

THE U.S. 2020 ELECTION: RESULTS AND ANALYSIS

December 15, 2020

I. Introduction

In the past, we have reported on elections in the United Kingdom, Germany, France, Canada and Israel, among other countries, with the goal of summarizing political changes and currents that may impact the business plans of clients and friends investing and doing business there. Several readers in the U.S. and abroad have asked us to attempt a “cut through the noise” assessment of the November 3, 2020 U.S. election, and we’ll do so here. A caution, though: while we will not assess policy differences and will make this election review apolitical to the extent possible, that extent will require assessments that some may consider politicized. We were unsparing in our assessment (to the annoyance of some) that Donald Trump had won the 2016 election; we are going to be unsparing here that Joe Biden won this election.

II. Election Results

Final Results (as of December 15, per the New York Times):

Candidate	Electoral College Votes (270 needed to win)	National Popular Vote	National Popular Vote Percentage
Joseph R. Biden (Democratic Party)	306	81,282,896	51.3%
Donald J. Trump (Republican Party)	232	74,222,484	46.8%

In the U.S. electoral system, it is only the Electoral College metric that counts.¹ Nevertheless, this table shows that this was not an election like 2016, for example, in which Trump won the Electoral College and therefore the presidency, while Hillary Clinton won the national popular vote. In this case, Biden

¹ Under the U.S. federal electoral system, each of the fifty states and Washington D.C., a federal enclave, runs its own election, with voters technically voting for each state’s electors, who then vote for the President and Vice President to whom that slate of electors is pledged, based on the state’s popular vote results. Each state has a number of electors based on its number of representatives in the House of Representatives – at least one - plus its two Senators. Several states have the minimum of three electoral votes, and California has the most with 55 electoral votes. All states but two award *all* their states’ electoral votes to the candidate who won the popular vote in that state. So, for example, if a candidate wins California by one single vote, that candidate receives all of California’s 55 electoral votes. The total number of electoral votes is 538 (based on 435 members of the House of Representatives, 100 Senators, and the minimum three allocated to Washington D.C.), with 270 electoral votes – half plus one - necessary to win the presidency.

won both metrics, by substantial margins. Moreover, Biden not only won the national popular vote, but an absolute majority of it, over 51%, which neither candidate in 2016 achieved, owing to third party candidates. Biden's Electoral College margin win, 306 – 232, was coincidentally the exact margin Trump won by in 2016, which he had frequently referred to as a “landslide.” Biden's national popular vote victory was just over 7 million votes (compared to Clinton's 2.8 million national popular vote win in 2016); the last national popular vote victory by more than 10 million votes was Ronald Reagan's in 1984.

In addition, Biden “flipped” five states that Trump had won in 2016, winning back the traditional upper Midwest “blue (Democrat) wall” states of Pennsylvania, Wisconsin and Michigan, and also the traditionally red (Republican) “sunbelt” states of Georgia and Arizona. Although these five state elections were mostly close by percentage, they were not particularly or historically close in absolute vote margins: after numerous recounts, audits, court challenges and appeals initiated by the Trump campaign, the vote counts remained relatively stable and no results changed, with Biden winning by over 10,000 votes in Georgia and Arizona, by over 20,000 votes in Wisconsin, by over 80,000 votes in Pennsylvania, and by over 150,000 votes in Michigan. Those five states, together with Nevada, which Clinton won in 2016 and which Biden won by over 30,000 votes, were the six states that the Trump campaign contested post-election, and which will be discussed in Part III in the context of U.S. litigation procedure and election law. By comparison, the well-known disputed 2000 election between George W. Bush and Al Gore involved a dispute over approximately 500 votes in one state, Florida. Trump did not flip any states won by Clinton in 2016; Biden carried all of Clinton's states. In sum, by standards of recent U.S. history, this was not a particularly close election.

Moreover, the governors of the contested states, their secretaries of state (the elected officials in each state charged with running and overseeing elections) and other state election officials, both Republican and Democrat, legally certified the fairness and accuracy of their respective election results. William Barr, Trump's U.S. Attorney General, in charge of the U.S. Department of Justice and hitherto one of Trump's most loyal lieutenants, stated in an interview that there was no evidence of widespread fraud in the election. And Christopher Krebs, the Trump-appointed first Director of the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA), certified that the 2020 election was the most secure, free and fair in U.S. history, upon which Trump unceremoniously fired him by tweet (one of Trump's attorneys subsequently suggested in an interview that he be tortured and killed). Barr's resignation was announced by Trump on December 14 in the very moments after the Electoral College voted to confirm Biden's victory.

The Electoral College formally voted to confirm Biden’s 306 – 232 victory on December 14, and Congress will formally count and certify the Electoral College result on January 6, perhaps not without some *pro forma*, but ultimately ineffectual, objections by Trump supporters. Biden will be inaugurated as the 46th President of the United States on January 20.

III. The Mail-in Voting and Post-Election Challenges Controversies

- a. Applicable U.S. Civil Procedure and Evidence Law. The U.S. legal system in both federal and state courts requires litigation to be commenced with a written complaint by the complaining party, or plaintiff, pleading with some particularity the legal wrongs alleged and the facts that support those allegations, and a request for relief, a remedy provided for by the law that can be granted if the allegations are proved. If a complaint does not meet that standard, even with the allegations assumed to be true, a judge can, by motion or on his or her own initiative, dismiss the complaint. Sometimes, a judge can convert a motion to dismiss the complaint into one for “summary judgment” (meaning, like summary execution, without a trial), in which the plaintiff has the opportunity to introduce proof of the claims alleged in the complaint to avoid dismissal. Again, in a summary judgment motion, the facts alleged and the proof introduced are assumed to be true or construed in the light most favorable to the plaintiff; they are not subjected to the evidentiary standards of a trial. If, even assuming those facts to be true, the claim could not succeed as a matter of law, the judge may dismiss the complaint “summarily,” without a trial, sparing the responding party the time and expense of defending a spurious or nuisance claim. These aspects of American civil procedure in the courts are important to understanding the sequence of post-election litigations commenced by the Trump campaign and their dispositions.
- b. The Voting by Mail Controversy. During the campaign, Trump repeatedly asserted that the election would be “rigged” against him and inveighed against what he called “mail-in” voting, in which states automatically send a ballot to each registered voter at their last known address. By comparison, Trump repeatedly said that he had no problem with what he called “absentee” voting, in which voters must first request a ballot, which is then sent to them. Trump claimed, pre-election, that “mail-in” voting was rife with fraud and would prejudice him, while “absentee” voting was perfectly fine (in reality, experts of both parties repeatedly assured the public that both types of voting by mail were equivalent, with the ballots being received, verified and tabulated in the same manner; Trump’s claimed distinction was spurious). While all U.S. states offer some kind of voting by mail, and it has been a mainstay of U.S. elections for over a hundred years, used increasingly by both Republican- and Democratic-dominated and governed

states, the kind of unsolicited sending of ballots to all registered voters that Trump claimed was so prone to fraud is practiced in only nine states, all of which are perennially solidly Democrat states, with the exception of Utah, which is solidly Republican.² The only arguable exceptions among the nine in terms of being potentially in play are Nevada and Colorado. Nevada was the only one of the six states lost and contested by Trump that practiced the kind of “mail-in” voting about which Trump complained. With only six Electoral College votes, Nevada was not necessary to Biden’s win, and in the event, he won the state, as stated, by over 30,000 votes. Post-election, Trump ignored the distinction between “mail-in” voting and “absentee” voting that he stressed pre-election, but it was a red herring to begin with, and a hard-to-explain one, since only one or two states that were really in play were using the system Trump complained about.

- c. Post-Election Litigation and Dispositions. After the election, the Trump campaign commenced approximately fifty separate litigations in federal and state courts in each of the six contested states. One after the other, federal and state court judges in these different regions of the country, some appointed by Republicans, some by Democrats, some in courts of first instance, some in courts of appeal, dismissed the Trump campaign’s cases, finding repeatedly that no material evidence was offered to support the claims of voter fraud, that there was no evidence of fraud or even material innocent irregularities, that the claims were merely speculative or wishful thinking, and that – and this is a crucial point – *the claims, even if presumed true, could not have affected the outcome in that state’s election.* For example, in Pennsylvania, a state won by Biden by over 80,000 votes, one of the Trump campaign’s cases filed in court attacked the validity of 592 ballots. Many analysts also remarked that, while Trump campaign lawyers freely engaged in unsupported allegations of fraud and widespread conspiracy outside of court, they were more circumspect before judges, frequently stating in court that they were not alleging the frauds they had claimed to the press just a day or two before. The inference made by many of those analysts was that, because statements on “the courthouse steps” are protected as free speech, but deliberately false statements by attorneys in court can be sanctioned by judges, the Trump attorneys were not always willing to repeat inside the courtroom what they had said outside it.
- d. Supreme Court Final Review. The litigations culminated on December 8, the “safe harbor deadline,” after which all state certifications of their election results are presumed conclusive, with the U.S. Supreme Court dismissing, in one curt unsigned “*per curiam*” (by the Court, meaning the entire Court, unanimously) sentence issued 34 minutes after respondents’ briefs were filed, a Pennsylvania Republican legislator’s claims attacking the Pennsylvania absentee

² <https://www.nytimes.com/interactive/2020/08/11/us/politics/vote-by-mail-us-states.html>.

(not mail-in) voting system and seeking to disenfranchise approximately 2.5 million Pennsylvania voters who had voted lawfully by mail.

Also on December 8, the Attorney General of Texas, a state that Trump won, filed a petition for the U.S. Supreme Court to hear its claim against the states of Georgia, Michigan, Pennsylvania and Wisconsin that their elections somehow prejudiced the rights of Texans in not delivering the election for Trump, with the ultimate goal of overturning those states' elections. The petition alleged no proof of fraud in the four state elections, and offered only speculative claims that Trump could not have lost, and therefore did not lose. In one embarrassing statement, the petition alleged that the odds of Biden winning in the four states were "less than one in a quadrillion to the fourth power,"³ odds that do not exist in nature.⁴ Analysts quickly condemned the petition as legally unsupported and frivolous, its speculative claims already adjudicated in the fifty-odd Trump campaign state and federal litigation losses, and speculated that the Texas Attorney General, who was under indictment for securities fraud and accused of bribery and abuse of his office by seven of his own deputies, was seeking a presidential pardon before Trump left office. Astonishingly, 18 other states' attorneys general and 126 Republican members of the House of Representatives signed on to supporting petitions, while 22 states joined Georgia, Michigan, Pennsylvania and Wisconsin's vigorous opposition that described Texas' effort to disenfranchise their voters and overturn the election as "seditious" (it is worth noting that many of those 126 members of Congress had won reelection on November 3 on the same ballots on which Trump lost, and that in asking the Supreme Court to disenfranchise the four states' voters and install Trump as President, they were implicitly asking the Court to also invalidate their own elections. It will come as no surprise that this nuance of their argument was glossed over and not addressed in their brief). Trump, in his individual capacity, joined that petition on December 9.

³ [Texas Supreme Court petition for leave to file a complaint, at 7.](https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf)
https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf.

⁴ For context, the odds of winning the "Mega Millions" lottery are only approximately 1 in 300 million, or 1 in 3.0^8 , making winning the lottery virtually infinitely more likely than the 1 in 1 quadrillion to the fourth power, or 1 in 10^{60} , also expressed as 1 in 10^{60} , possibility that the Texas Attorney General assigned to Biden winning the four states Texas sued in the Supreme Court. Not to put too fine a line on it, but if you give credence in the Texas Attorney General's odds, you should be buying a Mega Millions ticket every day. In fact, 1 in 1 quadrillion to the fourth power is a number so small that you would have better – much better - odds of winning the Mega Millions lottery once every second from the beginning of the universe to today (H/T to fellow Bronx High School of Science classmate, M.I.T. graduate, friend and fellow attorney Craig J. Albert of [Albert PLLC](#)) for the example). Those are the odds that the Attorney General of Texas felt free to place before the United States Supreme Court in a bid to overturn the democratic election results in four other states and install Trump for a second term, and which 18 other state attorneys general and 126 Republican members of the U.S. House of Representatives signed on to.

The Supreme Court dismissed the Texas petition as curtly as its dismissal of the Pennsylvania appeal on December 11, three days after the petition's filing, refusing even to allow Texas and its supporters to file a complaint, noting in another unsigned one paragraph *per curiam* statement that the Court had no jurisdiction under the U.S. Constitution to entertain a claim by one state as to how other states had conducted their elections. Two of the Court's nine justices added a statement, not denominated as a dissent, to the *per curiam* dismissal to the effect that they would have granted Texas leave to file the complaint, for the sole reason that they believe that the Supreme Court is obligated to hear cases in which one state sues another state, but expressly stated that they, like the other seven justices, would have granted no other relief. Notably, the three justices nominated to the Court by Trump, including one confirmed to the Court the week before the election, were among the seven who voted not even to accept the Texas petition to file a complaint, much less grant the relief of overturning the four states' election results.

- e. Extra-Judicial Attempts to Overturn Election Results. As the court cases were winding down, Trump personally engaged in multiple open attempts to convince state legislators in the contested states that Biden had won to vote for Electoral College electors who would vote for him and not Biden and simply disregard the popular vote election results in their states. These efforts were not only unprecedented, but flatly illegal in many states, where state law requires electors pledged to the candidate who won the state's popular vote to be chosen.⁵ Many analysts considered these overt attempts to overturn state election results and consequently the national election results, as distinct from the court challenges and recounts, which are at least provided for in the existing electoral - legal system, as a type of slow-rolling attempted coup unprecedented in American history. Republican as well as Democratic state legislators, governors, secretaries of state, election supervisors and federal and state judges in Pennsylvania, Michigan, Georgia and Arizona, Wisconsin and Nevada, resisting enormous pressure, including threats of physical violence against them and their families, refused to be complicit in attempts to overturn state popular vote results. For example, in Michigan, an armed group of Trump supporters was filmed as they surrounded the Detroit house of the Michigan Secretary of State, Jocelyn Benson (a Democrat), shouting death threats outside her door, while she was inside with her four year old child. Similar threats of violence were directed at Georgia Secretary of State Brad Raffensperger (a Republican) and his family, including "sexualized threats" directed at his wife.

⁵ The U.S. Supreme Court had held, earlier in 2020, that the many state statutes forbidding so-called "faithless electors" were constitutional, and within the U.S. Constitution's express provisions that each state may establish the rules for its own elections.

We have offered a detailed explanation of what occurred here because the waves of misinformation and complexity of events have created a lot of misunderstanding, both for many Americans and our friends in other countries. There will undoubtedly be a substantial national review of how this happened, and no doubt recommendations and efforts to “harden” the U.S. election systems going forward to prevent it from happening again.

IV. Takeaways: Hardening the U.S. Electoral System

The U.S. electoral system “held,” but unlike the election itself, it was a close thing. It is not hard to imagine a slightly closer result in a few fewer states, and a few fewer courageous state electoral officials, elected politicians and judges allowing a democratic election to be overturned by the losing candidate. That is, and should be, a shock to many Americans, who have, with some justification but also some arrogance, been used to identifying their democracy as the most established, safe and secure in the world. Post-election efforts by the Trump campaign and Trump himself included not only open calls for state legislators and judges to overturn popular votes after recounts and audits established that those popular votes were accurate, but threats of murder and violence against, among others, state governors, secretaries of state, election officials and their families in Michigan, Georgia and elsewhere. With all due respect to the goal of apolitical review, we, as attorneys no less than as citizens, must acknowledge, recognize and condemn the unprecedented anti-democratic and lawless extremism that followed the election results in open attempts to overturn them.

There will be a substantial tendency among Democrats and Republicans who disavowed these threats and actions to heave a sigh of relief with their ending and “move on.” However, the fissures and pressure points exposed in the U.S. system when one party and its leaders do not respect or accept the basic tenets of democracy demand remedial solutions. Many measures to “harden” the system before the next elections should be considered. Among them:

- Allow early (before Election Day) counting of mail-in or absentee votes in all states, so that results are clear on Election Day night, and not only days later (Trump’s discouragement of mail-in voting by his supporters resulted in a phenomenon, predicted months in advance of the election, in which he appeared to lead in many states on the night of Election Day because most of his supporters had voted in person, and their votes were counted first, only to lose ground as mailed Democratic ballots were counted later; the consequent shift in results was used by Trump to claim voting fraud (in some states’

cases, the reverse happened; Biden led on Election Day night in Florida, Ohio and North Carolina, and Trump in later tabulation came from behind and won those states. Biden did not request any recounts or mount court challenges in those states, and of course, Trump did not. The only states in which Trump alleged fraud had taken place were states Biden won.).

- Standardize from state to state the voting by mail and vote tabulation rules. This is probably a heavy lift politically (heavier than the first bullet point) as states jealously guard their Constitutional prerogatives to run their own elections. Nevertheless, a clear majority of states with standardized rules would go far to eliminate spurious fraud claims by losing candidates.
- Standardize state procedures for choosing slates of electors well before Election Day to prevent state legislatures from being tempted or pressured to put their thumbs on the scale on behalf of losing candidates.
- Amend the 1887 Electoral Count Act, a famously hard-to-decipher statute to make clear that electors may only vote for the winner of their states' popular vote (the so-called "faithless elector" issue), and that state legislatures had no power to overturn the state popular vote by substituting a different slate of electors who would vote for the losing candidate. The U.S. Supreme Court has held that the many state laws that already provide for this are constitutional; the rule should be enshrined nationwide.

Owen D. Kurtin

Kurtin PLLC is a New York City-based law firm focused on corporate, commercial and regulatory representation in the Biotechnology & Life Sciences, Communications & Media, Information Technologies and Satellites & Space sectors. For further information, please see our website at www.kurtinlaw.com and contact info@kurtinlaw.com.

The materials contained in this advisory have been prepared for general informational purposes only and should not be construed or relied upon as legal advice or a legal opinion on any specific facts and circumstances. The publication and dissemination, including

on-line, of these materials and receipt, review, response to or other use of them does not create or constitute an attorney-client relationship.

To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

These materials may contain attorney advertising. Prior results do not guarantee a similar outcome.

Copyright © Kurtin PLLC 2020. All Rights Reserved.