What Happens Next?

The Trials, the Transition and the Tinderbox

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It's official. President Donald Trump will be a one-term president and his term will end on 20 January 2020. Trump has been defeated by former Vice-President Joe Biden, who has won more votes than any other presidential candidate in US history. Biden reconsolidated traditional Democratic territory and made strong inroads into conventionally Republican strongholds in the Southeast and Southwest of the country. The election map looks convincingly blue, the color of the Democratic Party. People are dancing in the streets in many American cities.

Despite the length of time it took to determine the result, this is not a close election.Everyone who has felt that the last four years brought American democracy perilously close to collapse should now feel relieved. Biden's margin of victory in the decisive states is too large to be overturned by typical recounts or by the usual toolbox of legal challenges. As I will explain in this post, however, we're not completely out of danger yet.

The Future of Litigation

Trump has not conceded the election or admitted defeat.Instead, he and his legal team are still looking for ways to overturn the results. Given that Biden's victory does not hinge on either close margins that might be vulnerable to recounts or on one state that could be brought under substantial legal pressure, it will be nearly impossible at this point for conventional litigation to change the results. Plus, there is the small matter of evidence.So far, Trump's lawyers have found precisely no evidence of the voter fraud that the president assures them is there. Trump's extraordinary number of lawsuits have been ill-founded and easily dismissed so far. As constitutional law professor Justin Levitt said, they have all of the legal weight of "tweets with filing fees."

But there is still a long-shot possibility that new Republican legal *theories*, rather than facts on the ground, can throw the election into chaos. On Friday one long-shot possibility took a step closer to realization.Justice Alito of the US Supreme Court ordered the Commonwealth of Pennsylvania to segregate out ballots arriving after election day, even when they were postmarked before that date. Justice Alito's order was widely dismissed as irrelevant; after all, the state had already segregated late-arriving ballots because the US Supreme Court had indicated it might want to revisit the question about their constitutionality after the election was over. So then, why was the Court's order necessary?Was Justice Alito signaling that the US Supreme Court was determined to revisit that 4-4 decision issued right before the election upholding the Pennsylvania Supreme Court judgment that the late-arriving ballots could be counted? Four justices disagreed with that result, including Justice Alito who may now believe that he has a new fifth vote in Justice Amy Coney Barrett for a different result.

If the Court were to take up Pennsylvania's late ballot case again, the dangerous part of the decision would not be what it said directly about late ballots in Pennsylvania.Even if the late-arriving ballots were excluded, Biden's win would still be secure. Instead the danger lies in the interpretation of the Constitution that might be used in that case. In Pennsylvania, the three-day extension to give ballots a chance to arrive at election offices was a court-ordered exception to the Pennsylvania election law.The Pennsylvania Supreme Court found that the pandemic justified extending the statutory deadline because it would result in a massive increase in the number of mailed-in ballots just as the

Post Office warned that it would not be able deliver those ballots to election officials in time.

The Pennsylvania Supreme Court decision came in the wake of Trump's efforts to weaponize the Post Office. In the end, the Post Office did successfully prevent at least 150,000 and perhaps as many as 300,000 ballots from reaching election offices nationwide by Election Day in a drama that included the Postmaster General refusing a direct court order and now risking jail time. Given that mailed-in ballots were overwhelmingly from Democratic voters, those numbers could have been decisive if Biden's margins of victory in battleground states had been closer.

But if revisiting the late ballots question would make no difference in Pennsylvania, why would the US Supreme Court take up case again? The conservative justices on the Court could use the case to announce a narrow meaning of the constitutional clause that says that presidential electors should be selected "in such Manner as the Legislature thereof may direct" [Art II (1)]. Originalists claim that this clause pointedly excludes any role for anyone else.So if *state courts* change the rules for selecting electors, the Court might find those changes unconstitutional and nullify them.

This year, the pandemic produced many rule changes, creating the possibility of mail-in balloting, multiplying the reasons that people could give for absentee ballots, and expanding in-person early voting to minimize congestion at the polls on election day.Many states' elections were run under one-off rules that did not result from amended legislation but that were the result of governor's orders or court decisions. If the US Supreme Court were to rule that no changes to the election rules by any actor other than the state legislature were valid, it could cast into doubt the election results in many states.

Pennsylvania segregated out the ballots that were affected by the rules changed by its courts.In other states, however, it would be impossible to figure out which specific ballots were affected by court-changed rules. One could then imagine Republican litigators swarming into those states asking to have the results of the state election nullified on the grounds that illegal votes were completely mixed in with legal ones.That in turn would raise the open possibility – as I mentioned in my earlier post – that the state legislature could then just vote a slate of electors for the president of their choice directly if the state election had failed to produce a clear result. Since Republicans control 37 out of the 50 state legislatures, one can imagine how that would turn out.

Such a Court decision, with such far-reaching consequences, would be so radical, so unexpected and so consequential that my constitutional law colleagues all assure me that it can't happen.And I hope they are right.Many of these colleagues also firmly asserted that *Bush v. Gore* in 2000 could never happen either, because no Court would be so bold as to directly choose the president, particularly when the matter hinged on an interpretation of state law that most experts thought the Supreme Court could not reach.I hope that the lesson that the US Supreme Court learned from *Bush v. Gore* is not that the public will accept anything they say.

The Transition

Assuming that the election results can be certified as they stand now and that neither litigation nor the Electoral College produce surprises, there is still the transition to worry about. Trump remains in power for another two and a half months before the inauguration of President Biden on 20 January 2021. In the meantime, Trump's powers in office are not diminished and many are worried about how he will use them.

Some are anxious that Trump will leave the government even more in tatters. Already, over four years, he has gutted the ranks of experts throughout the government, left many positions unfilled and allowed many parts of the government to decay. But in recent weeks, the process of dismantling government seems to have accelerated. Trump fired three agency heads this week, including the head of the agency in charge of America's nuclear weapons (nuclear weapons!) as well as the head of the key development agency dispensing foreign aid.Trump issued an executive order three weeks ago that initiates a reclassification of many civil service positions so that their occupants lose their civil service protections. Once the

reclassification is complete (scheduled for the day before the inauguration of the new president), Trump can fire these formerly protected government employees at will.In short, Trump may use the transition period to create as much chaos as possible throughout the government so that the task of the incoming president will be made much harder.

All that said, many were relieved over the course of the last few months to learn that career civil servants were following the rules established in law for preparing a presidential transition, something done routinely every four years. But it turns out that the transition doesn't start in earnest until the incumbent concedes the race which sets in motion a process through which the General Services Administration formally identifies the successor. That step begins the flow of money, access and office space to the incoming president and his team. Trump's appointee as head of the GSA is refusing to sign the papers that would give the Biden team access to government resources it needs to set itself up until Trump concedes. Of course, he hasn't, and some believe he never will. If this crucial step is delayed much longer, the transition can get very bumpy.

There is, of course, other damage Trump can do during the transition. Some are speculating that Trump may issue pardons to everyone in his close circles, including himself.

The Tinderbox

Before the election results were announced, storeowners in parts of Washington DC and other American cities boarded up storefront windows anticipating violence if Biden won. And indeed, Trump has been angrily claiming since the election that he has been cheated out of a victory, that there are "illegal" votes being counted and that something must be done.When Trump held a press conference two days after the election to make a series of false statements riling up his supporters, all but two of the television networks cut away from him as soon as he started to use the White House Briefing Room to cast doubt on the fairness of the election.They were concerned about the effects that such a performance would have.

Trump's supporters are already well known for their visible assertions of raw force and intimidation, and observers are still worried that Trump supporters may turn to violence as the defeat sets in. Already Trump supporters held demonstrations in state capitals all over the country on Saturday and in Minnesota, Pennsylvania and Arizona, they came armed.If Trump decides to call them to action as his loss sinks in, all hell might break loose.

Governing in a Biden Presidency

The election was not what many of us had hoped for – which was the dawn of an entirely new political era in which Trump's angry, racist rudeness and continual norm-breaking were definitively rejected.Instead, Trump got *more* votes in 2020 than he did in 2016.In 2016, we could say that people didn't really know what they were voting for.Now they know, and they came out in even greater numbers to support him. Even if Trump is gone, we will still have to face the fact that very nearly half of the country consists of people who have not been offended by the continual constitutional assaults and the overflowing aggressive hatred that have dominated this country for four years.The US is more divided than ever – and we will have to work out how to go on from here.

The Republican Party, which has enabled Trump every step of the way, was not repudiated in the election.In the House of Representatives, Democrats actually lost seats to Republican candidates, something no one predicted.In the Senate, which was always going to be hard for the Democrats to capture, groveling Trump enablers were easily reelected.It now appears that Republicans will keep their lock on that chamber, though everything hinges on two run-off elections that will take place in Georgia on 5 January. The Republican leadership of the Senate is already showing signs that it will block anything a new Biden administration tries to do, including confirming nominees to Biden's own cabinet, something for which there has generally been quite a lot of deference given to an incoming president. We are already seeing that once old norms are smashed, they are not easily recovered.

Perhaps most devastatingly for the future, the Democrats did not flip Republican state governments. State legislatures will soon draw the federal congressional districts based on the 2020 census and those new districts will be in place for 10 years.The Supreme Court last year refused to limit partisan gerrymandering, which will give the vast majority of state legislatures which are still controlled by Republicans *carte blanche* to entrench their party in power. Democrats will therefore face an increasingly uphill challenge to maintain fair representation in the House of Representatives over the decade. Skewed districts already mean that the Democrats must win national House races by more than 5% nationwide to be guaranteed of a simple majority. Republicans who have become even more entrenched in this election at the state level can now tilt that playing field even more.

The fact that so many chokepoints in US politics are still filled with Trump supporters means that it will be hard for President Biden to enact his agenda once he takes office.And, of course, Trump packed the courts on his way out. The US presidency is sometimes thought of as the most powerful job on earth, but it becomes significantly more difficult to use that power if one has to govern in tandem with an obstructionist party that still controls many of the veto points.

So as many Americans and their friends around the world celebrate the Biden victory, fully conscious that the opposite outcome would almost surely have damaged American democracy beyond recovery, it is important to remember that America is in many ways the same country today as it has been through much of the Trump presidency – divided, angry and exhausted.

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