

THE STORM THAT MIGHT BLOW AWAY DEMOCRACY

How Trump May Throw Everything At This Election To Stop It

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I. Introduction: The Coming Storm¹

You don't really understand how presidential elections work. Almost no one does. Although elections are a semiannual feature of our democracy few comprehend the mechanics of how they work, or even pay attention. For many, a Presidential election cycle is simple: there are campaigns and debates, people vote on or before the first Tuesday after the first Monday in November, we all find a television to watch that night, and then the inaugural folderol rolls around two and a half months later. Ta-da!

But there is a *lot* that happens before election day, and even more after. Actually, it is wrong to talk about "election day." Perhaps even dangerous for it makes us think this is a one day event or that it ends on that day. Oh no. We have an election *process* that unfolds over months. Think of election day as a stake that anchors what comes before, and starts the process for what comes after.

Many administrative and ministerial tasks precede election day and still others must be completed in the 78 days between this year's election and the January 20, 2021 inaugural. Each of those steps has the potential for challenges, disruption and confusion or failure.

In normal election years these processes are (relatively) smooth and proceed without disruption or challenge. The reason for that is the one key event that is neither in the constitution nor required by law: the losing side concedes. That concession stops the losing campaign dead in the water and allows the remainder of the process to unfold to conclusion without upset.

This is not a normal year.

Trump, it is reported, will never concede.¹

Numerous articles report that the Trump campaign is gearing up for legal and other challenges to voting results it does not like and therefore does not accept.²

This paper is for those interested in knowing what conflict is or may be coming in the runup to and especially the 78 days between November 3, 2020 and January 20, 2021.

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II. Background: The Republican's Demographic Cliff

But first, let's lay a foundation of where the two national parties are headed.

Let me be blunt. The Republican party on the national level is headed for oblivion. Its demographics are not a path to future victories. As many have pointed out, that has not stopped the party from successfully managing to govern as a minority in the last quarter century, twice securing short-lived majorities in the House of Representatives, holding a thin majority in the Senate most of those years, and electing a President three times despite losing the popular vote in two of those elections.³

The party was self-aware of this after the 2012 election, when Mitt Romney's lopsided loss to President Obama came as a surprise. The party engaged in serious introspection and even published a report called an "Autopsy" on what it needs to do. "Republican leaders on Monday offered a sweeping self-critique of a party they said was in an 'ideological cul-de-sac' and needed better outreach and a new brand of conservatism to appeal to younger voters, ethnic minorities and women."⁴

Mr. Trump has not taken the party in that direction. Instead he has doubled-down on the strategy of energizing what he sees as his base, but not in expanding his appeal or expanding the electorate.⁵

This problem, as the 2013 "Autopsy" recognized, is that the party is not growing its electorate as the country itself grows, and certainly not in the places and demographic groups that are growing fastest.

This affects electoral turnouts. The party has won a plurality of the popular vote on the Presidential level exactly *once* in the last *seven* national elections. Nevertheless in two of those – 2000 and 2016 – the Republican candidate won anyway because of the peculiarities of the Electoral College, about which more (much more) later. But a deeper look also shows the number of voters who choose the Republican candidate is not growing appreciably. In the last four elections the Republican candidate has received essentially the same number of votes – 60 million give or take 2 million (a variability of +/- 3%).⁶ The overall trendline is flat, not upward, as is true for the Democratic candidates.

Democrats show greater variability, but an overall upward trend in the number of votes. Simply put, Democrats win when they got a lot more votes over a Republican

base. Except in 2016. Let's look at why.

2016 reveals a problem for Democrats – Clinton got more votes, but not where she needed them. No-shows in key states swung the outcome in the Electoral College to Trump, who ended up winning in Michigan, Pennsylvania and Wisconsin by razor thin margins. In total he won those three states by just 77,744 votes out of nearly 14 million cast in those states (a margin of 0.5%), giving him the extra 46 electoral votes he needed to win.

It is no coincidence that those three states enacted laws designed to suppress registration and turnout among predominantly Democratic voters and districts, including strict voter ID laws, limiting polling places, and removing voters from the polling lists. Voter ID laws are the single best weapon Republicans have used to suppress opposition votes. A 2014 study by the Government Accountability Office found that requiring an official government identification instrument would exclude a disproportionate amount of voters who were: under 24 years old, newly registered, or were Black (but not other BIPOC).⁷

Republicans lawmakers know this and occasionally stray from the party line of “fighting voter fraud” to “we can eliminate some young and black voters!” For instance, in Pennsylvania a Republican state legislative leader crowed about the passage of a strict voter ID law there before the 2012 election, “Voter ID, which is going to allow Governor Romney to win the state of Pennsylvania: done.” A similar remark was made by a legislator in Wisconsin when it adopted strict voter ID requirements. “And now we have photo ID, and I think photo ID is going to make a little bit of a difference as well.” Asked if that would make a difference in a close race, he was even more candid: “I think we believe that, insofar as there are inappropriate things, people who vote inappropriately are more likely to vote Democrat.”⁸ Wisconsin reportedly removed over 300,000 “inappropriate people” from the voting rolls with that law in 2016, and Trump then won the election there by 22,748 votes.

In short, voter suppression works, the Republicans pay no price for it, and it defeated Clinton.⁹ As one writer described this Wisconsin numbers shift: “Wisconsin tells the same numbers story, even more dramatically. Trump got no new votes. He received exactly the same number of votes in America's Dairyland as Romney did in

2012. Both received 1,409,000 votes.¹⁰ But Clinton again could not spark many Obama voters to turn out for her: she tallied 230,000 votes less than Obama did in 2012. This is how a 200,000-vote victory margin for Obama in the Badger State became a 30,000-vote defeat for Clinton.” 230,000 fewer votes in 2016 looks surprisingly similar to the 300,000 people disenfranchised by voter ID.

Thus it is increasingly clear that Republicans cannot win on the national level if everybody who wants to vote does so and those votes get counted. Thus their strategy this year is increasingly clear: prevent Democratic leaning voters from being registered; if registered from voting; if voting from being counted.

And most of all, never, ever accept a result from a state that does not favor Trump if you can help it. Keep the contest going, sow confusion and doubt, and delay, delay, delay.

How and when to do that is the focus of the remainder of this paper.

III. How elections work: Their Architecture and Engineering

So much of our electoral architecture and engineering is little understood and followed. These are the steps for a vote to lead to an inauguration

- > **Register.** The voter must register to vote.
- > **Get a ballot.** The voter must get a ballot on or before election day, either by receiving a mail ballot or going to a polling place.
- > **Fill out the ballot.** Complete the ballot and return it in person, by mail or at a drop off box, on or before election day.
- > **Count or “canvass” the ballots.** Each ballot must be counted; this is known as the “canvass.” Votes cast in polling places are automatically tallied and sent electronically (mostly) to a central county registrar on election night. Counting mail ballots is much more onerous and time consuming because it is done in several steps by hand (and eye). Check the postmark; check that the voter filled in every square or line correctly (e.g., print your name on one line, sign on another); check the signature; check for the internal security envelope; discern how the person voted; record that vote on a tally. For most states that process cannot by law

even begin until election day, or even after.¹¹

- > **Certify the county result.** Each county's results are tallied and certified by a date certain.
- > **Certify the state outcome.** The counties' tallies are toted up and the Secretary of State certifies the state result by a date certain, usually 30 days after election day, in early December. This and the next step are where you should look for challenges by Trump, who will claim "fraud" and try to prevent an adverse result from turning to cement.
- > **Certify the Electors.** In all but two states, the statewide results for President result in the Governor using the Secretary of State's certification of the vote to certify which candidate's slate of Electors has been chosen to cast all of that state's votes for President and Vice-President in the Electoral College.¹² That certification is sent to the Congress. If completed by December 8 this year, the results are conclusive; if not Congress may reject a slate of electors.¹³
- > **The Electors vote.** The certified slates of electors gather this year on December 14 in their state capitols to actually cast their votes: one for President and one for Vice-President.¹⁴ Per a recent Supreme Court ruling, the electors can be required to pledge their fealty to their slate's candidate, and can be punished for breaking that pledge and becoming "faithless electors."¹⁵
- > **The votes are transmitted.** The electors' votes and the final tally are sent to Washington DC to the President of the Senate (aka the Vice President) and the National Archives.
- > **The new Congress is seated.** Based on each state's separate results for Congressional races, the new members of the House and new and returning Senators are sworn in on January 3, 2021.
- > **The states' votes are opened.** On January 6 the Vice President, in the presence of all members of both houses, opens each state's envelope in alphabetical order and reads the result aloud. Any state's electors can be challenged by a written challenge signed by at least one member of each

House.

- > **The votes are accepted.** The state's votes are accepted and not subject to a challenge signed by at least one member of each House. If after any challenges have been decided candidates for President and Vice-President each have 270 or more electoral votes, that is when they are actually elected. The outcome on November 3 is interesting but not controlling. This is.
- > **No winner.** If no one reaches 270 votes, the decision on who will be President and Vice President goes immediately to the House and Senate, respectively.¹⁶
- > **The House picks the President.** If the House is voting for the President, it is done by states, not members, each state receiving one vote. Which party controls the most members of the state's elected delegation determines how the one vote is cast. States with equal representation can cast no vote or one-half vote for two candidates. The first to secure 26 states' votes is elected President.
- > **The Senate picks the Vice-President.** If the Senate is voting for Vice-President all Senators get a vote and the first to secure 51 is elected Vice-President. Running mates mean nothing – the Vice President need not be from the same party as President.
- > **What if it fails?** If the process does not result in an elected President by January 20, the current President's and Vice President's terms end at noon, and the newly elected Vice-President becomes acting President until the House chooses someone. If the Senate has also failed to elect a Vice-President, the Act of Succession devolves the Presidency to the next person on the list, currently the Speaker of the House.¹⁷

EVERY ONE of those steps is subject to interference, obfuscation, delay and litigation. And may well be.

IV. This election: The Gathering Storm Clouds

Republicans have an admittedly weak candidate. The polling is not good for

Trump.¹⁸ Yes, it was also bad in 2016 and he eked out a win. The numbers are worse for him this time, and not just in the familiar battleground states; states he won handily in the south and west are increasingly coming into play.¹⁹

This is unsurprising given that Trump has failed or refused to do what every incumbent before has done: expand their base of support. Normally polls showing an approval rating below 50% is a death knell for re-election. His support has not grown in his three and half years in office. And it has remained static throughout the 2020 election cycle, hovering just over 40%. He has made it clear he has no intention of doing anything different than what he did 4 years ago (“it worked”), but he has also offended what were parts of the Republican base, including older voters, suburban women, current and former members of the military, many establishment members of his party, and suburban voters.²⁰

Therefore the path for victory for him is not about attraction but subtraction: suppress as many votes as possible at every step of the process, contest any close contest, stop vote counts where he is ahead on election night, and if need be cause chaos in the choosing, voting, canvassing and announcement of the Electoral College votes in the eventual hope of sending the election into the House where, if nothing changes, there are 26 state delegations where the Republicans hold the advantage (Democrats have 22, and two are basically tied). In any case the composition of the *newly* elected House will decide, not the current one. Speaker Pelosi is working hard to try to flip at least one delegation to deprive the Republicans of 26 states’ votes.²¹

In the face of these long-term and immediate difficulties, the Trump campaign’s playbook for victory apparently includes the following instructions. It is, as all campaigns are, a multi-step plan with interlocking actions and actors. In the end however, we can discern several themes.

First, prevent as many votes as possible from being cast. The standard messaging is to “prevent fraud”, a claim that has been debunked so often that even the New York Times Magazine put it on the cover: “The Attack on Voting; How President Trump’s false claim of voter fraud is being used to disenfranchise Americans.”²² And, as we saw above, even Republican legislators have sometimes incautiously blurted out the truth, that things like voter ID laws are designed not to prevent fraud but rather to

prevent votes by targeted (Democratic) supporters.

Second, for those who do vote, sow confusion and doubt about any unwelcome outcomes, for instance where Mr. Biden is winning, and *anywhere* Trump is winning but there are still votes to be canvassed after Election Day that could shift the end result.

Third, build a narrative to support the legal or extra-legal effort to prevent a bad result from becoming final. Just as “voter fraud” is completely fictitious, so too arguments about voter integrity, voting irregularities, voting rules, or whatever comes out of the lawyers’ mouths, the goal is not to win the legal or policy issue at hand. Rather it is just to keep the unwelcome result from hardening into reality.

Fourth, if all else fails, create confusion and prevent a final result through the electoral process to produce a profoundly undemocratic result in which the final decision makers of the election are not the voters. Rather it will fall instead to the new members in the House of Representatives or to the eight, soon to be nine, justices of the Supreme Court of the United States, certain that the latter will be controlled by conservative operatives, and hopeful the former will remain so (if you count by states and not members).²³

With all of that table setting complete, how that may unfold is the subject of the remainder of this paper.

V. The Present through November 3: Prevent Registration of Voters

Voter suppression by changing rules to decrease the total electorate – especially Democratic leaning constituencies – has been a well-known feature of Republican efforts for several years now. It is discussed above. It went into overdrive following the Supreme Court decision that overturned a law passed by bipartisan majorities for over fifty years, known as “Preclearance Approval” in the Voting Rights Act.²⁴ Originally passed in 1965 to remedy widespread practices and laws in mostly southern states to disenfranchise Black voters, the Act has been reauthorized continuously by bipartisan majorities. Its key provisions prohibited enactment of laws, regulations or rules that “that diminish the ability of citizens, on account of race, color, or language minority status, to elect their preferred candidates of choice.”²⁵ Simply put, section 5 prohibited discriminatory practices, and section 4(b) required that any state or

county with a demonstrated history of discriminatory practices not be permitted to adopt any changes in voting procedures without first seeking the approval of the United States Department of Justice Civil Rights Division.

The Supreme Court did not rule that the ban on discriminatory practices was itself unconstitutional but effectively “gutted”²⁶ the law by holding that the preclearance procedures were unconstitutional because the formula used to determine which jurisdictions were bound by them was outdated. The Court held, in effect, that racist actions to prevent Blacks and other BIPOC from voting were no longer a matter of concern; if such actions were a problem Congress would need to reenact the law with a new formula. The opinion’s author, Chief Justice Roberts, famously declared that we live in a post-racial society and therefore “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”²⁷ He therefore stepped around a declaration that a law banning racist procedures to deny votes to people of color was unconstitutional by declaring instead that it really didn’t happen (much) anymore because the law worked, rendering a law to prevent it no longer necessary. In her famous dissent in that case, the late Justice Ginsberg pugently wrote that “throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”²⁸

States instantly proved the Chief Justice wrong as they rushed to pass dozens, scores of new laws designed to do exactly that: disenfranchise Black voters at every step of the voting process, beginning with registration. As one appeals court memorably put it, North Carolina “target[ed] African-Americans with almost surgical precision” through a voter ID law.²⁹ Voter ID laws are the shining star in that tarnished crown. Another favorite is purging the existing voting roles of undesirable voters in the guise of removing the names of people who have died or moved away. Mail an innocuous and spammy-looking postcard to a registrant’s address asking if this is you; if it is not promptly returned with an affirmative response it results in automatic removal. Another way is simply removing the name of any voter who has not voted in recent elections. There is no notice to the voter who will be surprised if, having been either inattentive or a sometimes voter, appears on election day and finds they are no longer

welcome. Requiring this kind of repeated re-registration is an effective tool for removing voters more likely to vote for the opposition.³⁰

There is one enormous benefit to Republicans in erecting barriers to registration. A voter who is not registered no longer matters; no effort need be made to keep them from voting, or if they vote, keep their vote from counting. From a political standpoint, those voters also disappear as supporters for the opposition, and the vast majority of media covering elections will reflexively treat the missing voters as disinterested or discouraged, not as disenfranchised.³¹

But for most states, the registration period has now closed or soon will. Thus any pernicious acts are now baked in, so let us turn to the efforts to keep the registered voters from voting.

VI. The Present through November 3: Discourage Voting

It is no secret that Trump has been doing all he can to discourage voting, which is actually a first for an American President. According to the New York Times, “The strategy was now in full view: Flood every state, every television news network, every newspaper and news feed with manufactured evidence of fraud to suppress Democratic votes before Election Day.”³²

One means is Trump’s relentless attacks on mail-in voting (except in Florida – Trump says mail-in voting in Florida is OK. Oh, and it must be, because he and the First Lady have already voted by mail in Florida.³³) This strategy is in full view nearly every day – sometimes several times a day – and is no secret and needs no further citation.

However, this may actually hurt the President more than help. Recent reports say that Republican officials are increasingly worried that elderly voters, traditionally a mainstay of the Republican coalition, are listening to the President’s words against mail in ballots and planning not to vote by mail. They may not vote at all given the pandemic’s effect on in person voting, again especially for seniors, especially in Florida. “Republicans there have long depended on mail votes from the older, whiter parts of the electorate, and whose mail ballots have traditionally been accepted at higher rates than nonwhite voters. However, this year is different, perhaps due to

Trump's rhetoric around voting, University of Florida political science professor Michael McDonald said. 'The numbers in Florida really are eye-popping,' McDonald said. 'We have at this point in time, registered Democrats outpacing the registered Republicans in mail ballot requests by over 660,000 ballot requests.'"³⁴ In Wisconsin a statewide poll showed 55% of Democratic voters planned to vote by mail, while only 15% of Republican voters did.³⁵

On the other hand, this may be a clever bank shot; if mail ballots are skewing heavily toward Democrats but are not counted until after the election, it gives Republican campaign lawyers an easy way to identify which ballots should not be counted: the ones that arrive in the mail but have not been counted by Election Day. More, much more, on this later.

Another technique is aggressive "poll-watching." According to the Associated Press, "One of President Donald Trump's top reelection advisers told influential Republicans in swing state Wisconsin that the party has 'traditionally' relied on voter suppression to compete in battleground states. . . Justin Clark, a senior political adviser and senior counsel to Trump's reelection campaign, made the remarks on Nov. 21 as part of a wide-ranging discussion about strategies in the 2020 campaign, including more aggressive use of Election Day monitoring of polling places. 'Traditionally it's always been Republicans suppressing votes in places,' Clark said at the event. . . [I]n 2020. It's going to be a much bigger program, a much more aggressive program, a much better-funded program.'"³⁶ Other techniques from the past included posting false signs saying, in essence, "Due larger than expected voter turnout, the election will be held over two days, Republicans will vote on Tuesday, Democrats on Wednesday." Or having poll watchers aggressively challenge the eligibility of BIPOC voters who appear at the polls to vote in person.³⁷

These techniques are used for two reasons. First, they work. They are battle tested over decades. The Democratic National Committee sued their Republican counterpart in 1981 "to stop the RNC from engaging in certain practices at the polls." The DNC presented evidence "that in a New Jersey gubernatorial election, the RNC had sent sample ballots to communities of color, and then had the names for each ballot returned as undeliverable removed from voter rolls. Democrats also alleged that

the RNC hired off-duty cops to patrol majority-minority precincts, wearing 'National Ballot Security Task Force' armbands. These details were enough to secure a consent decree between the two party organizations and the court in 1982, stopping the GOP from engaging in such voter-intimidation practices. Except, Democrats alleged, they didn't stop. The consent decree was updated in 1987 after Republicans created a voter-challenge list of black voters from whom letters had been returned as undeliverable, with an RNC official saying that the list could 'keep the black vote down considerably.' The decree was modified again in 1990 after a court ruled the RNC had violated it by not telling state parties about its provisions, which had led to the North Carolina GOP sending 150,000 postcards to potential voters listing voting regulations, in an apparent attempt at intimidation. The GOP violated the court order again in 2004 after yet another voter-challenge list targeted black voters."³⁸ After 35 years, the court finally lifted the court order in 2018. That removal was cited by Trump advisor Clark in Wisconsin as the opportunity to unleash renewed Republican tactics.

Second, despite the New Jersey federal court order, Republicans have paid no price for employing these tactics.

Third, they serve perhaps a more important purpose in casting doubt on the election results. Trump and leading Republican election officials can hardly speak a word without using the phrase "voter fraud" in discussing the upcoming election. As the New York Times covered in exhaustive detail, allegations of voter fraud are entirely baseless (save for the Republican operative in 2018 in North Carolina who got caught doing exactly that – requesting hundreds of ballots for others, filling them out and mailing them in).³⁹ But the Times reports that repeating the phrase and the charges without the necessity of evidence provides the campaign with a ready excuse to engage in all manner of tactics designed to discourage voting in the name of preventing nonexistent fraud. Even US Attorney General Barr has taken up the cause and is threatening to discard the Justice Department's long standing policy of non-intervention in elections this year, citing "fraud".⁴⁰

Critically, all of these techniques usually operate largely in the dark, as the media cover the ballots of people who vote; they never cover the people who do *not* vote. Discouraged voters simply disappear into the large pool of people who do not

vote for whatever reason.⁴¹

VII. Election Day: The Storm Arrives (or Doesn't)

On Election Day watch for two things: direct voter intimidation, particularly in urban precincts and Democratic strongholds in the swing states, and physical impediments to voting in states controlled by Republicans. Again, a person who does not vote can be ignored and does not need to be challenged or overcome.

We've already explored using poll watchers for direct intimidation but a bit more background is useful. Poll watching is an integral part of the American electoral tradition. Individuals identified by the campaigns can designate someone to be present at the polling place, to observe the process and bring any irregularities to the attention of officials and campaign lawyers. Crucially, these poll watchers cannot approach or speak to any potential voter — only the poll officials. The poll watchers cannot engage in electioneering inside or near the polling place (even wearing a T-shirt or hat expressing a view is prohibited), and the persons doing the watching must have been vetted by and given an official designation by the campaigns and local election head — no freelance volunteers allowed.⁴²

Trump has already sounded his bugle call for poll watchers from among his supporters. "I'm urging my supporters to go into the polls and watch very carefully, because that's what has to happen," he said at the first (and only?) debate. This has reportedly caused election officials around the country to fear freelance poll watchers, perhaps armed, may appear at polling stations and disrupt the vote. "The concerns about potential polling place violence come at a time of immense stress for election officials, who are contending with how to run an election during a pandemic while also trying to reassure voters that the democratic process remains fair and transparent even amid the president's increasingly strident rhetoric about voting."⁴³ The report went on, "It's the self-appointed poll watchers — those who might show up at the polls unannounced — that have some people more worried. Trump added to those concerns Tuesday when he complained that his supporters were prevented from monitoring an early-voting site in Philadelphia, calling it a sign of 'corruption.' He failed to mention that the individuals had not been registered as poll watchers and that the location was

a satellite elections office, not an official polling site.”⁴⁴

Intimidation works even if it does not occur inside the polling station. “Chanting Trump supporters outside an early voting site in Fairfax County, Virginia, has also raised alarms.”⁴⁵ Both voters and poll workers reported “feeling intimidated.”⁴⁶ According to a party official at the site, “the Republicans are straight-up attempting to intimidate voters at the government center.”⁴⁷ In the past signs threatening dire consequences for unlawful voting can scare away people, especially if they fear contact with law enforcement or have limited English.

And it bears repeating, if someone approaching a polling place or in line changes their mind because the scene looks chaotic or unsafe, it eliminates that person from the process, and does so effectively invisibly. The media covers the ballots of those who vote; it does nothing to find out about registered voters who don't complete a ballot.

Second, physical impediments can discourage voting in disfavored precincts. The simplest is the one used in states such as Georgia and Ohio, of placing many more voting stations in Republican districts than Democratic, leading to enormous lines in the latter. What parent of a toddler, what working person eager to get to work, doesn't lose some of their urge to vote when they see a line stretching for blocks and find out it may be hours before they can enter?

Similarly, “Texas's governor, Greg Abbott, issued a proclamation extending early voting in the state and allowing voters to return their mail-in ballots in person before election day. But after some of the state's largest, and most Democratic counties announced they were setting up multiple locations for voters to return their ballots, Abbott issued a second proclamation only allowing counties to return their ballots in one place. The decision most severely affected Harris county, which is nearly 2,000 square miles, and planned to offer 12 drop boxes for its 2.4 million voters. Now, it only has one. The county is also home to a sizable chunk of minority residents; 20% of the county is Black and 43% are Hispanic.”⁴⁸

Last, mail in ballots can be subject to interference, both in the receiving of the ballot by the voter and its timely return to the election office. Every state has different rules on when mail ballots can be counted, and whether they can be counted after

Election Day as long as they were received by Election Day.⁴⁹

Trump's ceaseless efforts to denigrate mail in ballots has been unique. No high level political candidate has ever attacked a method of voting as systematically as Trump. Again of course there are two reasons for this seemingly contradictory strategy, contradictory because it also suppresses Republican votes. As discussed below and mentioned above, the effect is changing as the voters who use mail ballots is changing. But second, it provides the most potent course to file legal challenges to when and how the votes are counted after election Day, discussed below.

But there is apparently a physical impediment being unleashed this year against mail voting, as Trump's appointees did not follow their own procedures for hiring a new Postmaster General. They installed not a seasoned postal worker but a campaign contributor who immediately began to dismantle part of the Post Office's mechanisms processing of mailed ballots, apparently threatening to reduce the number that will be received by election officials on time. The New York Times reported, "The Postal Service on Friday announced a substantial reorganization meant to increase efficiency as Democratic lawmakers demanded an inquiry into whether changes by President Trump's postal officials could threaten the effective use of mail-in ballots for the November election. Louis DeJoy, the postmaster general and a major donor to Mr. Trump's campaigns, was named to oversee the service in May. On Friday, he shifted top personnel, including some decades-long veterans of the Postal Service, and made changes to its organizational structure."⁵⁰ Since that article there has been considerable backsliding, a congressional hearing and Mr. DeJoy's changes in positions and professed fealty to prioritizing ballot delivery. But (as with other forms of interference with registration and voting) we will likely never know what happened to all ballots, save anecdotally. Because whatever stories may appear about ballots gone missing will quickly be forgotten as the news pack moves to the next phase, to which we now turn.

VIII. Post-Election: Election Day to December 6: Mail Ballots

The two issues to watch for starting the day after the election are how ballots are counted, and what happens to mail ballots that have not yet been counted. The goal

for Trump's campaign will be to repeat the Republican goal in Florida in 2000: if Trump is ahead in counted ballots as of November 3 in a state, lock that down and prevent any more counting. If he is behind, cast as much doubt and confusion on that result as possible, hoping to use that confusion later. In both cases mail-in ballots will be front and center. And they will be huge. A WaPo state by state survey revealed that almost 200 million eligible voters – 84% of all voters – can vote by mail this year.⁵¹

Mail ballots used to be a method that slightly favored Republicans. Their larger slice of the more elderly voters, coupled with those voters' preference for taking care of voting from home and avoiding the hassle of lines and waiting at polling places, meant mail ballots reliably gave Republican candidates a slight edge. For instance, in California where anyone can request a mail in ballot (or even register to receive a mail in ballot in every election), seniors and Republicans did so in greater numbers. It was a standard trope when watching election returns for California that the first results reported from most counties were the mail in ballots that were counted starting on Election Day morning, so many of them were in the can while everyone else was out voting in person, whose results would come in until after 8:00 p.m. But overall, according to a Stanford report in June, voting by mail did not normally skew to either party's benefit.⁵²

A. The Red Mirage and The Blue Shift

That began changing in 2000. With changes in the voting processes post *Bush v. Gore* and Florida, many more voters chose to vote by mail.⁵³ There was not a demonstrable shift in *who* voted by mail, but there was a noticeable shift in *when and whose* mail ballots got counted, before or after Election Day. A study by two professors on this phenomenon found that the canvass of votes after Election Day changed. First, the after count got much bigger as more people used mail ballots. Second, it – the after count, not the use of mail ballots overall - began to shift to shift toward Democrats. While no definitive reason was found, there is the suggestion that highly populated counties have more ballots and hence take longer to process them all, and provisional ballots – ballots cast at a polling place but for one reason or other have to be checked – come from urban areas, young people/new voters and low income voters.⁵⁴ These demographics skew to blue.

Trump misinterprets this to mean that more mail ballots are Democratic and *ipso facto*, they are bad. Trump announced on Fox News that if mail ballots were universal it would lead to “levels of voting that, if you ever agreed to it, you’d never have a Republican elected again.”⁵⁵

What is really going on is known as the “red mirage” and the “blue shift.” The red mirage is when the Republican candidate appears to be winning based on the count of votes cast on election day (either in person or by pre-counted absentees). The blue shift is the change in respective percentages as all the ballots are counted, including all the mail-in and provisional ballots, so that the Democratic candidate slowly catches up and surpasses the Republican.

For an example of just the blue shift, in 2012 Obama’s margins grew in swing states as mail ballots were counted: Michigan (60,695), Florida (27,281), Ohio (60,695) and Pennsylvania (26,146). He had already won those states, but compare that phenomenon to Clinton four years later, where the shift was not enough to overcome Trump’s Election Day counts in those states.

For an example of the red mirage, look at Florida in 2018. The Republican candidates for Governor and US Senate appeared to be winning on election night based on same day voters, but their margins slid fast in the six days after election as the mail ballots were tallied. The Governor lost 18,000 votes from his margin and the Senate candidate lost over 20,000 votes from his margin. While both won, the daily slippage was terrifying to Republicans. What’s important is the lesson that Trump took home. Ballots on Election Day should count; those arriving on time but counted later should not. He tweeted, “ballots massively infected. Must go with Election Night.” Thus developed his clear strategy for 2020: only the ballots counted by election day are valid. The game is not to win the legal argument, it is to provide cover if needed to discard the eventual results to prevent “fraud.”

An example of both phenomena is in Arizona’s US Senate election the same day. Republican McSally was ahead by 15,402 votes on election night, but a massive blue shift led the Democratic Synema to eventually win with net gain of 71,303 votes after all ballots were counted.

And perhaps the most salient example is one few talk about today, Sen. Kamala

Harris's first run for statewide office for California Attorney General. Her opponent Republican Steve Cooley was ahead on election night, enough so that he declared himself the winner and scheduled a victory presser for the next morning.⁵⁶ Not so fast Steve. He cancelled the presser, and as ballots were slowly counted and county officials trickled in their tallies in all 58 counties, his lead began to slip. It took a full 30 days to count them all and have finalized or "certified" results from the counties. Harris slowly crept ahead and finally won by 74,157 out of 9,647,276 total votes, a margin of 0.7%. Without the blue shift the Democratic Vice Presidential nominee's political rise would have ended.

We should expect that the blue shift will be particularly large this year. Due to Trump's relentless messaging Republican voters are now shunning mail ballots they once embraced.⁵⁷ In Georgia, a poll shows that 60% of Democrats plan to use one while only 28% of Republicans will.⁵⁸ In Pennsylvania and North Carolina Democratic voters have requested hundreds of thousands more mail ballots than Republicans.⁵⁹ And as we have already seen, in Wisconsin a statewide poll showed 55% of Democratic voters planned to vote by mail, while only 15% of Republican voters did.⁶⁰

The difference is not only among who is requesting the ballots but also at what rate those ballots are being returned. These facts are already alarming Republicans, particularly those in down ticket races reports the WaPo, "Of the more than 9 million voters who requested mail ballots through Monday in Florida, Pennsylvania, North Carolina, Maine and Iowa, the five battleground states where such data is publicly available, 52 percent were Democrats. Twenty-eight percent were Republicans, and 20 percent were unaffiliated. Additional internal Democratic and Republican Party data obtained by The Washington Post shows a similar trend in Ohio, Minnesota, New Hampshire and Wisconsin. Even more alarming to some Republicans, Democrats are also returning their ballots at higher rates than GOP voters in two of those states where that information is available: Florida and North Carolina." The report goes on, "The wide Democratic lead in mail voting so far has been the subject of urgent discussions among top GOP officials, according to people familiar with the conversations. The margins are 'stunning' — and bad news for Republicans up and down the ballot, said longtime GOP pollster Whit Ayres."⁶¹

The effect of this is to create a nearly perfect proxy for Trump campaign lawyers to identify hostile voters: simply attack ALL mail ballots. While this will of course reduce Republican votes as well as Democratic the effect will be disproportionately partisan. And remember: it's not the *total* that matters, it's the final percentage or ratio of the votes that are counted. Thus we should expect the following.

B. Challenge Mail Ballots, Massively With Legal Challenges

A campaign can attack mail in ballots in retail or by wholesale.

Retail challenges can occur as mail ballots arrive and are processed.

Republicans will target mailed ballots predominantly in urban counties where the votes lean toward Biden. "Republicans are also planning to wage a massive post-Election Day legal battle to challenge ballots that are missing witness signatures, or an outer envelope, or that arrive with no postmark."⁶² Challenges can be levied on each of these defects when the envelopes are opened and processed:

1. Did it arrive by the post-election deadline?⁶³
2. Does the postmark clearly show it was mailed on or before 11/3?
3. Is the envelope properly sealed?
4. Is the inner envelope that contains the ballot sealed and placed inside the courier package, or is it a "naked ballot"?
5. Is the outer envelope signed?
6. For those signatures: did the voter sign on the wrong line; does it exactly match the one on file; is the name identical (*e.g.*, use of a foreshortened first name such as Will for William or a missing or present middle initial); and, people's handwriting changes over the decades.

Any of these can lead to a disqualified ballot. Republican lawyers have already cataloged examples of these in a test run during the Pennsylvania primary.⁶⁴

Once processed, the ballots are separated from anything containing the voter's identity and are counted. Challenges to votes include:

7. Does the ballot reflect an unambiguous choice?
8. Are there any extraneous marks, such as crossed off or changed choice ("known as a spoiled ballot")

9. Was the right marker used (some require blue or black ink for machine reading)

Wholesale challenges will take the form of legal challenges to ballots, rules, and procedures. If you want to watch, watch for these. Trump and his campaign has already set in motion a plan to challenge all ballots that are counted after Election Day to try to wipe out the blue shift. The messaging is clear: they will claim that votes to be counted after November 3 (not received, but counted) are subject to “fraud” making any result unfair, unreliable, inaccurate. Please recall that the ultimate goal is to wipe out late-counted ballots but, barring that, sow confusion and doubt, and delay any final unfavorable decision as long as possible. The longer the count goes and the closer the margin the greater the incentive there will be to fight.

Those fights will occur on two fronts simultaneously, one legal and one, well, less so. Litigation will be the marquee, in trying to secure court orders to stop the count in a given precinct, county or state. This is what worked in Florida in 2000. The Bush campaign did not get courts to invalidate anything or any ballots. Rather, when the Gore campaign used Florida law to request recounts in specific counties where they expected it would harvest additional vote for Gore (recall that the margin in the original count was just 527 votes in favor of Bush out of 5,963,104 cast; their final totals were 2,912,790 to 2,912,253, with 138,061 for others, including Nader⁶⁵). Realizing the slimness of their lead, the Bush campaign adopted a simple legal goal: stop the recounts, everywhere. Eventually the Supreme Court did just that. The high court simply stopped the (re)count, saying there was no longer time before the December naming of the state’s electors (having built in that delay by issuing a preliminary injunction the week before to stop the recount while they considered, well, whether to stop the count – it must be nice to be a Supreme).

There is no need to relitigate that election, but neither can we, as the late Justice Scalia repeatedly said, “get over it.”⁶⁶ The grounds on which it ruled are important. They did it, they said, to protect the credibility and integrity of the “winner” even while acknowledging that there remained “undercounts” – that is *valid, legal ballots that had not yet been counted*.⁶⁷ But, they ruled that recounting in only some counties was unconstitutional. What part of the US Constitution did this offend? Why as every

lawyer knows, its most expansive, flexible and vaguest of grounds: the equal protection and due process clauses of the 5th and 14th Amendments. In brief, ballots in counties not being recounted were treated to less due process than those that were already counted and certified; therefore voters in non-recount counties were receiving something less than equal protection.⁶⁸ It is not worth debating whether that makes any logical, let alone legal, sense. Indeed the Court itself said, despite its role as the final arbiter of The Law to establish precedent, that this case was a one off. The (unsigned) majority opinion stated: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” That is judicial speak for “we are making this up and don’t hold us to it.”

That is also an open invitation to use the same concepts of “due process” and “equal protection” to challenge future election results (or more correctly, election rules and procedures that are producing an undesirable result).

Therefore expect legal challenges everywhere citing *Bush v. Gore* and claiming election integrity and credibility, along with due process and equal protection *for election day voters*.

C. Prevent The Counting of Mail Ballots

In addition to the legal challenges, expect more forceful attacks on the ground. For the playbook from Florida 2000 also contained a different chapter: physical disruption of the recounts. In Florida’s most populace county, Miami-Dade, the recount was underway. Joe Geller was the county’s Democratic Party chairman and went down. “But when he arrived, he found the lobby and elections office filled with several dozen protesters — many of them in suit jackets and button-down shirts. Geller had walked into the ‘Brooks Brothers riot,’ a protest organized by Republican campaign operatives, congressional staffers and lawyers. When Geller asked election officials for a sample ballot to test his voting machine theory [about ballots], the GOP operatives suddenly surrounded him, accusing him of stealing ballots to try to influence the election, he told The Washington Post in a telephone interview this week. ‘This one guy was tripping me and pushing me and kicking me,’ recalled Geller, who is now a state legislator. ‘At one point, I thought if they knocked me over, I could have literally got stomped to death.’”⁶⁹

That riot was organized by none other than Roger Stone (yes THAT Roger Stone) whose sentence for lying to Congress was commuted by Trump this year on the eve of his heading in for a jumpsuit fitting. Two take-aways from that event. First, it worked. There is bipartisan agreement that the melee prevented the election officials from timely completing their recount, the major reason the Supreme Court stopped the recount – there wasn't enough time left. Second, while that disturbance was by decorous well clad lawyers, this year they can stay in their offices, because imagine what it will look like with Trump's supporters bearing their Second Amendment regalia. They are already standing back and standing by. The WaPo reports "that the president's words had prompted the founder of a neo-Nazi website to post 'I still have shivers' and that 'He is telling the people to stand by. As in: Get ready for war.'"⁷⁰

It is not at all clear that local police in jurisdictions under seige will view them as problems or as allies and will not interfere. In Portland, Oregon police stood by with right wing militias in the streets. In Kenosha, Wisconsin an armed killer openly displaying a weapon was welcomed into their ranks AFTER shooting two people. At the Michigan statehouse this spring, armed "militia" (aka domestic terrorists) carried assault rifles to parade through the state capitol building to protest – masks.

Expect attacks against poll workers and registrars. While the Second Amendment zealots are physically threatening counts, the First Amendment zealots will be busy at their keyboards. Public officials will be hunted, doxed and driven out. Already in response to the COVID pandemic, states have lost over 50 public health leaders due to death and other threats just for issuing public health orders about masks, distancing and closing businesses that spread virus. "Vilified, threatened with violence and in some cases suffering from burnout, dozens of state and local public health leaders around the U.S. have resigned or have been fired amid the coronavirus outbreak, a testament to how politically combustible masks, lockdowns and infection data have become."⁷¹ Imagine if the stakes are not just wearing a mask or being able to go to the local tattoo parlor, but the Presidency.

Remember that the ultimate goal is confusion and delay, to force county registrars to certify incomplete totals before the blue shift overtakes the red mirage, and then force the Secretary of State to certify the final state results. Or, depending on the

strategy, not be able to finish the count and certify it at all. In Florida in 2000, it worked.

Now it is time we move away from you, the voter's, role in the election. Once those votes are finalized and certified (or, perhaps because they are not), your role recedes as other and different actors and institutions come into play. These are the steps that are normally purely ministerial and paid little attention to. Pay attention.

IX. After the Ballots, Choosing the Electors: December 8 - January 6

Welcome to the arcane world of the Electoral College. Good or bad, an instrument of slavery or not, fair or unfair, these are all beyond the scope of this paper. This paper merely looks at how it works, and can be made not to work.

Basic civics class, please get out your notebooks. Everyone knows two important numbers: 538 and 270. The first is a popular election website; the second is atop every vote counting app that allows you to allocate states' votes. Where do they come from?

538 is derived from the total number of members of the House of Representatives that each state has (435), plus the two senators (100), plus the three electors allocated by a special constitutional amendment to the District of Columbia; each state gets one elector for each Representative and Senator.⁷² Hence California gets 55 while at the other end seven states and DC each get the minimum three.

270 is 538 divided by two, which would be a 269-269 tie, so the winner needs to get 270 electors' votes to win. It's just arithmetic.

In each state (save Nebraska and Maine), electors are allocated in winner take all style – whomever receives the certification as the top vote getter in a state gets *all* of that states' electors. This is not constitutionally required. It is simply what 48 states and DC have enacted by laws. The Constitution gives each state the power to appoint electors, "in such manner as the Legislature thereof may direct."⁷³ We shall circle back to this in a moment.

The key date is December 8, the "safe harbor" date. Electors certified by a state by then are guaranteed to have their votes be "conclusive" and accepted and counted by Congress.⁷⁴ For electors appointed after that date, the decision on what electors to

accept, or none at all, will fall to the new Congress; there is no provision of law explaining how they make that choice, other than each House meets and votes on whether and which credentials to accept.⁷⁵

Therefore, for Trump the goal will be to challenge any slate of electors that threatens to vote for anyone but Trump. As with the vote counts, there are several kinds of challenges that will appear.

First is by litigation. Again, any challenge will be based on fairness, inaccuracy, fraud, credibility for the eventual victor, due process and equal protection. The challenge will be directed at the Governor (who does the official certification of the electoral slate) and the Secretary of State (who certifies the vote count the Governor uses to do the appointing).

Do not foreclose the possibility that here the United States Department of Justice may bring its considerable legal weight and firepower to the aid of the Trump campaign, ostensibly as a neutral yearning for the Rule of Law. Hogwash. This Department of Justice under William Barr is the most thoroughly politicized arm of the White House in living memory (unless your memory extends back to President Nixon and Attorney General Mitchell). Don't believe me. Over 2,000 former members of the Department of all partisan and nonpartisan stripes, of every age, shape and color, signed an open letter demanding his resignation for doing Trump's bidding in cases.⁷⁶

Any litigation strategy by the Trump campaign has but one end point: the Supreme Court. That is one reason Majority Leader McConnell made an exception to the rule that all Senate business must be stilled until the pandemic stops ravaging Senatorial offices: confirming Amy Coney Barrett to the Court. Every vote counts.

While that Court may choose not to take an active role in turning the election from a choice amongst some 140 - 150 million people into a vote of just nine, I would not place money on that side of the bet. The current court is a far more partisan court than even in 2000, with five of the nine appointed by Republican Presidents using explicitly political criteria handed up by the Federalist Society, with a mission and a purpose to carry out a legal agenda of deeply conservative roots and activism, to turn back all inroads and limitations on corporate and Republican power.⁷⁷

Second, a challenge may come by simple delay. If the electors are not chosen

by December 8, their credentials by definition are suspect and may not be accepted by Congress. Conversely, it appears by statute that if the electors are not appointed by that day, “the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”⁷⁸

This is not that odd. While every state since 1876 by law appoints its electors according to the certified election results, the Constitution nowhere requires this. Rather, the Constitution simply says, electors shall be appointed “in such Manner as the Legislature may direct.”⁷⁹ Trump campaign officials are reportedly already meeting with state legislators in key states where Republicans control both houses to explore the idea of the Legislature removing the voters’ choice if they have made an unfortunate choice and appointing the electors themselves, unbothered by popular sentiment.⁸⁰

The idea surfaced in Florida in 2000. While everyone else was dancing in the Supreme Court, the state legislature was working with the Governor (and President-elect’s brother) to discard the election results as “incomplete” and therefore invalid, and directly appoint the electors. They were within one day of doing so when the Supreme Court ruled and Gore conceded.⁸¹ The Supreme Court tossed its head in that direction in the opinion in *Bush v. Gore*, slyly indicating that if they didn’t stop the count the state “can take back the power to appoint electors” and appoint the Bush electors anyway; apparently it was best to have the popular vote appear to count for something if the legitimacy of the victor is an important legal principle.⁸²

Third, there could be a challenge by counter certification of a slate of electors. There is nothing to stop the slate of electors who feel cheated by the foolish voters from simply showing up in the statehouse on December 14, follow the prescribed procedures for casting and recording their ballots and send them off to Congress, addressed to the President of the Senate.⁸³

While those procedures are arcane and spelled out in great detail in the Electoral Count Act in sections 6 through 11, it appears that they are to be driven by the “Executive” of each state, which means the Governor. However, if the slate of electors has not been made by December 8, the Governor’s choice is no longer conclusive on the Congress under section 5, and the new Congress may choose to

accept the competing slate's votes under section 15.⁸⁴

Usurpation by the legislature of the electors instead of the voters is neither trivial nor arcane. Currently, 6 battleground states, including Arizona, Florida, Michigan, North Carolina, Pennsylvania and Wisconsin have Republican majorities in both houses. Arizona and Florida have Republican Governors too, if additional cover is needed, perhaps by the Governor refusing to certify the slate of electors on time, tossing the ball to the legislature. In the states with competing party control of the legislature and Governor's chair, it could result in one slate of electors appointed Governor, another by the Legislature.

This possibility is being actively discussed within the Trump campaign and with local lawmakers. "The push to appoint electors would be framed in terms of protecting the people's will. Once committed to the position that the overtime count has been rigged, the adviser said, state lawmakers will want to judge for themselves what the voters intended. The state legislatures will say, 'All right, we've been given this constitutional power. We don't think the results of our own state are accurate, so here's our slate of electors that we think properly reflect the results of our state,' the adviser said. Democrats, he added, have exposed themselves to this stratagem by creating the conditions for a lengthy overtime."⁸⁵ Note the use of the term "overtime." This is the beginning of trying to make it seem as if all voting somehow must stop on election day, even for ballots received before then. That has never, ever been the rule. Election tallies you see on election night are *always* tagged as "provisional." But the messaging will be that all votes counted after election night are bad. In other words, "if you try to take the time to count every vote you are responsible for us having to ignore the result of that count."

While this skirmishing may be going on, we can finally discard all attention to voters. They fade from attention except as a talking point about "upholding the will of the voters. As I perceive that will." We now heave onto the next milepost. Direct your attention to Congress.

X. Congress Hears the Challenges and The Votes: January 6

The new Congress is sworn in January 3, 2021, consisting of all the newly or

reelected members of the House, and the elected and returning Senators.⁸⁶ After much formality and swearing to uphold the Constitution and picture taking they adjourn for refreshments and return on January 6. After the legal fights and street fights over who the electors are in each state, Congress becomes the new and final playing field.

The electors' tallies from the 50 states plus DC will have arrived (in six copies) to be deposited with various officials, the most important being the President of the Senate, also known as Vice President Mike Pence. As noted, some states will have delivered more than one slate. It's happened before, in 1876.

First, challenges to state electors and certifications of electors must be resolved. How disputes are settled is, well, murky. There is a statute, 3 United States Code section 15 that addresses it. It is written in 19th century prose, and election law experts agree it is, well, murky. The Vice President as presiding officer may decide to rule from the chair, ensuring an immediate uproar. But he is not the final referee; he is just one more player on the field, as Gellman put it.

Section 15 seems to say that each House retires to resolve all challenges, but both must agree to come to a decision. Mind you, this is the *new* Congress. No one expects control of the House to change. The Senate, of course is very much in doubt. Three outcomes are possible. First, Democrats succeed in securing 51 Senate seats. If they do, all disputes go to unified Houses and after much yelling, perhaps some walkouts, pushing, expressions of disgust and anger, they will accept the Democratic slates and Mr. Biden will be chosen. Second, the Republicans manage to hold onto their majority and chaos reigns, with the likely result being that no slate of electors is accepted from the disputed slate. Thus would an entire state's electorate be rendered a nullity. Third, the Senate is perfectly balanced at 50-50, in which case the Vice President (remember him) steps in as the tie-breaking vote to choose the slates that chose him, and again chaos reigns.

The latter two scenarios are not unwelcome in Trumpworld. Let us go back to first principles: sow confusion and doubt, embrace delay, prevent the solidifying of any vote, result, certification or decision that is unfavorable. If need be, perhaps enough electors are challenged and discarded that neither candidate can reach that magic 270 votes.

I suspect we will know the projected outcome well before January 6. After all, by then we will have known the composition of the Senate for a month or more. Absent any similar conflicts and fights over votes in the states over their Senate races. But thank god there will only be a fight over the canvass of votes and nothing more.

After all challenges are resolved (or not), the votes of the final accepted electors are counted. The envelopes are opened for each state in alphabetical order by two clerks and the Vice President reads the result. If someone gets 270 votes it is over. If one or more states have been discarded, oddly their electors are still counted as among the 538 and therefore the winner still needs to reach 270 votes, because there is no provision for accepting the winner of a simple majority of the electors whose vote are actually counted.⁸⁷

If neither side gets the 270 votes, we move to our endgame, the floor of the House and the Senate.

XI. Endgame: January 7 - 20

If no one gets 270 or whatever majority is needed, the Constitution is clear. The President is chosen by the House, each state getting exactly one vote. The Vice President is chosen by the Senate, each Senator getting one vote.⁸⁸

The provision that each state gets one vote in the House brings in some new arithmetic. You now need to pay attention not just to who controls the House overall but who controls each state delegation.

Right now the current House state delegations have 26 states favoring Republicans, 23 favoring Democrats, and 1 split.^{89, 77, 78} That may change. The Speaker is working hard to try to flip at least one state delegation to deprive Trump of 26 states' votes.⁷⁹ At least one seat in Michigan seems to be a sure bet, giving the Democrats an 8-6 advantage.⁸⁰ One changed seat in Pennsylvania flips its delegation from Republican to Democratic.⁸¹ One in Florida makes it split. Alaska and Montana have one House seat each; while those are deeply red states, there is an effort to try to change either or both to Democrat for the first time in decades.⁸² On the other side, the Democratic Iowa delegation is at risk in possibly three seats.⁸³ You will need a spreadsheet and a head for numbers to follow all this.⁸⁴ But watch for enormous fights in these states if the results are close, Because it is not just about one House seat among 435; it's potentially for the Presidency.

Meanwhile, over in the Senate the fight is on for Vice President. The result is the same as that discussed above in dealing with state elector challenges. It's Harris if the Senate goes to Democrats by 51 or more (she gets to vote for herself, as she can resign to become Vice President anytime before until January 20). If the Republicans retain their majority or a tie, Pence wins (with him casting the deciding vote for himself).

So it is possible for the President to come from one party, the Vice President from another. It happened one time before. Adams and Jefferson ran for President and because of a quirk that was fixed by the 12th Amendment, the top vote getter became President, and the second Vice President. Adams came in first and Jefferson second (rather than Adam's running mate because of chicanery by Hamilton that was not rapped about in the musical).⁸⁵

Let's just say that did not work out well. For Jefferson. Adams refused to give

Jefferson any assignments, work, or even an office or so much as a desk.

XII. The election fails: January 20

If, heaven forbid, the House cannot elect a President because its delegations are split 25-25⁸⁶ two things can happen on January 20.

If the Senate produces a Vice President, that person becomes acting President until the House chooses a President.⁸⁷

If the Senate also does not produce a Vice President, the Act of Succession kicks in as it would any time there is a vacancy in the President and Vice-President. An acting President is sworn in.⁸⁸ First up on the list? The Speaker of the House, Nancy Pelosi.

One thing is certain however. The Constitution is clear that neither Trump nor Pence can stay if they have not been elected by the Electors or the respective Houses of Congress. Their terms “shall end at noon on the 20th day of January.” Period.⁸⁹ Power devolves to someone else who is sworn in. Stop worrying about that.

XIII. All this is informed speculation

No one knows of course what will unspool, or unravel.⁹⁰ But this report is informed by public and off the record statements by Trump and campaign officials.

This is merely a roadmap, a guide if you will to the coming events. Better to be informed and understand events as they come than to be caught unaware and trying to catch up. It should also help peek beneath the hood of the campaigns' competing statements and professed fealty to "protect the will of the voters" as they maneuver to do anything but.

For those who despair, there are two and only two ways to short circuit all of this.

One, Trump somehow finds his path to 270 electoral votes while losing the popular vote. Hey, it's happened before.

Second, Biden wins with such convincing clarity with a majority of votes on election night (just as Obama did in 2018 and 2012) that mail ballots only add luster to his victory, but aren't needed to decide it, and he won't lose if they stop counting. He needs, in short, an overwhelming victory.

Because remember, the Republicans are facing a dead end demographically. They have lost 6 of the last 7 presidential votes.

They probably cannot win if the election is decided democratically.

They have shown no unwillingness to resort to nondemocratic means to achieve the outcome of victory.

And there is nothing, absolutely nothing, Trump will not say, do or demand to get his way.⁹¹

Endnotes

1. By far the best article on this entire topic and the one receiving the most clicks is Barton Gellman's piece in the *Atlantic*, "The Election That Could Break America" with the subhead, "If the vote is close, Donald Trump could easily throw the election into chaos and subvert the result. Who will stop him?" This paper is heavily indebted to that article.

<https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/>

2. The Democrats are responding in kind, putting together a defense team. See, for example, in the *Washington Post* (WaPo) "Both parties prepare for possibility of contested election as chaotic White House race hurtles to a close". (10/8/20)

https://www.washingtonpost.com/politics/contested-election-2020-preparations/2020/10/08/49a58352-08af-11eb-a166-dc429b380d10_story.html

3. The Republican party's ability to gain a Senate majority from time to time will be unaffected by the demographic changes discussed below, due to the allocation of Senate seats by state rather than population. The Republican party has a built in advantage in getting to 51 seats because of the large number of Senators from solidly conservative states in the south, midwest and west. The party's ability to gain House majorities from time to time is due entirely to successful redistricting efforts in the states as the party also has had success in gaining majorities in state legislative houses and Governor's offices.

4. "Blunt Report Says G.O.P. Needs to Regroup for '16", *New York Times* (NYT), (3/18/13)

<https://www.nytimes.com/2013/03/19/us/politics/republicans-plan-overhaul-for-2016-primary-season.html>

5. A recent article showing he is going backward appeared in the NYT on October 9, 2020: "Trump's Struggles Ripple Across the Sun Belt, Endangering G.O.P. Stronghold – President Trump is fading nationally as he alienates women, seniors and suburbanites, polls show."

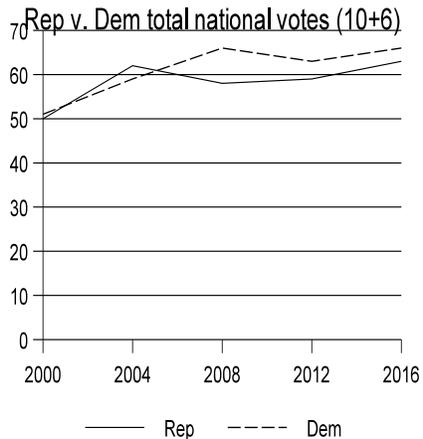
<https://www.nytimes.com/2020/10/09/us/politics/trump-biden-sun-belt.html>

6. The data are here:

Year	Republican	# of votes	Democrat	# of votes
2000	Bush	50,456,002	Gore	50,999,897
2004	Bush	62,028,285	Kerry	59,028,109
2008	McCain	58,319,442	Obama	66,662,039
2012	Romney	59,090,075	Obama	62,616,535
2016	Trump	62,979,636	Clinton	65,844,610

Earlier cycles are similar, but have the confounder of Ross Perot running in both 1992 and 1996. The 2000 election had Ralph Nader, who pulled in over 2,000,000 but it is difficult to know from whom, or anyone.

<https://www.infoplease.com/us/government/elections/presidential-elections-1789-2016>



7. <https://www.gao.gov/products/GAO-14-634>

8. “Republicans keep admitting that voter ID helps them win, for some reason”, WaPo (4/7/16).

<https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/>

9. “The Non-Voters Who Decided The Election: Trump Won Because Of Lower Democratic Turnout”, *Forbes* (11/17/16)

10. Actually, 1,407,966 in 2012 and 1,405,284 in 2016. But the point is the same – he didn’t move the needle on his side.

11. Interested in how each state counts mail in ballots? Point your browser: “How Quickly Will Your Absentee Vote Be Counted? A State-by-State Timeline” NYT (10/13/20)

<https://www.nytimes.com/interactive/2020/10/13/us/politics/when-votes-counted.html?action=click&module=Top%20Stories&pgtype=Homepage>

12. In 48 states and the District of Columbia, the winning candidate gets the entire slate of electors. In Maine and Nebraska the electors are determined for each Congressional District and the 2 statewide for the Senate.

13. 3 U.S.C. § 5.

14. Amendment XII to the United States Constitution.

15. *Chiafalo v. Washington* (July 6, 2020, No.19–465). See: “Supreme Court says a state may require presidential electors to support its popular-vote winner” WaPo (7/6/20)
https://www.washingtonpost.com/politics/courts_law/supreme-court-electoral-college-faithless-electors/2020/07/06/cf88f706-bf8f-11ea-b178-bb7b05b94af1_story.html
Faithless electors appear in almost every presidential election. In 2016 seven electors cast their votes for someone else; Clinton lost 5, Trump 2.
<https://www.infoplease.com/us/government/elections/presidential-elections-1789-2016>
16. Amendment XII.
17. Amendment XII. The Presidential Succession Act is 3 U.S.C. §§ 19, 21, 22.
18. Among many such articles, see, “The 10 Bellwether Counties That Show How Trump Is in Serious Trouble”. NYT (10/6/20).
<https://www.nytimes.com/2020/10/06/opinion/biden-trump-bellwether-counties-.html?referringSource=articleShare>
19. “Trump’s Struggles Ripple Across the Sun Belt, Endangering G.O.P. Stronghold – President Trump is fading nationally as he alienates women, seniors and suburbanites, polls show.” NYT (10/9/20)
<https://www.nytimes.com/2020/10/09/us/politics/trump-biden-sun-belt.html>
20. *Ibid.*
21. “Democrats focus on cutting off path to victory for Trump if presidency is thrown to House to decide”, WaPo (10/1/20).
https://www.washingtonpost.com/powerpost/election-house-trump-presidency/2020/10/01/d5bf9d12-0375-11eb-897d-3a6201d6643f_story.html
22. “The Attack on Voting; How President Trump’s false claim of voter fraud is being used to disenfranchise Americans.” NYT (9/30/20)
<https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html>
23. See note 16 and accompanying text.
24. The decision is *Shelby County v. Holder*, 570 U.S. 529 (2013); the Voting Rights Act sections at issue are sections 4(b) and 5 as reauthorized in 2006, 120 Stat. 577.
25. *Ibid*, citing 42 U. S. C. §§1973c(b)–(d).
26. “How Shelby County v. Holder Broke America: In the five years since the landmark decision, the Supreme Court has set the stage for a new era of white hegemony” *The Atlantic* (10/10/18)
<https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>
27. *Shelby County v. Holder*, *supra*.

28. *Ibid.*
29. “Strict North Carolina Voter ID Law Thwarted After Supreme Court Rejects Case” NYT (5/15/2017)
<https://www.nytimes.com/2017/05/15/us/politics/voter-id-laws-supreme-court-north-carolina.html>
30. Other examples include: discarding new registrations for spurious reasons as Ohio did in 2012 by rejecting all registrations filled out in a form printed by local newspapers on the ground the weight of the paper was incorrect; impose restrictions on some demographics such as Texas whose voter ID law allowed many kinds of state-issued IDs (such as a gun permit) but not a student ID created by its own state University; imposing barriers to certain populations, such as Florida barring newly enfranchised ex-felons after serving their time (which the voters, not the Legislature did) by tacking on a new requirement that the ex-felons (but not others) must have paid all fines in order to register.
31. An otherwise excellent discussion of the differences between the turnout in 2012 for Obama versus the 2016 for Clinton does this. It discusses in detail why her total number of votes in states like Wisconsin fell so drastically from his without questioning why or even mentioning the restrictive voter ID requirements imposed in 2015. This for example, “. . .Obama voters *did not bother to vote* for Clinton. They did not become Trump voters – Trump received only 10,000 votes more than Romney did in this county. *They simply stayed at home*. If even a fraction of these *lethargic* Democrats had turned out to vote, Michigan would have stayed blue.” “The Non-Voters Who Decided The Election: Trump Won Because Of Lower Democratic Turnout”, Forbes (11/17/16) (emphasis added).
32. “The Attack on Voting; How President Trump’s false claim of voter fraud is being used to disenfranchise Americans.” NYT (9/30/20)
<https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html>
33. “After criticizing voting by mail, Trump, first lady request mail-in ballots” (8/14/20)
<https://abcnews.go.com/Politics/criticizing-voting-mail-trump-lady-request-mail-ballots/story?id=72371423>
34. “Trump, While Attacking Mail Voting, Casts Mail Ballot Again” NPR (8/19/20)
<https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again>
35. “Some In GOP Fear Trump's Push Against Mail-In Voting Could Harm The Party's Chances” NPR (8/31/2020).
36. “Trump adviser: Expect more aggressive poll watching in 2020” (12/20/19)
<https://apnews.com/article/af2f0ede054d8baebbe1bb6ca47b4895>. The Trump advisor later tried to clarify his remarks by saying “he was referring to false accusations that the GOP engages in voter suppression.” *Ibid.* You can listen to the recording here and

assess for yourself whether his after-the-fact denials make any sense in context:
<https://www.newsweek.com/republicans-traditionally-suppress-voters-trump-adviser-says-recording-before-walking-back-remarks-1478598>

37. For the latter – aggressive challenges at polling places, it has long been reported that former Supreme Court Chief Justice William Rehnquist, early in his legal career in Arizona, was a poll watcher in Arizona during the 1960, 1962 and 1964 elections. He reportedly challenged Latinx voters. “Rehnquist in Arizona: a Militant Conservative in 60's Politics” NYT (8/4/86) Rumor has it he eventually becoming so obnoxious he was ordered to leave the polling place. He simply went to the next precinct and renewed his efforts to prevent Black and Latinx voters.

38. “The Republican Party Emerges From Decades of Court Supervision – After being bound by a consent decree for 35 years, the Republican National Committee is now free to continue its “ballot security” campaign.” The *Atlantic* (1/9/18)
<https://www.theatlantic.com/politics/archive/2018/01/the-gop-just-received-another-tool-for-suppressing-votes/550052/>

39. “The Attack on Voting; How President Trump’s false claim of voter fraud is being used to disenfranchise Americans.” NYT (9/30/20)
<https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html>

40. *Ibid.*

41. One big change this year is that voter discouragement tactics have moved online to social media, where they have become more visible. Reportedly Mark Zuckerberg has matured somewhat from his high school level understanding of free speech and has banned posts that provide misinformation about voting this year. “Facebook Moves to Limit Election Chaos in November. The social network said it would block new political ads in late October, among other measures, to reduce misinformation and interference.” NYT (9/22/20)
<https://www.nytimes.com/2020/09/03/technology/facebook-election-chaos-november.html>

42. “Trump's Calls For Poll Watchers Raise Fears About Voter Intimidation” NPR (9/30/20)
<https://www.npr.org/2020/09/30/918766323/trumps-calls-for-poll-watchers-raises-fears-about-voter-intimidation>

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. “Trump Supporters Disrupt Early Voting in Virginia. A group waving Trump flags and chanting “four more years” created a commotion at a polling location in Fairfax, Va.

A county official said some voters and staff members felt intimidated.” NYT (9/19/20)
<https://www.nytimes.com/2020/09/19/us/politics/trump-supporters-early-voting-virginia.html>

47. *Ibid.*

48. “Appeals court upholds Texas governor’s restriction on mail-in ballot drop boxes State can block election officials from offering more than one box, a blow to civil rights groups who say move makes it harder to vote” (10/13/20) *The Guardian (US)*
<https://www.theguardian.com/us-news/2020/oct/13/texas-mail-in-ballot-drop-box-appeals-court>

49. “How Quickly Will Your Absentee Vote Be Counted? A State-by-State Timeline” NYT (10/13/20)
<https://www.nytimes.com/interactive/2020/10/13/us/politics/when-votes-counted.html?action=click&module=Top%20Stories&pgtype=Homepage>

50. “Postal Service Leader Sets Reorganization Amid Scrutiny Over Mail Ballots” NYT (8/7/20)
<https://www.nytimes.com/2020/08/07/us/politics/postal-service-reorganization-mail-ballots.html>

51. “At least 84% of American voters can cast ballots by mail in the fall” WaPo (9/25/20)
https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/?itid=ik_inline_manual_43

52. Gellman, n.1.

53. There is widespread misunderstanding about who can vote by mail. This is in part because the rules vary by state. However, every state allows a person to vote by mail if they meet that state’s criteria. Currently, in 11 states every voter is automatically sent a mail in ballot without a request; in 14 more states every voter is automatically sent the vote by mail application; in 34 states (including some of those already listed) no reason needs to be given for requesting a mail ballot; in only 5 states must the voter state a reason just to request a mail in ballot.
<https://www.npr.org/2020/09/14/909338758/map-mail-in-voting-rules-by-state>

A complete list of each state and its mail in ballots rules can be found here:
<https://www.vote.org/absentee-voting-rules/>

54. Gellman, n.1.

55. *Ibid.*

56. “When Kamala Harris lost on election night, but won three weeks later. Her nail-biting 2010 victory for California attorney general raised her national profile.”

Roll Call (7/16/19)

<https://www.rollcall.com/2019/07/16/when-kamala-harris-lost-on-election-night-but-won-three-weeks-later/>

57. “Early surge of Democratic mail voting sparks worry inside GOP” WaPo (9/29/20)

https://www.washingtonpost.com/politics/gop-mail-ballots/2020/09/29/131a06fc-0263-11eb-b7ed-141dd88560ea_story.html

58. Gellman, n.1.

59. Gellman, n.1.

60. “Some In GOP Fear Trump's Push Against Mail-In Voting Could Harm The Party's Chances” NPR (8/31/2020).

61. “Early surge of Democratic mail voting sparks worry inside GOP” WaPo (9/29/20)

https://www.washingtonpost.com/politics/gop-mail-ballots/2020/09/29/131a06fc-0263-11eb-b7ed-141dd88560ea_story.html

62. “Early surge of Democratic mail voting sparks worry inside GOP” WaPo (9/29/20)

https://www.washingtonpost.com/politics/gop-mail-ballots/2020/09/29/131a06fc-0263-11eb-b7ed-141dd88560ea_story.html

63. Each state sets a different deadline, and some of them have been changing this year to address the expected flood of mailed ballots. For each state, see links in note 44. Note that the Trump campaign challenges have already begun as they seek to make the cut off as early as possible, and preferably Election Day. A single example: “2 Republicans challenge Minnesota plan for late mail ballots” AP, (9/24/20)

<https://apnews.com/article/virus-outbreak-election-2020-st-paul-state-elections-lawsuits-5f6e78b4f38d4814494aeaf8fc73840a>

64. Gellman, n.1.

65. <https://www.fec.gov/introduction-campaign-finance/election-and-voting-information/federal-elections-2000/president2000/>

66. Justice Scalia also said “the ultimate issue in the case was whether the federal election would be decided by the Florida Supreme Court of the United States Supreme Court. My, we can’t have the highest court for a state interpreting its own laws in ways that the Supremes can fix, can we? <https://www.youtube.com/watch?v=aOqiH-bTXIc>

67. *Bush v. Gore*, 531 U.S. 98 (2000).

68. *Ibid.*

69. ‘It’s insanity!’: How the ‘Brooks Brothers Riot’ killed the 2000 recount in Miami”
WaPo (11/15/18)
[https://www.washingtonpost.com/history/2018/11/15/its-insanity-how-brooks-brothers-ri
ot-killed-recount-miami/](https://www.washingtonpost.com/history/2018/11/15/its-insanity-how-brooks-brothers-riot-killed-recount-miami/)
70. “How Trump’s remark about poll watchers threatens another election norm”
WaPo (10/5/20)
[https://www.washingtonpost.com/opinions/2020/10/05/how-trumps-remark-about-poll-w
atchers-threatens-another-election-norm/](https://www.washingtonpost.com/opinions/2020/10/05/how-trumps-remark-about-poll-w
atchers-threatens-another-election-norm/)
71. “Health officials are quitting or getting fired amid outbreak” AP (8/10/20)
<https://apnews.com/article/8ea3b3669bccf8a637b81f8261f1cd78>
72. The allocation to states of one elector for each Representative and Senator is contained in Constitution, Art. 2, sec. 1.2, and codified in 3 U.S.C. § 3. The DC amendment is Amendment XXIII.
73. Article II, section 1.2; codified at 3 U.S.C. § 5.
74. 3 U.S.C. § 5, which sets the date as six days before the electors meet as determined by 3 U.S.C. § 7, which is “the first Monday after the second Wednesday in December.”
75. 3 U.S.C. § 15.
76. “2,000 Former FBI And DOJ Officials Call On Barr To Resign” *Forbes* (5/11/20)
[https://www.forbes.com/sites/alexandrasternlicht/2020/05/11/2000-former-fbi-and-doj-of
ficials-call-on-barr-to-resign/#39bd83a3171e](https://www.forbes.com/sites/alexandrasternlicht/2020/05/11/2000-former-fbi-and-doj-of
ficials-call-on-barr-to-resign/#39bd83a3171e)
77. Senator Sheldon Whitehouse’s presentation during the Barrett Judiciary Committee hearings is a useful primer on the operation.
https://www.youtube.com/watch?v=KpBo_T3Kwjc
78. 3 U.S.C. § 2.
79. Article 2, section 1.2.
80. Gellman, n.1.
81. Gellman, n.1.
82. *Bush v. Gore*, 531 U.S. 98 (2000).
83. While those procedures are arcane and spelled out in great detail, it appears that they are to be driven by the “Executive” of each state, which means the Governor. 3 U.S.C. § 6. However, if the slate of electors has not been made by December 8, the Governor’s choice is no longer conclusive on the Congress under section 5, and Congress may choose to accept the competing slate’s votes under section 15.

84. 3 U.S.C. §§ 5, 6, 15.
85. Gellman, n.1.
86. <https://www.senate.gov/CRSPubs/cf80c40a-29bc-4d1b-9dec-541dff2349b6.pdf>
87. The original Article 2, section 3, and the Twelfth Amendment that replaced part of it, both state: “the person having the greatest number of votes, shall be the President, if such number be a majority of the whole number of Electors appointed.” Thus electors who have been “appointed” but whose credentials or votes were not accepted appear to still be counted, effectively as “present but not voting” but the quorum needed to win stays at 270.
88. The Constitution also provides that the President can be chosen only from among the top three vote getters and the Vice President the top two; no late substitutions area allowed in this game. Amendment XXII.
89. Split delegations in the past have cast one half vote for two candidates.https://www.270towin.com/news/2018/11/15/2018-midterms-partisan-control-of-the-us-house-by-state_714.html
78. The split state is, of course, Pennsylvania, which is also likely to be the most swinging of the swing states, or the most battled of the battleground states after the election. Michigan also had a split delegation until one Republican quit the party.
79. “Democrats focus on cutting off path to victory for Trump if presidency is thrown to House to decide” WaPo (10/1/20)
https://www.washingtonpost.com/powerpost/election-house-trump-presidency/2020/10/01/d5bf9d12-0375-11eb-897d-3a6201d6643f_story.html
80. *Ibid.*
81. *Ibid.*
82. *Ibid.*
83. *Ibid.*
84. Or, bookmark this handy page, which will allow you to move seats from one side to the other and watch the states change colors.
<https://www.270towin.com/2020-house-election/state-by-state/consensus-2020-house-forecast>
85. *Alexander Hamilton*, Ron Chernow (2005) 510 - 511, 514-515.

86. That happened in 1800, when Jefferson and his running mate tied in the electoral college (each elector simply cast two votes, without designating for which office, an outcome that should have been foreseen but no one did in 1787 because they never dreamed of parties or two people running as a ticket). Burr suddenly saw himself as presidential and refused to concede. The House went through 35 votes with them tied, and it was finally broken when the lone Maryland Representative was assured Jefferson would continue some of the Washington-Adams policies and the tie was broken on the 36th vote. *Alexander Hamilton*, Ron Chernow (2005) 635-638.

87. Amendment XII.

88. 3 U.S.C. § 19(a).

89. Amendment XX, section 1.

90. And there is one other wild card – the Supreme Court decides to step in during any Congressional fights. Highly highly unlikely. Then again, so was *Bush v. Gore*.

91. There is actually one other wild card. Violence. While I have mentioned the possibility of violence at county or state election offices to prevent counts from continuing, I have not raised or discussed the possibility of violence in other venues. That is because no one is actively or at least publicly talking about using violence *to affect the outcomes of the elections processes*. There may very well be violent responses to particular events. That is simply beyond my ken or the reach of this paper. The New York Times has just reported the concern is, nonetheless, growing. “As Trump’s Language Grows More Heated, Fears Rise of Political Violence” NYT (10/15/20)

<https://www.nytimes.com/2020/10/15/us/politics/trump-election-violence.html?action=click&module=Top%20Stories&pgtype=Homepage>