



Election 2020

Potential US Presidential Election Outcome Scenarios

November 1, 2020



Contents

Introduction	2
Election 2020: Uncertainties	2
The Electoral College	2
State Election Law Developments	3
Potential Litigation Scenarios	3
Potential Electoral College Outcomes	4
Contacts	5

As midnight approached on November 8, 2016, and certainly as dawn broke on the East Coast, it had become apparent that Hillary Clinton would win the national popular vote but that Donald Trump would win the Electoral College vote to become the 45th President of the United States. But when dawn breaks on November 4, 2020, will we know who will be sworn in as president on January 20, 2021? And what impacts would any delay or ambiguity in the results of the election have on our economy and our democracy during a time of heightened partisan divisions and an ongoing global pandemic?

This essay endeavors to explore these weighty matters. Without an historic Electoral College landslide, both the mechanics of varying state election laws and the greatly increased use of mail-in voting make it quite likely there will be no clear winner on November 4, and perhaps for many days thereafter. Although our country has proven to be remarkably resilient during election controversies determining past transfers of power, our current polarized environment may well lead to more turbulence and potentially widespread civil unrest this year. For the sake of our democracy, our economy and our need to meet the challenge of the pandemic, we nonetheless hope that our fellow citizens will know for certain by the time they gather for a meal of Thanksgiving who will swear to “preserve, protect and defend the Constitution of the United States” on January 20.

Investors and C-suite executives here and abroad have much about which to be concerned. The potential impacts of a result of a period of prolonged uncertainty and unprecedented turmoil in the US economy following the election cannot be good for financial markets or business planning. As if to drive the point home with absolute clarity, the middle-of-the-night revelation made last month that President Trump and First Lady Melania Trump had tested positive for the coronavirus disease 2019 (COVID-19) rattled Wall Street and other financial centers across the globe. The previous day, the *New York Times* had reported that “[i]nvestors have spent recent months pushing the stock market to record highs, seemingly undeterred by the worst pandemic in a century and the enormous toll it has taken on the United States economy. But now, politics is giving them agita. In the last few weeks, the market’s results have reflected the uncertainty weighing on investors’ minds as they prepare for what could be a politically turbulent stretch — including a Senate fight to fill the former Supreme Court seat of Justice and the November presidential election, which could result in a constitutional crisis.”

And that was before the news broke about the Trumps’ diagnosis. Early on October 2, as the *New York Times* reported, “[t]he S&P 500 was down about 1 percent. The news rocked other markets too. The benchmark Stoxx Europe 600 ended slightly higher after a turbulent day. In Japan, where the news broke late in the trading day, stocks finished nearly 1 percent lower after erasing early gains. Oil futures also slid, with Brent crude and West Texas intermediate, the two main benchmarks, down more than 3 percent. Prices for other commodities fell, too.” All that after the President and First Lady had tested positive.

As we now have reached the eve of the election, let us roll the tape forward.

Election 2020: Uncertainties

In the modern era, especially as television augmented radio as the means by which the American public got news, we as a nation would gather in our living rooms on “election night” to follow the returns as they were reported by the major network anchors. Over time, we came to rely upon television networks with their elaborate ways of “projecting” who would win House and Senate races, as well as the presidency itself. In significant part, what made that possible (beyond modern technology) was the practice of citizens casting their votes in person on Election Day (by law, the Tuesday after the first Monday in November). Their votes would be tabulated throughout the day and then released in batches following the closing of the polls that evening. However, those days are now behind us, not least because of the COVID-19 pandemic.

Four major variables will continue to be at work to create uncertainty this year. First is the effect of the COVID-19 pandemic on voting, which will continue to affect everything from the mechanics of in-person voting, to the processing of an unprecedented volume of votes cast by mail, to the demographics of who votes by each method. The 2020 presidential election has seen the highest percentage of early, in-person voting and the greatest use of the mail (and collection boxes) for citizens to cast their ballots in our history. The early voting numbers across the country have been nothing short of staggering. As of Saturday, 89 million Americans had already cast ballots. In Texas and Hawaii, more voters had already voted in 2020 than in 2016. Ten additional states have exceeded 80% of 2016 turnout, including traditional battleground states such as Florida, North Carolina and Nevada, as well as new highly competitive states such as Georgia and Arizona. According to the *New York Times*, this robust early turnout has “set the country on course to surpass 150 million votes for the first time in history.”

This is the first time one of the major parties has encouraged citizens to vote early. In fact, the election of 1864 was the first to provide a widespread alternative to in-person voting, as President Abraham Lincoln sought to ensure that Union soldiers would be able to participate in the election. As he put it, “we can not have free government without elections; and if the rebellion could force us to forego, or postpone a national election it might fairly claim to have already conquered and ruined us.” Perhaps not surprisingly, the opposition Democratic party at the time warned of rampant fraud and “a scheme” by Lincoln’s Republicans “to gain some great advantage to their party,” as one state senator put it before the Wisconsin legislature voted on party lines to become the first state to authorize absentee voting.

Second, a feature of the US federalist system is now on display, namely, that the 50 states and the District of Columbia are effectively administering 51 different elections, with their own rules and procedures for distributing ballots and counting votes in the upcoming presidential election. Add a slew of lawsuits to this vast web of differing rules, particularly in the contentious “battleground states,” and a full picture of the election law complexity emerges.

Early voting indicates that a substantially higher number of Democrats than Republicans have already voted, whereas a corresponding higher percentage of Republicans will vote in person on November 3. As a result, barring a landslide, election “night” might evolve into election “weeks” by the time the votes are counted, which could be further delayed as the inevitable lawsuits are commenced to challenge the outcome in states across the country, many of which will be premised on the existence of some sort of fraud – notwithstanding the fact that state election officials have conducted elections for decades with only rare instances of fraud ever occurring. Of course, such a scenario would play out in a virtually unprecedented environment of disturbing social media manipulation trends, foreign interference by numerous adversaries and highly targeted misinformation campaigns aimed solely at sowing domestic unrest.

The third factor is the often misunderstood, but vitally important, way in which votes are counted in the Electoral College to determine who will serve as president and vice president. And potentially as significant this year will be the roles assigned to the US House of Representatives and the US Senate if the Electoral College does not decide the election.

Finally, for the first time in our nation’s history, a sitting president has publicly and repeatedly refused to commit to accepting a peaceful transfer of power, which led the US Senate recently to unanimously adopt a resolution reaffirming this core principle of our democracy and Senate Majority Leader Mitch McConnell (R-KY) to tweet: “The winner of the November 3rd election will be inaugurated on January 20th. There will be an orderly transition just as there has been every four years since 1792.” He was not the first to invoke this essential

feature of our democracy. When he stood on the West front of the US Capitol on January 20, 1981, as our hostages were being released in Iran and Jimmy and Rosalynn Carter sat behind him, President Ronald Reagan began his inaugural address by saying: “The orderly transfer of authority as called for in the Constitution routinely takes place, as it has for almost two centuries, and few of us stop to think how unique we really are. In the eyes of many in the world, this every-four-year ceremony we accept as normal is nothing less than a miracle.” Notwithstanding this history and deepening concerns in his own party, President Trump again refused to agree to accept the outcome of the November 3 election in the first presidential debate held on September 29. When asked in the vice presidential debate on October 7 whether President Trump would commit to a peaceful transition should he lose the election, Vice President Pence declined to answer the question.

To put what potentially lies ahead in perspective, we offer below a primer on the Electoral College. We then describe how governors, state legislatures and local election officials across the country are responding to the pandemic. We highlight the provisions of current state laws that govern, in particular, when absentee ballots must have been mailed, by when they must be received, and the procedures that will govern how and when they will be tabulated. With lawsuits being filed seemingly every day to challenge these decisions, we still do not have full clarity on the rules that apply in states such as Pennsylvania on the eve of the election. We assess as well where anticipated litigation could affect the counting and tabulation of votes once the rules finally have been set. Finally, we walk through the various steps by which the Electoral College will meet to make a decision and what could follow in the US House of Representatives and in the US Senate if the Electoral College has not selected a president and a vice president by January 6, 2021.

With polling favoring Vice President Biden, but certainly still providing a path to victory for President Trump, and the president showing absolutely no signs of backing down from his contention that the election is illegitimate, the odds of electoral uncertainty on the morning of November 4 are very real. However, we can certainly envision scenarios in which the American public will know the winner on Tuesday or shortly thereafter. The most likely scenario for such certainty would be for Vice President Biden to decisively win some combination of the early reporting swing states Florida, Georgia, North Carolina and/or Arizona, meaning that he will almost assuredly be declared the winner in the Electoral College. At the same time, if President Trump is declared the winner of all of the sunbelt swing states, along with an unexpectedly early call in a midwestern battleground state, there would be virtually no foreseeable path forward for Vice President Biden, particularly because of what wins in these critical states would likely mean for the outcome nationwide.

Because we can only hope for such early clarity, we lay out below what could go wrong.

The Electoral College

As prescribed in Article II, Section 1 of the US Constitution, the Electoral College elects the president and the vice president. The Constitution gives each state the power to appoint its electors “in such Manner as the Legislature thereof may direct,” with all states and the District of Columbia currently using some form of popular election. Each state has as many “electors” as it has representatives and senators in the US Congress. With the District of Columbia having three electors, the Electoral College is comprised of 538 members. When voters go to the polls or fill in their mail-in ballots, they might be under the impression that they are casting votes for a particular person for president and for vice president, but in fact they are voting for the slate of electors who have vowed to cast their ballots in the Electoral College for the individuals who make up the Democratic, Republican and any third-party “tickets” on the ballot. For that reason, you cannot vote for the president from one party and the vice president from another. They come as a pair. To prevail, a ticket needs to garner a minimum of 270 votes.

Most states require that all electoral votes go to the ticket that receives a plurality of the votes cast by whatever means. (Maine and Nebraska employ a “district system” in which two at-large electors vote for the slate with the most votes statewide and one elector votes for each congressional district’s highest vote getter.) After state election officials certify the popular vote of each state, the winning slate of electors meets in each state capital and cast two ballots – one for president and one for vice president.

The District of Columbia and 26 states “bind” their electors to vote for their promised candidate, including with oaths and fines. In July, in a little-noticed decision, the US Supreme Court unanimously upheld laws that allow state election officials to remove or punish “faithless” electors. In the modern era, very rarely have electors voted for someone other than for whom they pledged. Faithless electors have never decided a presidency. Given the Supreme Court’s decision, faithless electors are not likely to alter the outcome this year either. That is not the problem on the horizon.

If the Electoral College deadlocks or if neither the Biden-Harris ticket nor the Trump-Pence slate receives a majority of votes (which seems quite remote in the absence of a credible third-party slate), a “contingent election” will be held. At that point, future contestants on *Jeopardy!* might see “1887 Electoral Count Act” under US Civics for \$100. They would know it to be the law, with all its ambiguities, that provided the framework for deciding the 2020 presidential election. That legislation was enacted by a Republican Senate and a Democratic House in the aftermath of the 1876 presidential contest between Rutherford Hayes and Samuel Tilden. Following that election, Florida, Louisiana and South Carolina produced competing sets of electors. Under the Compromise of 1877, Democrats conceded the election of Hayes in return for an end to Reconstruction and the withdrawal of federal troops from the South. The legislation the two parties agreed to requires the electors to be chosen by no more than 41 days after the election. Should a joint session of Congress meet to decide the winner of the election (as further discussed below), the law quite helpfully sets forth where everyone is to sit when they gather on the floor of the House. However, it leaves a raft of questions unanswered, which only adds to the uncertainty about what lies ahead.

The election of the president goes to the House of Representatives and the election of the vice president is decided by the Senate. For an added touch of drama, the election would be decided in the House by the incoming members elected in November, with incoming or re-elected senators joining those completing their terms in the Senate. In the presidential election, each state delegation in the House casts one vote for one of the top three contenders to determine the winner. California, with its 53 members, will get just as many votes as Alaska. Since the first presidential election in 1788, the House has decided the outcome only twice – in 1800 and 1824. In the election of 1800, it took 36 ballots over seven days for Thomas Jefferson to defeat Aaron Burr. In 1824, John Quincy Adams defeated Andrew Jackson, who had received a greater share of the popular vote. It is often said that “three is a charm,” but the 2020 election could demonstrate its inapplicability next year.

But before we speculate about how a contested presidential election might play out in the House, in the next segment we will discuss the peculiarities of state election laws that could make for election “night” to extend for weeks. In our final segment, we will lay out the most significant dates, and what they might mean as January 20 draws nearer. In the interim, please see the attached [Appendix 1](#) that provides a timeline of things to come.

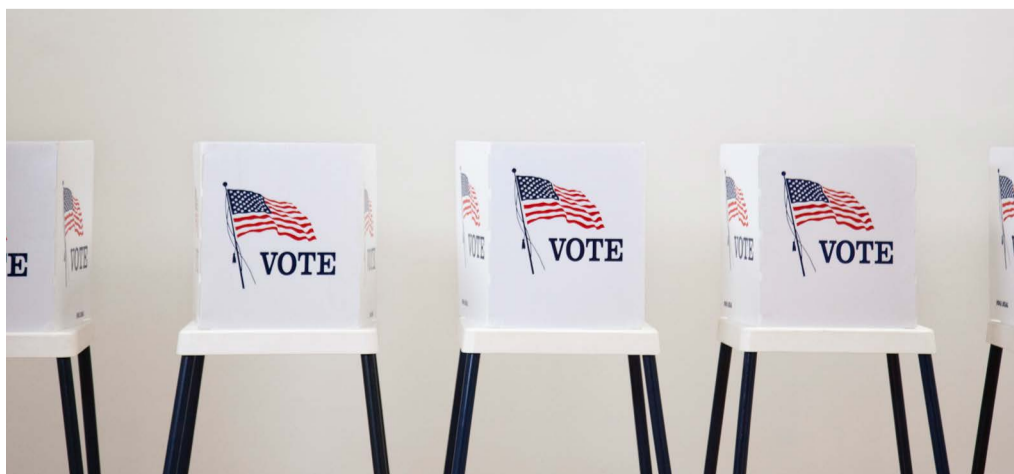
State Election Law Developments

There are many benefits to the US system of federalism, but the administration of a national election by hundreds of different governments at the state, county and local levels, each with its own election rules, processes and governing boards, might not be one of them. Madisonian debates aside, the reality is that voting looks very different based on where you live in the US and, indeed, often even where you live in your state and city.

As shown in the attached [Appendix 2](#), these very real differences also manifest themselves in how and when votes are tabulated. The policies range from those states that *end* the counting of votes on Election Day, such as Florida, to those that do not *begin* counting until Election Day, such as Michigan.

In this contentious moment, such distinctions could be critical. Consider these potential outcomes on Election Day. If Vice President Biden is declared the winner in Florida on election night, as well as in states that count votes early, such as North Carolina and Arizona, and those that use quick-to-tabulate electronic voting in person, such as Georgia, he will almost assuredly be declared the winner. Conversely, if President Trump were to sweep Florida, Arizona, North Carolina and Georgia, an unexpected early call in a Midwestern state such as Michigan, Wisconsin or Pennsylvania, his second term would be virtually reassured. In either scenario, the period of ambiguity would be relatively minimal.

On the other hand, if a scenario unfolds in which President Trump and Vice President Biden split Arizona and Florida, and a state like North Carolina is deemed too close to call, the likelihood for a long and messy period of ambiguity will increase significantly. This is because vote counting will only begin on Election Day in the critical battleground states of Michigan, Pennsylvania, Wisconsin and Minnesota, where officials have made clear that final results should not be expected on Election Day or perhaps even in the days immediately thereafter. The possibility for unrest in that period of ambiguity would be increased by the reality that in-person voting results, which will likely be significantly over-representative of Trump voters as compared to all voters, may well be released before the totals from the more laborious process of counting votes by mail, a method overwhelmingly favored by Democrats. As such, we can envision a scenario in which President Trump would appear to have a substantial lead in a battleground state after in-person results are announced. This “lead” would then evaporate over a series of highly contentious days as mail-in votes are counted, a time period during which claims of conspiracy, fraud and illegitimacy, along with scorn toward government officials, would surely take hold with many. For context, just look to California in 2018, when Republicans in hard-fought districts seemed to be doing well the day after the election, only to find that all of them had been defeated when mail-in votes had been counted.



Potential Litigation Scenarios

Litigation that already is ongoing will have at least as great an impact on the outcome as the anticipated litigation on and after Election Day. As shown in the attached [Appendix 3](#), courts already are ruling on issues ranging from the number and location of ballot drop boxes, to the end-date for receipt of absentee ballots – and their rulings will shape the electoral outcome indelibly before a single vote is announced.

The scale and scope of election litigation in 2020, like much else with this election, is unprecedented. The national party committees and numerous large and well-funded advocacy organizations have been litigating every nuance of voting, at virtually every level of government, in an effectively perpetual fashion since the 2016 election, particularly in jurisdictions no longer covered by preclearance under the Voting Rights Act after the 2013 Supreme Court decision *Shelby v. Holder*. At present, lawsuits have been filed in more than 40 states, and more might well be filed on Election Day.

The 2018 midterm election was essentially a continuation of the battles of 2016, reaching a fever pitch in states such as Georgia, where Democrat Stacey Abrams flatly declined to concede the election to now Governor Brian Kemp, citing voting improprieties. In a prime example of how election law issues have morphed into major political issues, Abrams actually decided that rather than conceding the election, she would both sue the state based on its administration of the election and start a national voting rights organization.

That organization, Fair Fight Action, has joined with traditional progressive organizations such as the American Civil Liberties Union, and new entrants such as Democracy Docket, on matters ranging from the rights of felons to vote in Florida, to how long ballots can be counted in Pennsylvania, to how long signature issues with mail ballots can be remedied in Arizona. The Democratic coalition has generally focused its proactive efforts on initiating litigation in states on issues expanding the franchise, and thus their electoral prospects, via efforts such as expanding access to absentee voting and drop boxes. In addition, they have sought to extend the time by which votes can be counted, as in Wisconsin.

On the other hand, the Republican National Committee, the Trump campaign and several of their GOP allies have initiated lawsuits in states that have either extended absentee ballot counting, provided additional drop boxes for ballots or provided additional opportunities to correct ballot mistakes. Many such suits are active nationwide. These range from a recent win in Iowa state court for the Trump campaign, where an injunction was secured to invalidate pre-filled mail-in ballots that were sent to 50,000 voters, to a federal suit in Nevada, where it is alleged that a recent decision to expand vote-by-mail and allow ballots to be received up to three days after Election Day violates federal election law.

In one of the most recent decisions potentially affecting the outcome in a battleground state, the US Court of Appeals for the Seventh Circuit stayed a federal district court’s order extending the deadline for Wisconsin election officials to accept absentee ballots. As a result, ballots must be in the hands of election officials by the close of polls on Election Day. The lower court’s order would have required ballots to be accepted if received by November 9. The Seventh Circuit also stayed an order extending the deadline for online and mailed-in voter registration. The date will now be October 14, a week earlier than the original date ordered by the lower court.

As with other recent court decisions, the court weighed whether COVID-19-related disruptions and health risks warranted additional time to both register to vote and mail absentee ballots. The Seventh Circuit, noting the Supreme Court’s negative view toward last-minute election changes, concluded that “it is not possible to describe COVID-19 as a last minute event.” The Seventh Circuit also invoked another election-related Supreme Court decision to reject, as “doubtful,” the district court’s “assum[ption] that the design of adjustments [to election rules] during a pandemic is a judicial task.”

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Two decades on, the *Bush v. Gore* acorn predictably has yielded a mighty oak of 2020 Supreme Court orders affecting election conditions, mostly focused on extended deadlines for receipt of mail-in ballots. In non-precedential opinions accompanying those orders, four Justices (Thomas, Alito, Gorsuch, and Kavanaugh) put down markers that their views signal only the end of the beginning.

In the Wisconsin, Pennsylvania, and North Carolina cases, those four Justices (or a sub-set of them) paved the way for post-election Supreme Court challenges to whether those states and others may constitutionally include in their final tabulations ballots received during the interval between the original and extended deadlines. Will Justice Barrett, who sat out the Pennsylvania and North Carolina skirmishes, make five? After all, she worked on the Bush team during *Bush v. Gore*.

Developing a “rock, paper, scissors” template, the Gang of Four Justices advocated that state legislative decisions on election conditions and deadlines should always prevail over contrary decisions of state courts or election agencies; and, in turn, that federal courts can invoke federal constitutional authority to overturn state court decisions—even those made under state constitutions—to ensure adherence to a state’s “legislative scheme for appointing Presidential electors.”¹

¹ *Democratic National Committee v. Wisconsin State Legislature*, No. 20A66 (S. Ct.) (Oct. 26, 2020) (“*Wisconsin State Legislature*”), Statement of Kavanaugh, J., concurring in the denial of the application to vacate stay at 9 n.1, quoting *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

Based on that principle, Justices Alito, joined by Justices Thomas and Gorsuch, asserted in the Pennsylvania case that the Supreme Court post-election could order states to reject ballots that were timely only under extended deadlines adopted by State courts or election boards.² Justices Gorsuch and Alito took the same position in the North Carolina case.³ Given those foreseeable post-election challenges, several states already plan to segregate ballots received after the original deadlines established by state legislatures.

Chief Justice Roberts has used a less granular filter so far, voting not to overturn election actions taken by state courts as well as state legislatures, distinguishing (in the Wisconsin case) “the authority of state courts to apply their own constitutions to election regulations” from “federal intrusion on state lawmaking processes.”⁴

The three-Justice liberal wing of the Court (Breyer, Sotomayor, and Kagan) consistently has voted to uphold state or lower federal court decisions that liberalize voting rules to accommodate pandemic conditions. Their professed goal is prevent “disenfranchis[ing] large numbers of responsible voters in the midst of hazardous pandemic conditions”⁵ But without support from Chief Justice Roberts—or even with it, once Justice Barrett joins the fray—their views will not carry the day. Stay tuned, and buckle your seatbelts.

Both presidential campaigns have built legal structures capable of addressing or initiating challenges across the country, with the Trump campaign having never really ceased operation since 2016. The Biden campaign legal team is led by a former Attorney General, Solicitor General and White House Counsel. The team reportedly has 8,000 lawyers lined up in Florida alone to address potential Republican-led election challenges. Similarly, the political parties and various advocacy organizations have built up legal teams to previously unforeseen levels, utilizing a torrent of grassroots fundraising from activists concerned about voting irregularities on both sides. All of this point to an ability by both parties to litigate election issues in as many places, for as long as is needed.

The litigation underway now is substantially different in character than the issue at the heart of *Bush v. Gore* (a case in which our firm was engaged for the Bush campaign, with the support of many other talented private sector lawyers, including ones named John G. Roberts, Jr., Brett Kavanaugh, and Amy Coney Barrett). Also substantially different in nature is the significantly expanded scope, size and sophistication of the election litigation efforts at both sides’ disposal. Depending on how such legal power is deployed, we may well long for the relative civility, tranquility and lack of disruption during the early winter months of 2000.

Finally, we think it important to note that one of the premises underlying much of this litigation is that election fraud is likely to be widespread and could tip the balance of the election. However, as our former colleague, Ben Ginsberg (who led President George Bush’s legal team in *Bush v. Gore*), wrote in *The Washington Post*: “The truth is that after decades of looking for illegal voting, there’s no proof of widespread fraud. At most, there are isolated incidents — by both Democrats and Republicans. Elections are not rigged. Absentee ballots use the same process as mail-in ballots — different states use different labels for the same process.” He went on to cite this evidence: “The [Heritage Foundation Election Fraud Database](#) has compiled every instance of any kind of voter fraud it could find since 1982. It contains 1,296 incidents, a minuscule percentage of the votes cast. A [study](#) of results in three states where all voters are mailed actual ballots, a practice at the apex of the president’s outrage, found just 372 possible cases of illegal voting of 14.6 million cast in the 2016 and 2018 general elections — 0.0025 percent.”

Potential Electoral College Outcomes

As we look ahead, we set out some important dates to keep in mind and what events triggered by them might mean for the question that will be on the minds of citizens as they wake up on November 4 and perhaps many more days to follow.

December 8, 2020. A state can be assured that its electors to the Electoral College will be recognized if post-election disputes are resolved within 35 days. Moreover, state election officials and voters cannot be certain that “faithless electors” will vote as they are supposed to, but at least the Supreme Court’s recent decision supports states compelling electors to vote as directed. For what it is worth to those thinking back to 2000, the Florida legislature was prepared to send Republican electors to certify the election, but the Supreme Court halted the Florida recount in *Bush v. Gore* on day 34. Vice President Gore conceded on day 35. So far, so good – but keep reading.

December 11, 2020. This date is not on the electoral calendar, but it could be quite important for another reason. When the US Congress was unable to fund the government for the fiscal year that began on October 1, it agreed to fund the government at fiscal year 2020 levels through December 11. If the election were to produce an outcome that created an even greater level of animosity and distrust than exists today and as a result Congress was unable to agree to another stopgap spending bill, the government would shut down at midnight on the 11th. This is not likely, but a real possibility.

December 14, 2020. Between December 8 and December 13, Governors or Secretaries of State (depending on state law) are expected to certify the results of the election. However, will they be able to do so and will some, motivated by a desire to see President Trump re-elected, find reasons not to certify Vice President Biden as the winner in states in which he has appeared to prevail? Until recently, mail-in votes in most states were relevant only at the margins. Our history is one of people showing up on Election Day to cast their vote in villages, towns and major metropolitan areas as a source of pride and civic responsibility. However, that was before the COVID-19 pandemic turned upside down many of our core assumptions about everyday life. And this might be nowhere more true than how and when voters cast their votes for the President of the United States and various other offices this year.

If the results are still in dispute, we could face a situation in which a legislature of one party and a governor of the other party could each put forward a slate of electors. Four swing states – Michigan, North Carolina, Pennsylvania, and Wisconsin – have Republican legislatures and Democratic governors. New Hampshire has a Republican governor and a Democratic legislature. As noted above, three states produced competing sets of electors in 1876, which led to the Compromise of 1877 and established the mechanisms, further described below, by which the House of Representatives is tasked with sorting things out.

We as a nation do not have a common set of rules and procedures for conducting federal elections. As a nation that prizes the Tenth Amendment and a philosophical penchant to look to states as “laboratories of experiment,” we have left it to them to decide how to conduct their elections. As a result, no established set of rules govern who may vote, how they may vote, when they may vote, what they need to establish their right to vote, or when, all is said and done, their vote will be counted – or even if it will matter when a joint session of Congress meets on January 6, 2021. Some states, such as Oregon, have long ago switched to voting by mail. Other states, driven by the COVID-19 pandemic, are only now looking at how they might get ballots to voters and to set rules for when and whether their votes will be counted (e.g., received or postmarked by November 3). As noted above, these varying rules will be particularly important this year. To take but three examples, in Michigan, Pennsylvania and Wisconsin – three states that are likely to be rather significant in the Electoral College – officials will not start processing mail-in ballots until Election Day, unless the rules are changed before then. There is no way under the sun that will rise on November 4 that they will have processed anything close to the majority of votes cast other than in person the day before. And once they have completed their work, perhaps even before, we are assuming that the candidate likely to lose the vote will be in court challenging the results.

If no candidate has secured 270 votes when the Electoral College meets, either because state results are still being litigated or for any other reason, such as the two principal candidates each having 269 votes, the decision is left to the House of Representatives on January 6. This is not exactly what a tired and divided nation might want to endure as the end of the year approaches, but we would be entering into three weeks of additional uncertainty.

January 3, 2021. The 117th Congress will convene, with the swearing in of the House members and senators elected on November 3, to join those senators completing their unexpired terms. As a result of a special election in Georgia, we will not yet know who will fill one of the Georgia Senate seats (since the expected runoff will be held on January 5). If Democrat Mark Kelly wins the Arizona special election, he might have already been sworn into office in late November or early December.

January 6, 2021. As a result of the adoption of the Twentieth Amendment, the new Congress, rather than the outgoing Congress, will meet to count the Electoral College votes. As set forth in the US Constitution, “the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.” Donald J. Trump will still be president and Mike Pence will still be vice president when the newly elected Congress convenes in a joint session at 1 p.m. Eastern Time on January 6, with Vice President Pence sitting in the chair.

Under the Constitution, the House must choose a president “immediately.” The founders required an immediate choice so that there would be no time for deals to be struck. But what if no one is selected on the first ballot? As one observer recalled what unfolded in 1801, “[t]he scene was now ludicrous. Many had sent home for night caps and pillows, and wrapped in shawls and great-coats, lay about the floor of the committee rooms or sat sleeping in their seats. At one, two, and half-past two, the tellers roused the members from their slumbers, and took the same ballot as before.” Imagine the scene today via C-Span.

When the counting begins, members of Congress may object to individual electoral votes or to state returns as a whole. An objection must be declared in writing and signed by at least one representative and one senator. In the case of an objection, the Joint Session recesses and each chamber considers the objection separately in a session that may not last for more than two hours, with each member speaking for no more than five minutes. After each house votes on whether or not to accept the objection, the Joint Session reconvenes and both chambers announce their decisions. If they agree to the objection, the votes in question are not counted. If either chamber does not agree with the objection, the votes are counted. Although objections were recorded in 1969 and 2005, the House and Senate rejected the objections and the votes in question were counted. Might the third time be different?

Assuming that current majorities continue, there would be more states on January 6 with a majority of Republican members and, thus, Donald Trump almost assuredly would be re-elected. But what if Democrats win enough votes on November 3 to enjoy a slight majority, say 26-24? To get to 26, Democrats would need to retain currently competitive seats in Iowa and Minnesota, and would need to win competitive seats in four states from a pool that includes Alaska, Florida, Michigan, Montana, North Carolina and Texas.

But what if neither party had a majority, such as 25-25 (or 24-24 with two state delegations having equal numbers of Democrats and Republicans), and Vice President Pence were to declare that votes cast for Democrats that would shift the balance should not be counted owing to alleged electoral fraud that is still being litigated in the courts? Or what if one or more Republican legislatures, over the objections of a Democratic governor, have put forth a slate of Republican electors if the results hadn’t been certified by December 14? Those potential scenarios would appear to give President Trump a win, but, in fact, the Democratic House would have the authority to avoid that possibility.

House Democrats, out of concern for this possibility or otherwise (such as ongoing litigation challenging the election results for one or more Republican House members), could refuse to seat one or more Republicans and, thus, deny their state delegations a majority on January 6. Under Article 1, Section 5 of the Constitution, the House has the authority to “judge” a contested election. It did so as recently as 2018, when the House refused to seat the Republican winner in the Ninth District of North Carolina after a Republican operative was found to have committed fraud in an effort to swing the outcome of the race. House Democrats could vote not to seat a Republican candidate claiming victory even if state election officials had certified the candidate as the winner. In 1995, for example, House Republicans refused to initially seat Representative Jane Harman (D-CA), even after she had been certified by the state to have won her race by 812 votes.



² *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (S.Ct.) (Oct. 28, 2020), Statement of Alito, J. at 3.

³ *Moore v. Circosta*, No. 20A72 (S. Ct.) (Oct. 28, 2020), Statement of Gorsuch, J., at 2.

⁴ *Wisconsin State Legislature*, Statement of Roberts, C.J., concurring in the denial of application to vacate stay, at 1.

⁵ *Id.*, Statement of Kagan, J., dissenting, at 3.

Not to be forgotten, pursuant to the Twelfth Amendment, the Senate would choose the vice president if the Electoral College outcome has not been resolved by this time. (The Senate has only chosen the vice president once – in 1837). When the Senate convenes (on a day not specified in the Twelfth Amendment but presumably well before January 20), that vote is to be tabulated by the Senate, not by state. A minimum of 67 senators must be present to establish a quorum. They are to choose between the two top vote getters in the Electoral College, with the winner being the one that gets a majority of the votes. But what if the November elections lead to an equally divided chamber, with 50 Republicans, 48 Democrats, and the two Independents who regularly caucus with the Democrats (Senators Bernie Sanders and Angus King). At that point, Vice President Pence would still be serving as President of the Senate and, thus, would potentially need to break the tie, choosing either himself or Senator Kamala Harris. What if enough senators of either party refused to be present and, thus, denied the establishment of a quorum, denying either Senator Harris or Vice President Pence a win even if they enjoyed a majority of the votes actually cast by voters, whether in the popular vote or the Electoral College?

Would you want to own shares in the stock market on January 6 and the days to follow? Would you want to read headlines about the US becoming a “banana republic”? Would you be desperate for some sort of resolution the country could respect?

January 20, 2021. Pursuant to the Twentieth Amendment to the US Constitution, which came into effect in 1933, the beginning (and ending) of the terms of the president and vice president were moved from March 4 to January 20 every four years. The terms of members of Congress also were moved up, to begin on January 3, every two years. Since our elected representatives no longer needed to travel from the farthest flung areas of the country by horseback, it made sense to move up the convening of the Congress and the swearing in of a president and vice president to roughly three months after the election rather than in the spring. Until now, no one had ever seriously considered the prospect of revelers on New Year’s Eve not having a sense of who would take the oath of office three weeks later. However, that possibility is now quite real. Owing to ongoing litigation and a deadlock in the House and the Senate, the country would be facing the prospect of neither major party candidate being sworn in at noon Eastern Time on the 20th.

So, here we potentially are, two weeks after the House and the Senate have failed in their most basic duties to choose a president and vice president in the absence of a determinative outcome in the Electoral College. How might this play out, with potentially significant implications for the stock market, let alone the fabric of our democracy?

As noted above, the term of the new president and vice president begin with their inauguration at noon Eastern Time on January 20. Not just implicit in that but explicit under the Twentieth Amendment is this: the term of the current president and vice president comes to an end at noon. And what if at the appointed hour of noon there is no answer to the most basic question: who is to be sworn in as president and vice president? That is when the Presidential Succession Act of 1947 (perhaps the Daily Double under US Civics for \$80) would come into play. It provides in relevant part: “If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.” Since she almost assuredly would have been elected Speaker of the House on January 3, Representative Nancy Pelosi would become acting president. She has accomplished much in life, but the thought of being the first female acting president cannot possibly be a title to which she would aspire on January 20, 2021.

We cannot predict with certainty what will occur in the next few months, let alone what impact it may have on US society, as well as US and world financial markets. But we are of the view that it is vital that stakeholders, institutions and enterprises contemplate the possibility that the US may be in for a period of enormous tension and widespread confusion in the weeks following the November elections, which could lead to civil unrest on a scale not felt in decades. The year 2020 has already been one that has shaken the foundations of what have long been global norms and traditional expectations. And the evidence is mounting that with the US elections approaching, the wild ride may not be over yet.

For our collective sakes, let us hope we as a country find a way well before January 6 to determine with certainty who will stand before the nation on January 20 and swear to “preserve, protect and defend the Constitution of the United States.”

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[Return to Analysis](#)

November 3

General Election Day

By statute, the presidential election occurs on the Tuesday after the first Monday in November every four years and thus can be changed only if Congress changes the date by legislation that is enacted into law. The president has no power to change the date on his own initiative. In the words of the statute, “[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” ([3 U.S. Code § 1](#))

December 8

“Safe Harbor” Deadline

State electors to the Electoral College will be recognized if any disputes that occurred in connection with the November 3 election have been resolved within 35 days.

“If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.” ([3 U.S. Code § 5](#))

December 11

Government Spending Ceases Pursuant to Public Law No: 116-159

If Congress is unable to agree to another stop-gap spending bill, the government would shut down at midnight.

December 14

Electoral College Delegations Meet and Vote in their Respective States

Between December 8 and December 13, Governors or Secretaries of State (depending on state law) are expected to certify the results of the election. By law, “[t]he electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State each as the legislature of such State shall direct.” ([3 U.S. Code § 7](#))

January 3

Convening of the 117th Congress

The Twentieth Amendment to the Constitution, which came into effect in 1933, moved the date for the start of a new Congress from March 4 to January 3. (The March date had been included in the Twelfth Amendment as the date by which the House had to commence a contingent presidential election if the matter had not been resolved by then because no candidate had received an absolute majority of votes in the Electoral College.) The Senators and Representatives elected on November 3 will join the Senators who were not up for re-election to commence the new Congress, which will be known as the 117th Congress.

The Amendment provides in relevant part:

“The terms of Senators and Representatives [shall end] at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.” ([U.S. Const. 20th Amendment Sec. 1](#))

“The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” ([U.S. Const. 20th Amendment Sec. 1](#))

January 6

Joint Session of Congress to Count Electoral Votes and Declare Official Election Results

As a result of the adoption of the Twentieth Amendment, the new Congress rather than the outgoing Congress will meet to count the Electoral College votes. No matter what happens on November 3, Donald J. Trump will still be president and Mike Pence will still be vice president when the newly elected Congress convenes in a joint session at 1 p.m. on January 6, with Vice President Pence sitting in the chair. The relevant provision says: “Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.” ([3 U.S. Code § 15](#))

Article II of the Constitution provides in relevant part:

“The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.” ([U.S. Const. Article II Sec. 1](#))

If no candidate reaches 270 electoral votes, the House of Representatives votes by state delegation, and the Senate by individual senator, to choose the President and Vice President, respectively.

As provided for in Article II:

“[I]f no Person have a Majority, then from the five highest on the List the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.” ([U.S. Const. Article II Sec. 1](#))

January 20

Inauguration of the President and Vice President

Even if the 117th Congress is still fighting over who should serve as president and vice president, the Twentieth Amendment makes clear that President Trump and Vice President Pence’s term will end at noon: “The terms of the President and Vice President shall end at noon on the 20th day of January.” ([U.S. Const. 20th Amendment Sec. 1](#))

If a President and Vice President have not been chosen, the Speaker of the House will become President in an acting capacity. In the words of the statute, the Speaker elected on January 3 would become acting president “[i]f, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.” ([3 U.S. Code § 19](#))

November 1, 2020

[Return to Analysis](#)

Polls Close (EST)	State	Method for Counting In-person Votes (Electronic Machines or Paper Ballots)	Ballot Counting Info and Timeline of Results for Battleground States
7 p.m.	Georgia	Electronic	State begins processing ballots in advance but does not begin counting votes until Election Day. Results could be finalized on Election Night.
	Indiana	Paper and electronic	
	Kentucky	Paper and electronic	
	South Carolina	Electronic	State expects results to be finalized on Election Night.
	Vermont	Paper ballots	
	Virginia	Paper ballots	
7:30 p.m.	North Carolina	Paper and electronic	State begins counting ballots 14 days before Election Day. While a Federal Appeals Court recently affirmed that North Carolina could count ballots received within nine days of Election Day, the state expects results to be finalized on Election Night.
	Ohio	Paper and electronic	Absentee ballots may be scanned prior to the election. The state has cautioned that results might not be finalized on Election Night.
	West Virginia	Paper and electronic	
8 p.m.	Alabama	Paper ballots	
	Connecticut	Paper ballots	
	Delaware	Electronic	
	District of Columbia	Paper and electronic	
	Florida	Paper and electronic	State begins counting ballots 22 days before Election Day. Results could be expected on Election Night.
	Illinois	Paper and electronic	
	Maine	Paper ballots	Results could be expected on Election Night, but Maine's use of ranked-choice voting could delay final results.
	Maryland	Paper ballots	
	Mississippi	Paper and electronic	
	Missouri	Paper and electronic	
	New Hampshire	Paper ballots	
	New Jersey	Electronic	
	Oklahoma	Paper and electronic	
	Pennsylvania	Paper and electronic	State begins counting ballots on Election Day. US Supreme Court recently affirmed Pennsylvania's decision to count absentee ballots through November 6. The state expects results to be finalized by November 6.
	Rhode Island	Paper ballots	
Tennessee	Paper and electronic		
8:30 p.m.	Arkansas	Paper and electronic	



Polls Close (EST)	State	Method for Counting In-person Votes (Electronic Machines or Paper Ballots)	Ballot Counting Info and Timeline of Results for Battleground States
9 p.m.	Arizona	Paper and electronic	State begins counting ballots 14 days before Election Day. Results could be finalized on Election Night.
	Colorado	Mail-in only	State expects results to be finalized by the night of November 4.
	Kansas	Paper and electronic	
	Louisiana	Electronic	
	Michigan	Paper ballots	State begins counting ballots on Election Day. Results should not be expected on Election Night.
	Minnesota	Paper ballots	State begins processing ballots in advance but does not begin counting votes until Election Day. State expects results to be finalized on Election Night.
	Nebraska	Paper ballots	
	New Mexico	Paper ballots	
	New York	Paper ballots	
	North Dakota	Paper ballots	
	South Dakota	Paper ballots	
	Texas	Paper and electronic	State begins counting ballots four days before Election Day. State has suggested results could be expected on Election Night.
	Wisconsin	Paper and electronic	State begins counting ballots on Election Day. Results could be expected on Election Night.
Wyoming	Paper and electronic		
10 p.m.	Iowa	Paper ballots	State begins counting ballots on Election Day. Results could be expected on Election Night.
	Montana	Paper ballots	Results should be expected on Election Night.
	Nevada	Paper and electronic	State begins processing ballots in advance but does not begin counting votes until Election Day. Results could be expected on Election Night.
	Utah	Paper and electronic	
11 p.m.	California	Paper and electronic	
	Hawaii	Paper and electronic	
	Idaho	Paper and electronic	
	Oregon	Mail-in only	
	Washington	Mail-in only	
1 a.m. on November 4	Alaska	Paper and electronic	

November 1, 2020

Return to Analysis

Litigation Brought by the Democratic National Convention (DNC) and Democratic Organizations

Alabama (AL)	Curbside voting - Republican victory: US Supreme Court stayed a lower court ruling that would have allowed (though not required) Alabama counties to offer curbside voting
Arizona (AZ)	Absentee ballots – Temporary Republican victory: Ninth Circuit Court of Appeals <u>issued</u> a temporary stay on a lower court ruling, which would have given Arizona voters up to five days after the election to remedy ballot identification issues. The Ninth Circuit is considering the appeal.
Florida (FL)	Ex-felons voting – Republican victory: Eleventh Circuit Court of Appeals, in a reversal of a lower court, <u>reinstated</u> a Florida law requiring ex-felons to pay court fines and fees before registering to vote.
Georgia (GA)	Absentee ballots – Democratic victory: Georgia Secretary of State settles in federal court; agrees to contact voters whose absentee ballots were rejected within three business days. Voters must be contacted within one business day if the ballot is invalidated during the 11 days before Election Day.
	Absentee ballots – Republican victory: Eleventh Circuit Court of Appeals reversed lower court decision which gave the state three extra days to count ballots postmarked by Election Day. (<i>New Georgia Project v. Raffensperger</i>)
	Polling locations (pending): Federal lawsuit asking state to provide sufficient number and equitable distribution of polling places. (<i>Democratic Senatorial Campaign Committee et. al. vs. Raffensperger</i>)
	Election security – Republican victory: Federal judge rejected lawsuit seeking preliminary injunction to order the state to use hand-marked paper ballots instead of touch screen voting machines. (<i>Curling et. al. vs. Raffensperger</i>)
Michigan (MI)	Poll books – Republican victory: Eleventh Circuit Court of Appeals stayed lower court's order to provide paper backups for poll books. (<i>Curling et. al. vs. Raffensperger</i>)
	Absentee ballots – Republican victory: State Court of Appeals reversed lower court's decision to allow ballots to be counted for two weeks after Election Day.
Ohio (OH)	Absentee ballots – Republican victory: Federal judge <u>dismissed</u> lawsuit from voting rights advocates arguing that Ohio's provision of one absentee ballot drop box per county is unconstitutional. Plaintiffs and the state have expressed confusion over the judge's order, which seemed to argue that the lawsuit is unnecessary given the Ohio Secretary of State's plan to order more ballot drop boxes.
Pennsylvania (PA)	Absentee ballots – Democratic victory: US Supreme Court, through a 4-4 deadlock, let stand a lower court ruling that requires Pennsylvania to count absentee ballots received within three days after Election Day, even if these ballots are not postmarked. (<i>Pennsylvania Democratic Party v. Boockvar</i>)
South Carolina (SC)	Absentee ballot witnesses – Republican victory: US Supreme Court <u>affirmed</u> South Carolina's law requiring voters to sign absentee-ballot envelopes in the presence of a witness (a lower court had ruled the requirement was unconstitutional during COVID-19). However, the Supreme Court also ruled that ballots already cast must still be counted, as long as they are received within two days of the Court's ruling.
Texas (TX)	Absentee voting – Republican victory: Fifth Circuit Court of Appeals <u>reversed</u> a lower court's decision invalidating Texas' requirement that voters under 65 must provide an excuse to receive an absentee ballot. The case was remanded for further litigation.
	Signature verification – Republican victory: Fifth Circuit Court of Appeals <u>reversed</u> a lower court order, which would have required Texas to advise election officials that mail-in ballots with signature verification issues could be rejected without giving voters a chance to correct them.
	Absentee voting – Republican victory: Fifth Circuit Court of Appeals affirmed Texas decision that each county could have a maximum of one absentee ballot drop box. A lower court had previously struck down the change. (<i>Anti-Defamation League et. al. vs. Abbott</i>)
Wisconsin (WI)	Absentee ballots – Republican victory: US Supreme Court rejected lower court decisions that would have extended the duration of time the state could count ballots. Ballots are due on Election Day. (<i>Democratic National Committee vs. Bostelmann</i>)

Litigation Brought by the Republican National Committee (RNC) and Republican Organizations

Iowa (IA)	Absentee ballots – Republican victory: Trump Campaign <u>won</u> an injunction in state court invalidating pre-filled mail-in ballots that were sent to 50,000 voters in certain counties.
Michigan (MI)	Voter transportation – Republican victory: Sixth Circuit Court of Appeals stayed a lower court decision which had blocked a law that would have made it illegal to pay for voter transportation.
Minnesota (MN)	Absentee ballots – Republican victory: Eighth Circuit Court of Appeals ruled that absentee ballots must be received no later than Election Day, ruling against Minnesota's plans to accept ballots for seven days after the election. The Court ruled that ballots received after Election Day should be "segregated" and not counted. As of October 29, over 400,000 Minnesota absentee ballots had not been received by election officials.
Montana (MT)	Absentee ballots – Democratic victory: Federal judge <u>rejected</u> lawsuit from Trump Campaign arguing that Montana's plan to grant counties right to run elections by mail is unconstitutional. The Ninth Circuit Court of Appeals <u>affirmed</u> the lower court's decision.
Nevada (NV)	Absentee ballots – Democratic victory: Federal judge <u>rejected</u> Trump Campaign lawsuit challenging state decision to send mail-in ballots to voters.
New Jersey (NJ)	Absentee ballots – Democratic victory: Federal judge <u>rejected</u> Trump Campaign lawsuit challenging state decision to send mail-in ballots to voters.
	Absentee ballots – Democratic victory: Federal judge <u>rejected</u> Trump Campaign motion for preliminary injunction against new state rules allowing state to accept absentee ballots without postmarks for up to two days after Election Day.
North Carolina (NC)	Absentee ballots – Temporary Republican victory: Federal judge <u>issued</u> a temporary stay blocking North Carolina's Board of Elections' decision to allow absentee voters the chance to correct certain ballot issues without filling out a new ballot. Judge's final decision is pending.
	Absentee ballots – Democratic victory: Fourth Circuit Court of Appeals <u>affirmed</u> North Carolina's decision to count ballots received up to nine days after Election Day as long as they are postmarked before November 3.
Pennsylvania (PA)	Absentee ballots – Democratic victory: Federal judge <u>rejected</u> Trump Campaign motion for preliminary injunction to disqualify Pennsylvania's plan to have drop boxes for mail-in ballots.
	Absentee ballots – Democratic victory: US Supreme Court declined to review Pennsylvania's plans to count absentee ballots three days after Election Day, even without a postmark.

Yellow = Pending | Blue = Democratic Win | Red = Republican Win