

# The Day After: Preparing for a Contested Election

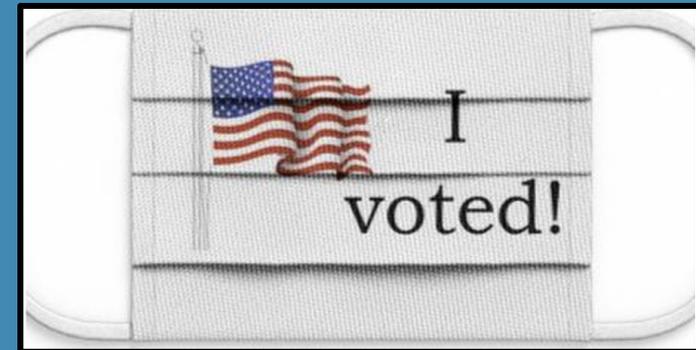
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@Persily



# Litigation Contingencies in the 2020 Election

- Who is perceived as “in the lead” at each stage?
  - The Nature of the Dispute
    - Traditional – Absentee Ballots, Provisional Ballots, Recounts
    - Non-Traditional – Polling Place Violence, Unprecedented Use of Federal Authority, Post Office
  - Forum
    - Local, State or Federal
    - Which state? And who controls it?
    - Courts, Administrative Process, Legislature
  - Actors
    - State – Legislature, Governor, Courts
    - Federal – Courts, Congress, Executive (Vice-President)
  - Applicable Law (and how well decided)
    - State election laws
    - Electoral Count Act
    - U.S. Constitution
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# Key Phases in Resolution of 2020 Election Disputes

**3 November:** Election Night

**3-20 November:** Deadlines for receipt of ballots; expiration of “cure” period for defective ballots

**17 November-3\* December:** Deadlines for canvassing and certification

**8 December:** Safe Harbor Deadline of Electoral Count Act

**14 December:** Meeting of Electoral College

**6 January:** Counting of electoral votes; first session of 117th Congress

**20 January:** Inauguration day; expiration of President’s term

## How to think about the election litigation calendar: Pre-Election Day Litigation

- **Pre-October (over 200 cases already filed)**
    - Work the refs
    - Establish the ground rules
  - **October**
    - Protect and promote early/absentee voting
    - Address extraordinary COVID-related actions by Governors, Secretaries of State and Election officials
    - Trial runs for absentee ballot and voter disqualification (signature matching, curing etc.)
    - Litigation over administrative failures (voter registration and mail ballot distribution system)
  - **Week before election**
    - Litigation over rules for election day voting (polling place changes, material shortages, etc.)
    - Expanding deadlines for early and absentee voting.
    - Injunctions to deal preemptively with vote suppression.
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## How to think about the election litigation calendar: Election Day and the Day After

- **Election Day**

- Polling place violence/malfeasance
- Polling place dysfunction (lines, machine breakdowns, material/personnel shortages)
- Extension of time for voting or receipt of mail ballots
- Possible battles between state and federal authority over polling places

- **Immediate Aftermath**

- Depends on (1) who is ahead, by how much, and where; (2) nature of disputes arising in early voting and election day; (3) number of uncounted ballots.
  - Locally controlled administrative process involved in counting ballots.
  - (Mostly) state court litigation over counting of legal votes and disqualification of illegal votes.
    - Absentee ballots (lateness, signatures, fraud...) – see <https://tinyurl.com/mailballotcases>
    - Provisional ballots (unregistered voters, wrong ballots, illegal voters)
    - Disputed polling place ballots (overvotes/undervotes)
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## How to think about the election litigation calendar:

### The week (or two) after Election Day

- Continue processing and counting mail ballots (some states allow ballots to be received up to two weeks after Election Day)
  - Rush to cure defective mail ballots
  - Litigation over rules applied in canvassing process (e.g., whether courts are applying law as intended by legislature)
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How to think about the election litigation  
calendar:  
The month after Election Day (until Dec 8)

- \*\*Dec 8 = Safe Harbor Deadline of Electoral Count Act (rush to finish count and have it certified or for state legislature to appoint electors)
  - \*\*Dec 14 = Meeting of Electoral College
  
  - 2000 (*Bush v. Gore*) path
    - Action in both state and federal court over legality of count.
    - Supreme Court effectively declares which count is valid
  
  - 1876 path
    - Competing slates of electors from state legislatures, governors, and courts.
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# How to think about the election litigation calendar: December 14-January 20

- \*\*January 6 = Counting of electoral votes
  - \*\*January 20 = Inauguration Day
  - Open questions
    - Which slates of electors are considered legitimate according to the safe harbor of the Electoral Count Act?
    - Who decides among competing slates of electors? Vice-President?
    - Can the House shut down proceedings and thereby trigger the 20<sup>th</sup> Amendment (leading to Nancy Pelosi being President)?
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# COVID-Related Election Litigation Tracker

Case Search

This database tracks election law cases arising out of the COVID-19 pandemic--over 300 cases in more than 44 states. On this page you can search our case database by the primary or subsidiary issue tags we have assigned, state, court type (state vs. federal), circuit (for federal cases), party name, keyword and/or status of case. Each field completed further narrows the search results.

## Case Search

◀ Back

🔍 Search

Keywords

Party Name

Case Status

State

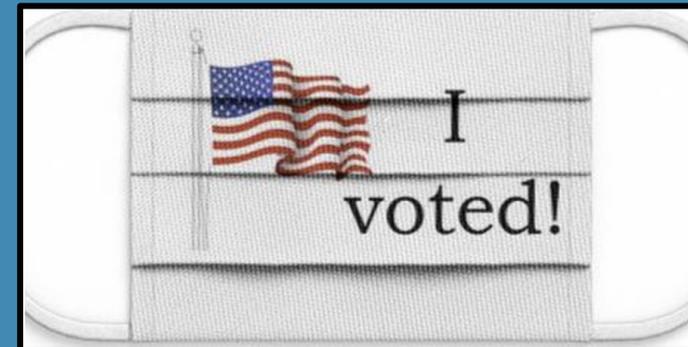
Courts: State  Federal

Circuit

Primary Issue



HealthyElections.Org



# SOURCES OF LAW RELATED TO MAIL-BALLOT LITIGATION

## Fundamental Right to Vote

- First and Fourteenth Amendments
- Weighs burden on right to vote against state's asserted interests

## Procedural Due Process

- Fourteenth Amendment
- Balances interest of the individual in process with interests of the state

## Voting Rights Act

- Section 2 (racial vote dilution)
- Section 3(b) and 201 (ban on "tests or devices")
- Section 208 (assistance for disabled voters)

## Equal Protection

- Fourteenth Amendment
- Protects against disparate treatment of similarly situated voters

## Americans with Disabilities Act

- Title II (prohibits discrimination against disabled individuals)

## State Law Claims

- State constitutions
- State law