

Q. & A.

# HOW TO PRESERVE AMERICAN ELECTIONS



By Isaac Chotiner

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*"In the long term, we need national, nonpartisan election administration run by a nonpartisan agency," the law and political-science professor Richard Hasen says. Photograph by Stephen Maturen / Getty*

On Wednesday, President Donald Trump refused to promise a peaceful transfer of power should Joe Biden win the election, telling reporters, "We're going to have to see what happens," and, "You know that I've been complaining very strongly about the ballots, and the ballots are a disaster." He added, "Get rid of the ballots and you'll have a very peaceful—there won't be a transfer, frankly. There will be a continuation." Earlier that day, he predicted that the election results "will end up in the Supreme Court," and made clear that he wants to confirm a new Justice quickly in order to secure a favorable ruling, saying, "I think having

a four-four situation is not a good situation, if you get that.” On Thursday, various Republicans commented on Trump’s statements. Some, such as the former Wisconsin governor Scott Walker, defended him; others, such as Senators Marco Rubio and Susan Collins said, without mentioning Trump, that both the election and any transfer of power would be peaceful. The Senate Majority Leader, Mitch McConnell, refused to answer reporters’ questions on Thursday, but tweeted, “The winner of the November 3rd election will be inaugurated on January 20th. There will be an orderly transition just as there has been every four years since 1792.”

Discussion surrounding the election’s fairness and legitimacy has been in high gear since the President began attacking voting by mail, baselessly claiming that it was likely to be fraudulent. This week, Jeffrey Toobin wrote for *The New Yorker* about the legal issues we are likely to face surrounding the election, and on Wednesday morning *The Atlantic* published an article by Barton Gellman about the ways that Trump might try to cast doubt on and even steal the election. Gellman reported that “the Trump campaign is discussing contingency plans to bypass election results and appoint loyal electors in battleground states where Republicans hold the legislative majority,” which might be technically possible, as the Constitution gives state legislatures the authority to choose their electors and does not require the electors to adhere to the statewide vote.

To talk about the biggest threats to the election, I spoke by phone, on Thursday, with Richard Hasen, a professor of law and political science at the University of California, Irvine, and the author of the recent book “Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy.” During our conversation, which has been edited for length and clarity, we discussed whether people should vote by mail or in person, what happens if state legislatures try to choose their own slates of electors, and what the next Congress can do to make elections freer and fairer.

**Trump’s threats regarding the election have to do with both political and legal issues. Is it worth thinking about these as separate categories?**

I think the two are working hand in hand. The Trump campaign and its allies are putting out legal arguments that are intended to make it harder for people to vote successfully by mail. And I think the short-term goal here is to shrink turnout. Whether that is actually to Trump’s benefit I seriously question, because I think he is disenfranchising his own voters. But the legal strategy is one that also helps to bolster a political strategy—that of potentially calling election outcomes into question, and generally making it seem like the election system is chaotic, which could leave room for other actors besides the voters to ultimately be the determinant of the winner of the November election.

**What is your biggest specific concern?**

I’ve had great concerns about both whether we can have a fair election and whether most voters will accept the election as legitimate, and I had those concerns well before any of us had ever heard of COVID-19. My book came out on February 4th, as the Iowa caucuses melted down and it wasn’t clear what the results were. You have this confluence of a number of forces: efforts at voter suppression, pockets of election-administrator incompetence, dirty tricks by foreign and domestic sources, and increasingly incendiary rhetoric around rigged or stolen elections. And all of those things contribute to reduced public confidence in elections and their legitimacy. You add that we are trying to hold an election during a pandemic, where there has been resistance among Republicans and in some courts to expanding voting opportunities in a safe and healthy way, and it is a volatile mix. The President is a big part of the story, but his rhetoric and what he is doing wouldn’t be so worrisome without these other broken parts of the system.

**Let's fast forward to November 3rd. We know Trump will say he won, and then you are going to have various Republicans saying he won, even if that is not clear or if it's clear that he didn't. And then there will be legal issues. Putting aside the rhetoric, which will be bad for the country, and maybe dangerous, what are the specific legal steps you are worried about Republicans taking?**

I think I disagree with the premise of your question.

**O.K., good.**

I am not sure Trump will declare victory. He might do something somewhat different and say there was cheating, and he never got a fair election, and more people wanted to vote for him.

**That's a good distinction.**

Barton Gellman's story says Trump will never concede. We may be splitting hairs. Is he going to say he would have lost in a fair election? Absolutely not. The real question is whether he goes quietly or whether he tries to fight the results of the election. And the biggest determinant there, in terms of which way he goes, is the margin. If Trump is ahead on Election Night, then he plows ahead. If it is close, he plows ahead. If he loses Florida and Texas, I don't know that he plows ahead, and I don't know if Republicans go along with him.

**O.K., but, just for fun, let's stick to the nightmare scenarios. I agree about the Florida/Texas scenario, but let's put that aside for now. Let's say it's closer, and Trump says either that he won or would have won in a fair election. What are the legal steps the White House and Republicans can take or might take?**

There are a lot of ways that this can go, but let's say that it comes down to a very close election in the Electoral College, and let's say it comes down to the state of Pennsylvania, where Trump could well be ahead on Election Night. He is encouraging his supporters to vote in person, while Democrats and others are more likely to vote by mail. In that scenario, he could say, "We should stop the counting, because mail-in ballots are fraudulent, and I have won Pennsylvania and therefore the Presidency." So what could happen legally, then, is there could be all sorts of maneuvering about how votes are actually counted, and classes of ballots that come in, for example, without their secrecy envelopes—the so-called naked ballots we have been talking about.

There is already legal maneuvering in state and federal court over these issues, but there could be continued legal maneuvering that would be geared more toward trying to stop the count or limit the number of outstanding ballots counted. There could be parallel efforts in the state legislature to try to declare that the vote was marred by improprieties, and therefore that the state legislature has to choose its own slate of electors—and then there would be a big fight over whether they could do that, and that is a fight that could play out both in the courts and in Congress, eventually, as Electoral College votes are considered and taken.

**One of the most talked-about parts of the *Atlantic* story, which you alluded to, is that, if the votes went against Trump in various states, the state legislatures with Republican majorities could appoint their own slates of electors. How concerned are you about this scenario?**

I do not think it is likely, but I don't think it is impossible that this will happen. I was having a debate with Nate Silver about this. He looks at it more like a statistician. I look at it more like the engineer at a nuclear reactor who is worried about the small risk of

a catastrophic meltdown—and I think we have gone from a negligible risk to a small risk. But that is still very worrisome, because the consequences are so huge.

To summarize why I think this Electoral College gambit by state legislatures is unlikely, to begin with, is that the Constitution provides, in Article II, that states get to set the manner for conducting elections. States have already set the manner! They are letting voters vote, and in every state it is winner take all, except for a couple states where they do it partially by congressional district. So the manner has already been set—people have already started voting. I take it that you couldn't change that midstream. The play would instead have to be that the legislature says that we gave it to the people, but the election was so poorly conducted that they have made a choice that we cannot discern, so we are going to do this on our own. That has a lot of risks. No. 1, it calls their own elections into question, because it says they don't know if the ballot count is valid. No. 2, in states with Democratic governors, there is going to be a serious fight about whether state legislatures can act without the governor's acquiescence in appointing electors, when usually it's the governor who is sending in the slate of electors.

Furthermore, this would be political dynamite. The idea that you are going to disenfranchise voters and not allow the vote count—I think you would have a huge backlash against those legislators who would do this. It would be seen as the ultimate Republican power grab, worse than some of the things we have seen in every state. You would have rioting. It would be hugely disruptive. And then those electors are going to be sent to Congress, where, if there is a Democratic House and maybe a Democratic Senate, their votes might not be accepted. This would be a constitutional crisis, but it wouldn't necessarily lead to the choice of Trump. It could go down a bunch of different roads. It could end up in the courts. It could become a political battle more than a legal battle. It would be setting off a kind of explosion that would be incredibly disruptive and uncertain.

#### **So the legislature chooses the electors and the governor sends them to Congress?**

Every state has its own set of rules, and I would refer you and your readers to the work of Ned Foley. When someone declares victory or defeat, it has no legal effect. It might in terms of public opinion, but it's really the certification of the vote count, which happens weeks after the election, that matters. For the Presidential contest, there is the certification of the election by state election officials, and for the purposes of the Presidency that leads to the appointment of a slate of electors from each state. Those electors meet, and then the governor of the state sends to Congress a report about how the electors voted. There are all kinds of scenarios in federal law when there are competing slates, and that gets to be a mess. But it is the governor who reports the Electoral College vote. So think of Wisconsin and Pennsylvania as two states with Democratic governors who might not report what a Republican legislature might do, and contrast that with Arizona and Florida, where the Republican governors would be more likely to do that.

#### **I assume we are probably talking about something ending in the Supreme Court in one of these scenarios.**

I think that, if we have a disputed Presidential election, there will no doubt be attempts to get the Supreme Court involved. Whether the Court steps in and how it does is really speculative right now. What I can say is that, even though we have an eight-member Court, assuming we don't have another member appointed before the election, the Court is not divided ideologically like it was when Justice Scalia died. It's a 5–3 Court. So it's unlikely we would have a deadlock.

#### **It won't be divided after a ninth Justice, either.**

Right, and that's why the argument that you need a ninth Justice to decide the race is a ridiculous one.

**This is something Trump and Lindsey Graham have been saying.**

Yes. It's not a reason to speed things up. And, if the Court does decide something 4–4, it is not like we have no decision—the decision of the lower court would stand. That would be a problem if you had conflicting lower-court decisions.

**You said earlier that you didn't know if Trump's comments on mail voting would actually help him. What message should Democrats be sending on mail voting? The general argument is that mail ballots are rejected at higher rates, but mail voting can help turnout. Sometimes people don't show up at the polls because the weather is bad or whatever else, and this is safer.**

Here is the advice everyone should take, whether they are Democrats or Republicans or a member of a third party or no party. No. 1, register to vote. We are quickly coming up on thirty-day deadlines in a number of states. If you aren't registered to vote, you can't vote. No. 2, have a voting plan, because voting will be different this year, whether you are voting in person—your polling place may have moved, the times may have changed—or if you are voting by mail. And you have to know what the rules are. We are talking about a hundred thousand people that may be disenfranchised inadvertently in Pennsylvania because the instructions are not clear. They have to put their ballot in a second envelope. These naked ballots are not going to count.

So, once you have a voting plan, you need to make sure that you vote as early as you are allowed to vote, and that you follow all the rules. Only in some states are you told you made a mistake and can correct that error. In other states, you are not told about that. And you are right: you are more likely to be disenfranchised if you vote by mail. If you listen to Michelle Obama, when she gave that speech at the Democratic National Convention, she said to vote early in person if you can. So I think that is the Democratic message. I think voting in person may not be right for everybody, and I think waiting to vote until Election Day is somewhat risky. We may have long lines. Remember, the President has encouraged people who vote by mail to go to polling places and try to vote again or check their registration. We don't know what it will be like on Election Day. So voting as early as possible, and doing it right, is a key message for all voters.

**An expert on this told me that the Pennsylvania naked-ballot thing was serious enough that Democrats should consider telling their voters in the state to not vote by mail.**

Well, it's not like Pennsylvania has great election administration in person. I think the key is a massive public-education campaign about how to vote. It may not be rocket science, but some of these rules are really arcane. In New York, if you put on a piece of Scotch tape, it wasn't counted. Voting by mail is not ideal for voters who are not experienced with it, even though in the five states that do vote by mail, with voters who are well educated about how to properly do it, you don't have the rates of spoiled ballots we are seeing.

**But even you started by saying that Trump discouraging his voters from voting by mail could hurt him.**

Well, right. It's not just Democrats that are going to have this naked-ballot problem, but if more Democrats are voting by mail it could have a greater impact on Democrats. But we saw in the April 7th Wisconsin primary, where Democrats captured a key state Supreme Court seat, that Republicans were less educated about how to vote by mail, and many of them did not feel safe to turn out in person, and Democrats ended up doing quite well. The Trump campaign and Republicans must be worried, because, despite the President's rhetoric, they are engaged in lots of mailings in places like Florida and North Carolina, urging their voters to vote by mail.

**If Democrats come to power in Washington in January, and control both houses of Congress and the Presidency, what should they be doing to insure the safety and security of future elections?**

Congress has broad power to set the manner for conducting congressional elections. It is the power it used in 1993 to require states to provide voter-registration opportunities at D.M.V.s and public-assistance offices. There is a whole menu of things that Congress can do to fix voting. It would require Democrats to get rid of the filibuster. And some of what Congress might do could be blocked by the Supreme Court.

I think, in the long term, we need national, nonpartisan election administration run by a nonpartisan agency, like the Federal Reserve, and we need much more uniformity in our rules, and no fragmentations of election authority in the hands of partisan officials. That is what we need to do so that every four years we don't have this angst about whether or not we can pull off a successful election. I also think we need a right to vote directly for President and other offices built into the Constitution, as opposed to just having negative rights that you can't discriminate in voting on the basis of race or gender. And we need minimal standards imposed on states when they run their elections—that they run them in a competent way and don't disenfranchise people for things that are out of voters' control.

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*[Isaac Chotiner](#) is a staff writer at *The New Yorker*, where he is the principal contributor to *Q. & A.*, a series of interviews with major public figures in politics, media, books, business, technology, and more.*

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