

OUR COLUMNISTS

HOW FAR COULD REPUBLICANS TAKE TRUMP'S CLAIMS OF ELECTION FRAUD?



By Jeannie Suk Gersen

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As Trump's litigation looks unlikely to change the outcome of the election, Republicans are looking to strategies that might remain even after rebuffs both at the polls and in court. Photograph by Mark Kaulzarich / Reuters

Among the “firsts” associated with the 2020 election, the most norm-shattering of all will be if the candidate who lost never concedes to the one who won. After the major news outlets called the election for [Joe Biden](#) on Saturday, [Donald Trump](#) switched from insisting, “I won this election, by a lot,” to claiming that his loss was due to election fraud. Trump’s conduct seemingly has not fazed President-elect Biden as he proceeds into the transition; at the least, it was not a surprise, since Trump

spent months making ominous and ungrounded predictions of voter fraud. There is, however, a limit to what Biden's team can do, particularly in national security, if the Trump Administration holds up a transfer of power, as the head of the General Services Administration has done thus far by not formally recognizing the transition.

As if to fill the void, on Sunday, former President George W. Bush, the previous Republican in the highest office, issued a statement pointedly supporting the legitimacy of the election results. "The American people can have confidence that this election was fundamentally fair, its integrity will be upheld, and its outcome is clear," Bush said. Twenty years ago, it was Republicans who were outraged that Al Gore retracted his initial concession to Bush, refused to concede when Bush was narrowly ahead during recounts in Florida, and then fought Republican state officials' move to certify Bush as the winner, by suing to have the recount continue. The Supreme Court finally ordered an end to the Florida recount, in Bush v. Gore, on December 12th, 2000, and Gore conceded the next day. Now Democrats are calling upon Republicans to accept that Biden has won, and Republicans are looking to legal remedies to try to flip the result. But, because Biden's win does not hinge on the results in one state, as Bush's did, and because the margin of victory is not as thin, Trump's legal remedies are far less realistic than Gore's were.

Senate Majority Leader Mitch McConnell said, on Monday, that "President Trump is a hundred per cent within his rights to look into allegations of irregularities and weigh his legal options." Since Election Day, Republicans have pursued a smorgasbord of lawsuits, but they have been dismissed or are otherwise unlikely to succeed. The Trump campaign filed multiple suits in Pennsylvania, Nevada, Michigan, Georgia, and Arizona, generally alleging fraud, or demanding that states stop counting ballots or allow closer observation of the counting. Though some cases are ongoing (for example, a lawsuit to compel Pennsylvania to impose an earlier date for voters' proof of identification), the vast majority were quickly dismissed for lack of evidence.

One case that Republicans began pressing before the election has gone to the Supreme Court. On September 28th, the Pennsylvania Republican Party challenged the state Supreme Court's decision that, notwithstanding the Election Day deadline set by the Pennsylvania legislature, mail ballots postmarked by that day but arriving up to three days afterward were to be counted. The case has already produced three orders from the Justices: first, in mid-October, the Court deadlocked 4-4 on whether to lift the state court's order while the Republicans prepared a request to decide whether a state court may alter the state legislature's deadline for receipt of ballots. The Court therefore left the extended deadline in place for the election. Second, days before the election, the Court refused to expedite its consideration of the Republicans' petition, again, leaving the extension in place. And, third, three days after Election Day and before Biden was declared the winner in Pennsylvania, Justice Samuel Alito ordered County Boards of Elections to comply with existing state guidance that mail ballots received after Election Day should be segregated and "if counted, be counted separately." Had Biden's victory ended up depending upon Pennsylvania, or, more precisely, on the mail votes that arrived after Election Day, then a Supreme Court decision on whether those votes must be disqualified would have been relevant to the election outcome. But the fact that Biden's win did not hinge on any one state deflated the potential for the Supreme Court to decide the election.

The Court could still agree to hear the case, in order to decide whether the Constitution's provisions that "the Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," and that "each State shall appoint" electors "in such Manner as the Legislature thereof may direct," prohibit state courts from modifying state legislatures' election rules. Even if the answer can't affect this Presidential race, the question could recur in future elections. But the Justices might bear in mind that any decision could still influence the perceived legitimacy of this election: even hearing this case would fuel Republicans' claims that the election procedures were awry, while refusing to hear it would seem to Democrats a

vindication of Biden's victory.

Prominent Republicans have largely refrained from acknowledging that Biden has won, and from challenging the President's allegations of fraud—with the notable exceptions of Representative Will Hurd and Senators Mitt Romney, Lisa Murkowski, Susan Collins, and Ben Sasse, who each publicly congratulated Biden. Some Republican leaders have urged rejection of the results. On Sunday, Senator Lindsey Graham said, "Do not concede, Mr. President. Fight hard."

But what would it mean to fight hard, when Trump's barrage of litigation is extremely unlikely to change the outcome? Graham has laid some groundwork for the strategies that might remain even after rebuffs both at the polls and in court. In an interview with Sean Hannity on Fox News last Thursday, as it became clear that Biden would soon be declared the winner, Graham signalled his approval of the idea that Republican-controlled state legislatures might appoint electors who would cast votes for Trump, even though Biden won those states' popular votes. Referring to Article II of the Constitution, which provides that a state "shall appoint" its electors "in such Manner as the Legislature thereof may direct," Governor Ron DeSantis, of Florida, also urged people in battleground states to push their Republican legislatures to override popular-vote results.

It would be outlandish for a state legislature to deviate from the wishes of the state's voters. But states have the power to determine that fraud affected the vote count and choose Presidential electors who do not reflect that supposedly faulty result. States with Republican legislatures that could, theoretically, override a popular vote in favor of Biden include Pennsylvania, Georgia, Arizona, Michigan, and Wisconsin. This possibility remains far-fetched in any of these states, perhaps particularly Pennsylvania, where last month, the Republican majority leaders of the state Senate and House wrote, in an op-ed, "The only and exclusive way that presidential electors can be chosen in Pennsylvania is by the popular vote. The legislature has no hand in this process whatsoever." The majority leaders reaffirmed that commitment on Friday. But, on Tuesday, a group of Pennsylvania lawmakers announced that it wants the legislative committee to conduct a "comprehensive examination" of "irregularities and inconsistencies" in the election "prior to the certification of the election results and the empanelment of Pennsylvania's electors to the Electoral College."

If several states' electors were to diverge from the popular vote, in theory, on December 14th, the Electoral College vote could result in a win for Trump, and, on January 6th, the newly seated Congress tabulating the electoral votes could declare Trump reelected. Alternatively, neither candidate might garner a majority of the electoral votes, in which case the Twelfth Amendment to the Constitution says that "the House of Representatives shall choose immediately, by ballot, the President." Because Democrats retain a majority of the House, one might assume that would mean a Biden Presidency. But the Twelfth Amendment specifies that each state delegation gets one vote, meaning that a state that has more Republican than Democratic representatives would likely vote for Trump. Though there will be more Democratic than Republican members, there will be more Republican than Democratic state delegations in the House. Trump could well be the House's choice for President.

Yet another disastrous situation would be if some states' officials split and choose rival slates of electors. This would leave Congress to decide which of the electoral votes from those states to count. And, even though Trump will likely fail to convince courts to credit his allegations of election fraud, he could still press his fraud claim to Congress and urge its members to disqualify some states' electoral votes. Given Trump's continuing hold on Republican lawmakers, it appears not out of the question that they would take such an appeal seriously. And, as I wrote last week, if Congress cannot ultimately agree on how to count the electoral votes, it is unclear how the Presidential election would be resolved. Even if the American people wanted the Supreme Court to settle it, the Constitution and other laws would not provide clear means for the Court to decide.

None of these doomsday scenarios are likely yet. Perhaps Republicans are merely tiptoeing around Trump for the time being, waiting for his lawsuits to fizzle out, and expecting them to show the fraud and illegality claims to be unfounded. But the more time that passes without Trump conceding, and without Republican lawmakers publicly acknowledging that power will indeed transfer to Biden as a result of the election, the more it is imaginable that a portion of Congress may be persuaded to use the fraud claim to decline to count some electoral votes for Biden, come January 6th. In the meantime, on Monday, contrary to the long-standing practice of the Department of Justice, Attorney General William Barr explicitly authorized federal prosecutors to investigate voting fraud in the 2020 election “prior to the certification of elections in your jurisdictions.” (Barr’s decision prompted the [resignation of Richard Pilger](#), the director of the Department’s Election Crimes Branch.) The move, coming at this delicate time, seems designed to improve Trump’s chances of influencing states’ certification of the election results, their appointment of electors, and Congress’s counting of electoral votes. It became particularly alarming when followed by Secretary of State Mike Pompeo’s statement, on Tuesday, that “there will be a smooth transition to a second Trump Administration.”

As we have learned in the past four years, it was not one aberrant President, by himself, but rather Trump’s hold on important Republican Party officials, that enabled the proliferation of chaos and erosion of norms. Even now that Trump has lost the election, the death grip will perhaps be slow to loosen because of his undeniable popularity with Republican voters. And Republican leaders may expect to be rewarded rather than punished by their constituents for fighting between now and January to prevent a Biden Presidency. This form of democratic responsiveness, in which leaders need only to appease adherents of their own party, underscores the difficulties that Biden will have in fulfilling his self-proclaimed mandate to unite the country. There are still significant partisan hurdles to clear before Biden is inaugurated, even though the voters have democratically chosen him as their next President.

This post has been updated to include news developments.

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