may-19-will-be-conducted-by-mail/>.

¹⁶ *Relating to Elections: Hearing on H.B. 1 before the S. State Affairs Comm.*, *supra* note 11, (statement of Rep. Giddings).

¹⁷ *Relating to Elections: Hearing on H.B. 1 before the S. State Affairs Comm.*, *supra* note 11, (statement of Sen. Souza). She, and constituents who testified, also suggested that the bill was presented in response to events around the country and the strong need to maintain in-person voting. *Id.*; *Relating to Elections: Hearing on H.B.1 before the S. State Affairs Comm.*, *supra* note 11 (statements of Charity Majors and Nikki Schumacher); *Relating to Elections: Hearing on H.B.1 before the H. State Affairs Comm.*, *supra* note 11 (statement of Wendy Blanton); Joey Prechtel, *Don’t expect Idaho to move to mail-in-only voting after May primary*, KTVB (June 3, 2020, 8:06 PM), <https://www.ktvb.com/article/news/politics/elections/dont-expect-idaho-to-move-to-mail-in-absentee-voting-after-may-primary-november-election/277-aa043579-f326-42c7-a759-54ecce7c1f44> (explaining that regardless of the record turnout in the all-mail May 2020 election, there is only “a slim chance ... that the state will move to all-absentee voting in the future”) due to Idaho’s traditional tendencies).

¹⁸ Michael D. Hernandez, *All-Mail Elections*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 2014), <https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections635457869.aspx>.

¹⁹ *Absentee Voter Information*, IDAHO VOTES, <https://idahovotes.gov/absentee-voter-information/> (last visited Feb. 12, 2021).

²⁰ *Relating to Elections: Hearing on H.B.1 before the S. State Affairs Comm.*, *supra* note 11, (statement of Sen. Stennett).

²¹ *Relating to Elections: Hearing on H.B.1 before the S. State Affairs Comm.*, *supra* note 11, (statement of Rep. Giddings).

The bill passed through both State Affairs Committees without further discussion and both released the bill to the Legislature with a do-pass recommendation.²² It received 67 affirmative votes in the House and 33 affirmative votes in the Senate.²³

Judicial overturn of the bill appears unlikely. Though COVID-related litigation is anything but settled, courts have been fairly deferential to legislative bodies to determine their local responses to COVID-19.²⁴ And, HB 1 conflicts neither with the governor's ability to declare states of emergency²⁵ nor the Idaho Constitution's broad allowance for the Legislature's prescription of "qualifications, limitations, and conditions for the right of suffrage."²⁶ And, as Senator Souza clarified, voters may continue to request absentee ballots if they do not wish to vote in-person.²⁷

²² *Relating to Elections: Hearing on H.B.1 before the H. State Affairs Comm.*, *supra* note 11; *Relating to Elections: Hearing on H.B. 1 before the S. State Affairs Comm.*, *supra* note 11.

²³ *2020 Extraordinary Session Legislation: House Bill 1*, IDAHO LEGISLATURE, <https://legislature.idaho.gov/sessioninfo/2020spcl/legislation/h0001/> (last visited Feb. 2, 2021).

²⁴ *E.g.*, *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); Robert Barnes, *Supreme Court again splits on coronavirus-related election issue*, WASH. POST (July 30, 2020, 6:02 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-reform-idaho-november-election/2020/07/30/e1568da4-d2a9-11ea-9038-af089b63ac21_story.html.

²⁵ Compare H.B. 1, with Idaho Code § 46-1008.

²⁶ IDAHO CONST. art. VI, § 4.

²⁷ *Relating to Elections: Hearing on H.B. 1 before the S. Comm. on State Affairs*, *supra* note 11, (statement of Senator Souza).