



SYMPOSIUM ESSAY

Weaponizing the Electoral System

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Abstract. The gravest threat to our democracy does not come from obstacles to voting—indeed, despite state-level efforts at retrenchment, voting remains far easier across the country than in 2008 when the United States first elected a Black president. Rather, the greatest concern is the effort to solidify party control of election mechanisms, turning the ordinary task of tabulating election results into an opportunity for partisan mischief.

Under the strains of 2020, despite COVID-19 and its many challenges, the system held up remarkably well. But the stability of these structures depends on a long-haul bipartisan commitment to repeat engagements, a commitment anathema to the demands of populist immediacy. These deservedly obscure local agencies and officials were targeted by President Trump as a vulnerability in the process of certifying election results and one that could be manipulated through partisan appeals.

This Essay will examine the fragility of election structures that depend on bipartisan agreement to certain ground rules. I argue that democracies depend on two critical features: (1) a commitment to repeat play; and (2) institutional guardrails such that the majority (or even plurality) will win according to preset rules, but not win too much. The populist fervor of the times threatens both. This Essay explores how close to the abyss the election system came in 2020, and how delicate the balance remains going forward.

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Table of Contents

Introduction 30

I. Weaponizing the Electoral Process 31

II. Democracy Unmoored..... 35

Introduction

The assumption that elections should determine the presidency is so ingrained in the American political psyche that the United States held contested elections even during the Civil War and World War II. This is decidedly not the norm in other democracies—Churchill, for example, faced no new parliamentary elections during the War. But in the United States, elections historically have gone forward, with the ordinary forms of election administration determining the winner and, most critically, the ordinary forms of rotation in office playing out, even in fraught election periods.

Until January 6.

It is hard to overstate the unprecedented nature of the violent assault on the Capitol as Congress met to solemnize the results of the 2020 presidential election. The congressional count of the Electoral College votes has long been part and parcel of the orderly transfer of power that has defined democratic accountability in the United States. On occasion, as with Richard Nixon in 1960 and Al Gore in 2000, the ceremonial vice-presidential task of ordaining the result has fallen to the defeated presidential candidate—with far more legitimate concern about electoral shenanigans in those years than 2020. And yet, across wars, changes in political fortunes, and deep political dissensus, the process has been orderly and dignified.

At the same time, it is important not to exaggerate what happened on January 6. This was not an attempted coup d'état in the fashion of Latin American dictators of the late twentieth century. There was no effort to take over the nerve centers of power, no attempt to control broadcasting, no roundup of enemy politicians, no meaningful effort to mobilize the military. Even the *autogolpes* of presidents overthrowing their own civilian rule had a military component to solidify state authority. Instead, as violent and damaging as the assault on the Capitol may have been, it had the unmistakable air of a Trump production: malevolent, exploitative, and lazy. Not surprisingly then, on January 6, Trump could incite the crowd to violence, but then retreat to the White House to watch on television.

That January 6 was more spectacle than coordinated threat should not discount the seriousness of the breach of democratic norms. Even after the shock of a violent assault, 139 House Republicans and 8 Republican senators voted against certifying the 2020 election results,¹ effectively transforming an administrative symbol of orderly democratic governance into cynical partisan theater. In turn, as the rhetorical assault on the supposedly stolen election persisted, 70% of surveyed Republicans rejected the Biden election as

1. Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (updated Jan 7, 2021), <https://perma.cc/4SJU-FT48>.

fraudulent.² As well captured by longtime Republican strategist Stuart Stevens, even before the assault on the Capitol, “much of a major party has turned against democracy. It’s foolish to believe that does not have consequences.”³

In practical terms, this means that the Republican Party has set its sights on voting and election administration as the prime culprit for losing the presidency. At the local level, this means repeated frivolous challenges to ballot counting coupled with assaults on poll workers in a manner “geared towards intimidating officials.”⁴

I. Weaponizing the Electoral Process

Of greatest concern is the effort to solidify party control of election mechanisms, turning the ordinary task of tabulating election results into an opportunity for partisan mischief. Such appeals to immediate partisan gain are a chronic problem for election administration across the world. Thus, the European Commission for Democracy through Law (known as the Venice Commission), the European Union’s preeminent institution on democratic best practices,⁵ sets as one of its categorical building blocks that “[a]n impartial body must be in charge of applying electoral law.”⁶ Drawing on the experience of sixty-one countries, the Venice Commission decrees that “where there is no longstanding tradition of administrative authorities’ independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.”⁷

The United States is notably derelict in this regard. Elections are generally under the supervision of state-level partisan officials, usually the Secretary of State, but that is only where ultimate authority resides. In reality, the election process is highly decentralized and usually left to the hands of bipartisan local bodies. Whereas democratic best practices would insulate election mechanics from partisanship, the United States substitutes a nonprofessional administration that is bipartisan, not nonpartisan. Perhaps this is not the

2. Victoria Bekiempis, *70% of Republicans Say Election Wasn’t “Free and Fair” Despite No Evidence of Fraud—Study*, GUARDIAN (Nov. 10, 2020, 11:12 AM EST), <https://perma.cc/AH7E-EGCD>.

3. Shane Goldmacher & Adam Nagourney, *4 Takeaways from Biden’s Electoral College Victory*, N.Y. TIMES, (updated Jan. 5, 2021), <https://perma.cc/T2ZY-UZ9U>.

4. Memorandum from the Mun. Clerk’s Off. and the Mun. of Anchorage Elections Team to the Mun. of Anchorage Assembly 14 (May 25, 2021), <https://perma.cc/7F4V-RQZ6>.

5. See EUR. COMM’N FOR DEMOCRACY THROUGH L. (VENICE COMM’N), CODE OF GOOD PRACTICE IN ELECTORAL MATTERS GUIDELINES AND EXPLANATORY REPORT 4 (2002), <https://perma.cc/DXH5-AC5G>.

6. *Id.* at 10.

7. *Id.*

platonic ideal, but it has generally been good enough to muddle through. So long as each of the major parties could vigilate the other, a commitment to electoral competition, repeat play, and basic values of popular sovereignty kept temptations to cheat reasonably at bay. American democracy is marred by a long history of franchise restrictions. But apart from scattered episodes of one-party local control, like that of Jim Wells County in Lyndon Johnson's 1948 Senate election,⁸ American election results have basically corresponded to the votes actually cast.

Over the course of the 2020 election and its various challenges, the institutions responsible for election administration proved remarkably resistant to the demands of the Trump campaign to set aside voting totals or to declare the results illegitimate. It is easy to be distracted by the cartoonish legal figures holding press conferences in the parking lot of a lawn care company, or advancing legal claims so outlandish that they succeeded only in launching efforts to disqualify the lawyers involved for professional misdeeds.⁹ But what should not be overlooked is the institutional resilience in the face of extraordinary pressures from President Trump and his acolytes.

A comprehensive examination by researchers at Stanford and MIT concluded: "In the end, poll workers, election administrators, and the courts rose to the occasion and professionally resolved each of these [election lawsuit] challenges in accordance with law and established procedures. None of the recounts, election challenges, audits, or lawsuits turned up any significant fraud or had any impact on the outcome of the election in any state."¹⁰ The state-by-state review revealed that, "[t]he electoral system confronted and passed its most severe test in recent memory. Any fair appraisal would focus on the heroism of election officials, civil society actors, and voters, who turned out in record numbers despite the threat of the pandemic."¹¹

Notwithstanding the political pressures placed on election officials, the system held up remarkably well. From secretaries of state to local election boards to courts tasked with overseeing election disputes, Trump's fraud and malfeasance claims failed and failed again, and failed in the courts as well. These institutions held a reservoir of what Swedish political scientist Bo

8. Martin Tolchin, *How Johnson Won Election He'd Lost*, N.Y. TIMES (Feb. 11, 1990), <https://perma.cc/Y4N4-ZLHA>.

9. See, e.g., Katelyn Burns, *The Trump Legal Team's Failed Four Seasons Press Conference, Explained*, VOX, (Nov. 8, 2020, 11:50 AM EST), <https://perma.cc/5B9C-QL6T>; Murray Waas, *Revealed: How Sidney Powell Could Be Disbarred for Lying in Court for Trump*, GUARDIAN, (Dec. 6, 2021, 5:12 PM EST), <https://perma.cc/MC69-DLTC>.

10. STAN.-MIT HEALTHY ELECTIONS PROJECT, THE VIRUS AND THE VOTE: ADMINISTERING THE 2020 ELECTION IN A PANDEMIC 551 (Chelsey Davidson & Zahavah Levine eds., 2021).

11. *Id.* at 22.

Rothstein terms “knowledge realism,” or an “assured knowledge of what is true and what is not.”¹²

Having run elections year in, year out, these local officials were able to maintain their bearings even under the extraordinary strains of COVID-19. If the electorate divides along partisan lines on the use of early voting, for example, there is nothing suspicious about early vote trends not matching final results. Years of experience and plain common sense discounted claims that ballots might contain bamboo that would indicate Chinese infiltration in Arizona, or claims that the historically less than formidable Italian military had designed space-based technology to flip ballots from Trump to Biden. Seen from afar, these claims will seem to stoke madness of the moment. For those on the front line of elections, however, these were assertions contrary to detailed experiential knowledge of how elections operate.

Much of this knowledge is remarkably localized. Take Michigan, for example, one of the true battleground states with a Democratic governor, a gerrymandered Republican legislature, and a small popular vote margin for Biden over Trump. Michigan is one of twenty states that maintains township governments, an American pattern dating from seventeenth century New England, and decentralized local control of most governmental functions, including administration of elections: “Involving 83 county clerks, 280 city clerks and 1,240 township clerks, Michigan’s elections system is administered by 1,603 county and local election officials[,] making it the most decentralized elections system in the nation.”¹³ Each county has a local canvassing board, and it is “virtually unheard-of for canvassers to do anything but do the job of certifying their county’s results, then sending them on to the Board of State Canvassers to do the same.”¹⁴ Indeed, “it is the settled law of this State that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical. . . .”¹⁵ The multiple levels of Michigan state election administration produced reliable results because of a high level of bureaucratic routinization and a bipartisan commitment to adhere to centuries of custom:

12. Bo Rothstein, *What Saved American Democracy?*, SOC. EUR. (Jan. 13, 2021), <https://perma.cc/2QY2-AHPN>.

13. *Michigan’s Elections System Structure Overview*, MICHIGAN.GOV: OFFICE SEC’Y STATE, <https://perma.cc/R8YZ-6EKV> (archived April 9, 2022).

14. Sarah Cwiek, *Drama at the Board of Canvassers: No, That’s Not Normal. Here’s What’s Up*, NPR: MICH. RADIO (Nov. 20, 2020, 11:46 AM EST), <https://perma.cc/9MTC-L2DZ>.

15. MICH. DEP’T OF STATE, BUREAU OF ELECTIONS, MANUAL FOR BOARDS OF COUNTY CANVASSERS ch. 3, at 8 (2020) (quoting *McQuade v. Furgason*, 91 Mich. 438, 440 (1892)).

“Bureaucracy is viewed favorably as capable of advancing the common good, and everyone is expected to participate in the community’s political affairs.”¹⁶

But the stability of these structures depends on a long-haul bipartisan commitment to repeat engagements, a commitment anathema to the demands of populist immediacy. These deservedly obscure local agencies and officials were targeted by President Trump as a vulnerability in the process of certifying election results and one that could be manipulated through partisan appeals. The predicate, of course, was the claim of fraud: “In Detroit, there are FAR MORE VOTES THAN PEOPLE. Nothing can be done to cure that giant scam. I win Michigan!”¹⁷ The means chosen to unearth this putative fraud was to destroy a century of public decency for momentary political gain.

Bowing to pressure from the White House, two Republican members of the Wayne County Board of Canvassers initially refused to certify the election results¹⁸ in the heavily Democratic county,¹⁹ citing small discrepancies in the number of people recorded as having voted by precinct officials and the actual number of votes cast.²⁰ The mild discrepancies were nothing surprising to experienced election officials; some voters show up, get discouraged by lines, and leave, while others simply do not cast ballots.

But the actions taken by the Republican canvassers were completely unheard of. The county-level board of canvassers was assigned only the ministerial task of checking that all precinct level returns are received before forwarding the tabulations up the chain to the state board. The canvassers do not serve as judges of electoral outcomes. The Wayne County actions provoked great public outcry, and ultimately the Republican board members reversed course and voted with their Democratic counterparts to certify the election results,²¹ although they later attempted to recant their votes after a

16. STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 87 (2007).

17. Reality Check Team, *US Election 2020: Fact-Checking Trump Team’s Main Fraud Claims*, BBC NEWS (Nov. 23, 2020) (quoting a November 18, 2020 tweet from Donald Trump), <https://perma.cc/BJ49-ZCAJ>.

18. David Landau, Hannah J. Wiseman & Samuel Wiseman, *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE 97, 111 (2021).

19. Maggie Astor, *When Michigan Republicans Refused to Certify Votes, It Wasn’t Normal*, N.Y. TIMES (Nov. 18, 2010), <https://perma.cc/G3TH-V6Z8>.

20. These discrepancies occur when voters sign into a polling place but leave before casting a ballot, and canvassing boards regularly certify election returns despite evidence of these small deviations in vote counts. Given that there were an estimated 357 votes out of about 250,000 affected by such inconsistencies in Wayne County, they were not significant enough to change Biden’s victory in the county. *Id.*

21. *Id.*

phone call from President Trump.²² President Trump also attempted to influence the state election board, which is also equally divided along party lines; but that body voted to certify, albeit 3–0 with one Republican abstention.²³ All of a sudden, the country was in suspense as to whether Michigan could complete its election process, which generally has all the excitement and uncertainty of watching paint dry. In blunt form, “[w]hen Boards of Canvassers meeting[s] become exciting, things have stopped being normal.”²⁴

Ultimately, this time around, normalcy prevailed. The Michigan State Senate, which is majority Republican, convened an Oversight Committee chaired by Senator Ed McBroom, a public and highly vocal Trump supporter.²⁵ The Committee concluded there was no widespread vote fraud in the 2020 election in Michigan and McBroom attributed that to “the extent to which our elections officials go to facilitate our elections.”²⁶ The report ends by stating that:

We commend the innumerable clerks, canvassers, staff, workers, and volunteers across Michigan that make the enormous complexity of elections operate so smoothly, so often. The complexity of the work and the dedication we discovered are astounding and worthy of our sincerest appreciation. . . . If all citizens remain vigilant and involved, we will emerge stronger after any challenging time.²⁷

II. Democracy Unmoored

The ability of election administrators to hold the line in 2020 should not breed complacency. The intensity generated by the Trump-campaign claim of fraud sparked extralegal attacks on election officials. Such attacks were of a sort that threatens the ability of the election system to function at all. A false accusation that the Erie County postmaster in Pennsylvania had backdated mail-in ballots resulted in vigilante harassment and that official having to

22. Landau et al., *supra* note 18, at 111. President Trump and other Republican party members also initially tweeted expressing support for the board members’ initial refusal to certify the county results. *Id.* at 111 n.68.

23. *Id.* at 111.

24. Cwiek, *supra* note 14.

25. Jonathan Oosting, *A U.P. senator stood up to Trump. His Career May Suffer. His Cows Don’t Care.*, BRIDGE MICH. (July 1, 2021), <https://perma.cc/4EQY-GPPN> (“McBroom, who was a Trump delegate at the 2016 Republican National Convention, lives the kind of throwback lifestyle the former president had put on a pedestal with his pledge to ‘Make America Great Again.’”).

26. See MICH. S. OVERSIGHT COMM., REPORT ON THE NOVEMBER 2020 ELECTION IN MICHIGAN, S. 101, 58TH Sess., at 3-4 (2021) (“This Committee found no evidence of widespread or systematic fraud in Michigan’s prosecution of the 2020 election.”).

27. *Id.* at 35.

abandon his home to take his family into hiding.²⁸ Similar threats were reported across the country, most notably in Georgia where Trump supporters, in addition to staking out the house of Georgia Secretary of State Brad Raffensberger “also harassed ground-level election workers, none of whom enjoyed police protection [like Raffensberger did]. Ruby Freeman was in hiding, for instance. Ralph Jones, who helped oversee voter registration, had endured vile online messages, slurs, and threats.”²⁹

Once election officials come under personal threat, and once these routine, bureaucratic processes are weaponized, however—as undertaken by the Trump camp in 2020—can the normalcy chronicled by the Michigan Senate Report be maintained?

The four years of the Trump presidency marked a profound shift in the United States. Lasting damage has been done to public trust in democratic institutions, government capability, the status of news media, the ability to invoke science and proof, and more. Putting our political culture and democratic system back together will require more than mere policy to repair.

28. MARK BOWDEN & MATTHEW TEAGUE, *THE STEAL: THE ATTEMPT TO OVERTURN THE 2020 ELECTION AND THE PEOPLE WHO STOPPED IT* 54-59 (2022).

29. *Id.* at 146.