

# SETTLING THE ELECTION

## WHAT HAPPENS IF NO ONE WINS ON ELECTION NIGHT?

October 2, 2020

Investors are increasingly focused on the risk of a contested election due to potential mail-in voting delays that may spark legal challenges. The impact of the delayed decision in the 2000 election, settled by the Bush v. Gore Supreme Court decision, led to a five-week period of stock market weakness. In an effort to help investors fully understand the potential ramifications of such a challenge amid economic uncertainty, this special report describes the timeline a contested election may take from a legal standpoint.

Mail ballots have been steadily increasing in popularity for years, but 2020 promises a quantum leap in their use. Most election officials expect the nationwide percentage of ballots cast by mail to increase from 23% in 2018 to more than 50% in 2020, and perhaps as high as 70% or more in some locales. Five states — Colorado, Hawaii, Oregon, Utah, and Washington — already had all-mail voting systems. Elsewhere, however, November 2020 could represent a sea change in how Americans cast ballots.

The COVID-19 pandemic is behind the increase in mail-in voting. Fear of infection is a major disincentive to stand in line — perhaps indoors — for hours, waiting to cast an in-person ballot. Another, less covered consequence is the impact the pandemic is having on the number of open polling places. Given that so many poll workers are senior citizens, state and local election administrators are having trouble recruiting enough people to staff the usual set of polling places. Many polling locations will therefore be closed this election.

---

Northern Trust  
Global Asset Allocation

**James McDonald**  
Chief Investment Strategist  
jxm8@ntrs.com

**Daniel Phillips, CFA**  
Director, Asset Allocation Strategy  
dp61@ntrs.com

Jenner & Block, LLP

**Sam Hirsch**  
Partner  
shirsch@jenner.com

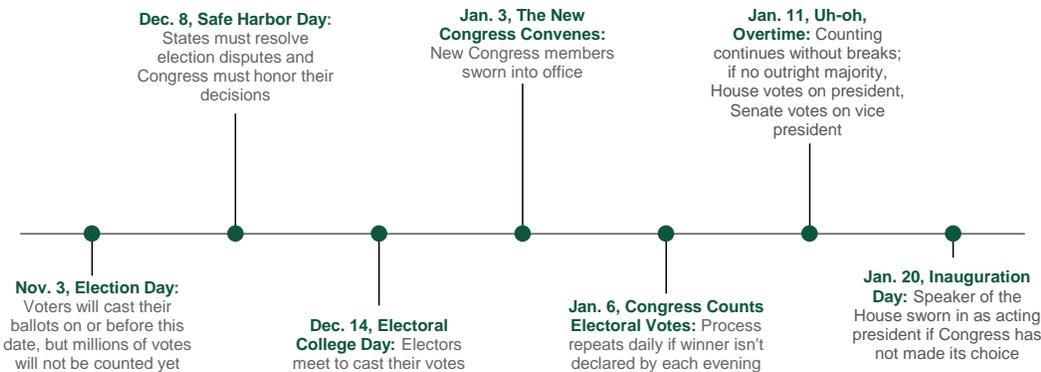
**Jessica Amunson**  
Partner  
jamunson@jenner.com

**Thomas Perrelli**  
Firm Chair, Partner  
tperrelli@jenner.com

---

### EXHIBIT 1: THE TIMELINE OF A CONTESTED ELECTION

A high-level overview is provided below and further detail starts on page 4.



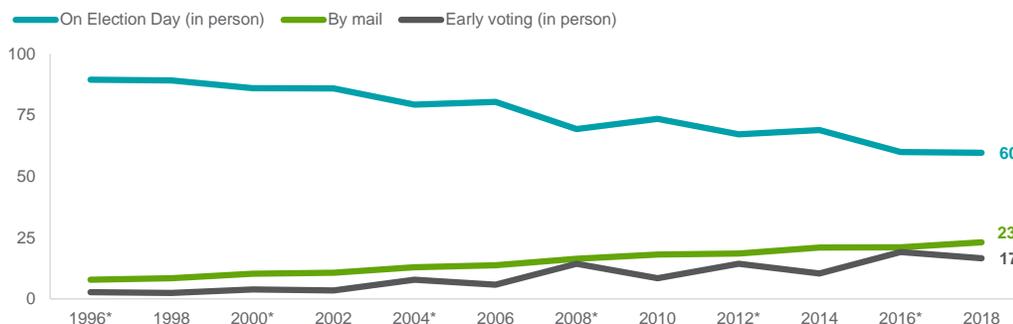
Source: Northern Trust Asset Management, Jenner & Block LLP.

Public-opinion polls suggest that Democrats are more likely to favor mail-in ballots and Republicans are more likely to vote in person. President Donald Trump and other Republican officeholders have led efforts to contain the anticipated explosion in mail-in ballot usage, alleging they contribute to voter fraud. Democrats and Republicans have been battling in court to expand or contract, respectively, opportunities to cast ballots by mail and to have those ballots counted and reported in a timely fashion.

**EXHIBIT 2: INCREASING NUMBER OF VOTERS “MAILING IT IN”**

The pandemic will likely lead to a jump in the already-upward trending number of mail-in votes.

VOTING METHOD (% OF SURVEY RESPONDERS)



Source: Northern Trust Asset Management, Jenner & Block LLP, U.S. Census Bureau, Current Population Survey. \*Presidential election year. In 2018, 0.7% of responders did not know and/or did not say what voting method they used. Data from 1996 through 2018.

The states’ approaches to mail ballots are hardly uniform. In most states, any registered voter can vote by mail without citing a reason. But in a half-dozen states, voters must provide some sort of “excuse” for voting by mail. For example, in Texas, mail ballots generally are available only to people who will be out of the county on Election Day and during early in-person voting, are in jail, are 65 years or older or are sick/disabled. And the Texas Supreme Court has held this year that lack of immunity to COVID-19 does not qualify as a physical disability, for these purposes.

A second distinction divides the states that will:

1. Affirmatively mail out ballots to all registered voters.
2. Affirmatively mail out ballot applications (but not the ballots themselves).
3. Mail applications or ballots only upon request from an individual registered voter.

A third distinction involves whether and when voters will be given an opportunity to “cure” problems if, say, a signature on a ballot envelope purportedly does not “match” the one on file for that voter. Or if a voter identifies herself as “Sue” on the envelope but identified as “Susan” at the time of registration. A fourth distinction is between states that require mail ballots to arrive at election administrators’ offices on/before Election Day, versus states that allow mail ballots to arrive later so long as there is no indication (such as a postmark) that they were mailed after Election Day. Finally, a fifth distinction is between states or localities that do not commence counting mail ballots until the night of the election, versus those that count them as they arrive over a period of days or weeks.

Because many states will allow ballots to arrive post-Election Day and/or will refuse to count mail ballots as they arrive, election night totals will be incomplete — in some cases, radically so. A candidate leading in early returns may be tempted to prematurely declare victory in certain states, or nationally, knowing full well that thousands or millions of ballots remain uncounted. That, in turn, will place great pressure on the news media to be cautious and sober in making election predictions after polls close, even into the days or weeks that follow. Related, exit polls taken at polling places may be less reliable this year because fewer ballots will be cast in person.

## COMPLICATIONS ARISING FROM PROVISIONAL BALLOTS

Similar issues to the above may also plague a significant number of “provisional” ballots. These ballots are cast in person (rather than by mail) but are held up to confirm the voting status of the voter. Provisional ballots will likely increase this year as a fraction of all in-person ballots. Due to the pandemic, election administrators in most counties are consolidating polling places and hiring first-time poll workers who may be less familiar with normal election procedures. Historically, provisional ballots tend to skew Democratic.

Some states have had provisional ballots (or something akin to them) for decades, but they first went nationwide when Congress mandated them in the Help America Vote Act of 2002 (HAVA). This HAVA provision was designed to minimize the number of voters who show up at a polling place but are turned away without casting a ballot because poll workers don’t find their names on the precinct’s list of registered voters.

The provisional ballot is sealed in a secure envelope and is counted only if local election officials, sometimes with post-Election Day help from the voter, can determine that the voter was in fact registered and eligible to participate. However, the rules about when to count (or discard) a provisional ballot are set not by HAVA, but by state law. For example, some state laws provide that a provisional ballot cast at the wrong polling place should be wholly discarded (even though the location where the vote was cast did not affect the ballot’s list of presidential candidates).

## THE RED MIRAGE, THE BLUE SHIFT AND POST-ELECTION LITIGATION

The combination of mail ballots and provisional ballots has given rise to an accentuated version of what some call the “Red Mirage” and the “Blue Shift.” Preliminary vote totals announced after polls close skew Republican. That’s the mirage. But as harder-to-count ballots are added to the totals in the days or weeks that follow, Democrats make significant gains. That’s the shift. For example, in the 2018 contest for U.S. Senator from Arizona, post-election night counting increased the Democratic margin of victory by some 70,000 votes.

### EXHIBIT 3: STATES IN FOCUS

Mail-in rules within swing states and those with close Senate races will be important to understand.

Key states for the:	Early counting of ballots?	Ballots can arrive post-Election Day?	Electoral College votes (#)	Current leader in polls (margin, percentage points)	Most recent election winner (margin, percentage points)
<b>Presidential election</b>					
Arizona	Yes	No	11	Biden (2.8)	Trump (3.5)
Florida	Yes	No	29	Biden (1.1)	Trump (1.2)
Georgia	Yes	Yes	16	Trump (1.2)	Trump (5.1)
Michigan	No	Yes	16	Biden (5.2)	Trump (0.2)
North Carolina	Yes	Yes	15	Biden (0.5)	Trump (3.7)
Ohio	Yes	Yes	18	Biden (3.3)	Trump (8.1)
Pennsylvania	No	Yes	20	Biden (5.7)	Trump (0.7)
Texas	Yes	Yes	38	Trump (3.2)	Trump (9.0)
Wisconsin	No	No	10	Biden (5.5)	Trump (0.8)
<b>Senate race</b>					
Alabama	No	No	n.a.	Tuberville (8.0)	Jones (1.5)
Colorado	Yes	No	n.a.	Hickenlooper (not available)	Gardner (2.5)
Georgia	Yes	Yes	n.a.	Perdue (2.8)	Perdue (7.9)
Iowa	No	Yes	n.a.	Greenfield (2.6)	Ernst (8.5)
Maine	Yes	No	n.a.	Gideon (6.5)	Collins (36.8)
Montana	Yes	No	n.a.	Daines (1.6)	Daines (17.9)
North Carolina	Yes	Yes	n.a.	Cunningham (6.0)	Tillis (1.7)

Source: Northern Trust Asset Management, Jenner & Block LLP, National Conference of State Legislatures, Real Clear Politics, U.S. Election Atlas. Key states are those deemed to be most important to the election’s outcome. “Most recent election winner” shows incumbent Senator and their margin of victory in previous election (generally 2014). Poll data Real Clear Politics average as of 10/1/2020.

## INVESTMENT STRATEGY COMMENTARY

The Red Mirage/Blue Shift phenomena increase the incentive for post-election litigation. This may come from Republican plaintiffs seeking to slow or halt the counting of ballots that are perceived to favor Democrats, and also by Democratic plaintiffs seeking to prevent Republican state or local election administrators from taking actions perceived to benefit Republicans. Claims and defenses will arise under both federal and state law, and litigation will likely be filed in both federal and state courts. This especially may be the case in the dozen or so states that are either “tipping points” for the Electoral College or important for controlling the U.S. Senate.

Federal claims and defenses raise the possibility of litigation reaching all the way to the U.S. Supreme Court, as happened famously in 2000 in *Bush v. Gore*. This is one reason, among many, why the upcoming confirmation battle for Judge Amy Coney Barrett to replace the late Ruth Bader Ginsburg as the court’s ninth Justice has such strong partisan valence and urgency. In an eight-member court, a tie vote would affirm the judgment from the court below. Notably, the Supreme Court of Pennsylvania, perhaps the most important swing state, is currently majority-Democratic.

However, the courts’ power to affect the outcome may be limited by the available judicial remedies. Courts do have the power to call for a revote, but, in practice, that is extraordinarily rare. Therefore, post-election court orders are much more likely to focus on the counting of ballots already cast but not yet counted, such as provisional ballots and late-arriving mail ballots. Ultimately, the final word will likely not come from the judiciary, but from Congress.

### RESOLVING DISPUTES ABOUT THE VOTE COUNTS

There are key federal laws governing disputed presidential elections; namely, the 12<sup>th</sup> Amendment to the U.S. Constitution and the Electoral Count Act of 1887 (ECA). These laws were established in the wake of the bitterly contested presidential elections of 1800 and 1876, respectively.

Unfortunately, these laws are hardly a picture of clarity. We have enlisted the help of election and constitutional law experts Jenner & Block, LLP to help clarify this process.

The 12<sup>th</sup> Amendment provides that the members of the Electoral College shall meet in their respective states to vote for the president and vice president and shall certify, seal and transmit the results. Weeks later, the president of the Senate (usually the sitting vice president) opens the certificates, counts the votes and — ordinarily — announces the winner. If no candidate for president or vice president has an outright majority, the 12<sup>th</sup> Amendment establishes an alternative procedure discussed in the January 11 entry of the timeline on page six. The 12<sup>th</sup> Amendment does not address what happens if there is a dispute over a state’s certified vote tallies. In 1876, when Florida, Louisiana, and South Carolina delivered competing sets of certified results — one backing the Republican, Rutherford B. Hayes, the other backing the Democrat, Samuel J. Tilden — the country faced a constitutional crisis with no playbook. In the end, it was resolved with a political deal between Democrats and Republicans. Today, we have a playbook in the form of the ECA, but it is hardly clear. Perhaps the best way to understand the ECA is to follow the timeline it establishes, which gets us to what could happen during this election season.

### THE TIMELINE

#### **Tuesday, November 3, 2020: Election Day**

The voters in each jurisdiction will cast their ballots on or before this date. But as described above, millions of votes will not be counted until days or weeks later.

#### **Tuesday, December 8, 2020: “Safe Harbor” Day**

If a state makes a “final determination” of any dispute by this “safe harbor” date, then Congress must treat the state’s appointment of electors as “conclusive.” In making its final determination, however, the state must rely on state laws as they existed prior to Election Day. The safe-harbor

provision encourages states to enact comprehensive rules governing potential election disputes before the election and to implement those rules in the five-week period following Election Day.

### **Monday, December 14, 2020: Electoral College Day**

This is the date when the electors will meet in their respective states and cast their votes for president and vice president. It also is the deadline for the governor of each state to deliver the final determination of any election disputes and a “certificate of ascertainment” showing the state’s election results and chosen slate of electors. As explained below, the governor’s certificate can play an important “tie-breaking” role in certain circumstances. Although 18 states (including swing state Pennsylvania) do not legally bind their electors, most states compel electors to pledge to support their party’s nominee. And 15 states back up their pledge laws with a sanction, sometimes imposing a monetary fine against any elector who flouts the pledge — and usually replacing the “faithless” elector with one who will honor the pledge. Notably, in *Chiafalo v. Washington* earlier this year, the Supreme Court unanimously upheld the states’ power to enforce their pledge laws.

### **Sunday, January 3, 2021: The New Congress Convenes**

At noon Eastern Time (all times going forward are Eastern Time), the members of the new Congress will be sworn into office. The replacement of the 116<sup>th</sup> Congress with the 117<sup>th</sup> could affect the presidential election in at least three ways. The first of these — changing House control — seems unlikely, as Democrats appear poised to retain control. The second possibility — changing Senate control — is a hot topic, as there are plenty enough close Senate elections this year to tip the chamber’s balance (see Exhibit 3). It is likely that neither party will come out of this year’s election with more than 52 of the 100 Senators. If there is a 50-50 tie, Republican Vice President Mike Pence — as president of the Senate — will play a tie-breaking role (discussed further below). The third issue — which party controls most House delegations — comes into play only if neither Trump nor Biden captures an outright majority in the Electoral College.

### **Wednesday, January 6, 2021: Congress Counts the Electoral Votes**

At 1 p.m., the Senate and House will meet in a special joint session to open the certificates alphabetically by state, count the electoral votes and declare the winners. If at least one member of each chamber raises an objection to any state’s electoral votes, the two chambers will divide and meet separately to resolve the dispute. Then they will reconvene in the joint session to resume counting, proceeding alphabetically through the list of states.

The counting rules are complex, turning on (1) whether Congress received one, or more than one, electoral return from the state; (2) whether the “safe harbor” (discussed above) applies; (3) if the safe harbor does not apply, whether the electors’ appointments were “lawfully certified” by the governor; and (4) whether the electors’ votes were “regularly given.” If the two chambers agree to accept or reject a state’s slate of electors, as would be more likely if Democrats control both the House and at least 51 seats in the Senate, their agreement would control the outcome. But if the two chambers deadlock, as would be more likely if Republicans control at least 50 Senate seats (but not the House), then the governor’s “tie-breaking” certificate ordinarily will control. If the deliberation and counting do not conclude by evening, either chamber may recess until 10 a.m. the following morning. And that process can repeat, day after day, up to a point, as Congress works its way through the alphabetical list of states.

### **Monday, January 11, 2021: Uh-Oh, Overtime**

Beginning on this date, if Congress has not yet completed the counting of electoral votes, it may no longer take recesses each night. Round-the-clock marathon sessions begin. It is possible that no candidate gets an outright majority of the appointed electors, either because there is a tie vote (likely 269 to 269) or perhaps because both chambers have rejected certain electors or have accepted slates that include votes cast by “faithless” electors for other candidates or for persons

## INVESTMENT STRATEGY COMMENTARY

not actually running. (This has happened repeatedly in recent years, though it has never deprived a candidate of an Electoral College majority.) If this occurs, the 12<sup>th</sup> Amendment dictates that the presidential election will be resolved by the House and the vice presidential election by the Senate.

In the House, each state, rather than each representative, would have one vote, and the 12<sup>th</sup> Amendment commands that “a majority of all the states shall be necessary to a choice,” so 26 House delegations would have to agree on a candidate. Currently, control of House delegations closely tracks the 2016 presidential-election results. In each of the 20 states that Clinton carried, Democrats hold a majority of the House delegation. Republicans control the House delegations in 26 of the 30 states that Trump carried. Democrats control the Arizona and Iowa delegations and are tied in the Michigan and Pennsylvania delegations. However, all of this could change — in either direction — in the next Congress. Indeed, if only one House seat changed hands, from Republican to Democratic — say in Florida, Alaska, Kansas or Montana — then neither party would control 26 House delegations and Congress might not be able to choose the next president.

In the Senate, 51 senators would have to agree on the choice of the vice president. But either party could block action by denying the constitutionally mandated two-thirds quorum, as each party will surely have at least 34 Senators. So it is not hard to imagine the vice presidency going temporarily unfilled in this circumstance.

### **Wednesday, January 20, 2021: Inauguration Day**

At noon, the current terms of Trump and Pence will expire, no matter what has gone before. If Congress has successfully made its choice, the newly elected or re-elected president will be sworn in. If not, the Presidential Succession Act of 1947 mandates that the Speaker of the House (likely Democrat Nancy Pelosi of California) would resign from Congress and become the Acting President. And, under the 25<sup>th</sup> Amendment, Acting President Pelosi could fill the vice-presidential vacancy, so long as her nominee wins confirmation by simple majorities in both the Senate and the House.

### **CONCLUSION: PREPARING FOR UNCERTAINTY**

With confidence in polling data remaining relatively low, many investors remain concerned about the potential for a very close election and a disputed outcome. We have laid out the procedural steps that will be taken in this case, but the odds are increasing that we may not immediately know who has won the presidential race and key Senate contests. Complicating matters further will be the reduced reliability of polling data, as fewer people will be voting in person and forecasters will have to make assumptions about the voting tendencies of those voting in person versus by mail.

Noting concern over their accuracy given the 2016 disparity between election polls and actual results, surveys of investors, polling data, and betting markets all expect a Biden presidency. As we indicated in our [U.S. Election 2020](#) report, the presidential outcome is only one piece of the puzzle as control of the Senate will be critical to pass meaningful legislation. Financial markets, however, are increasingly hedging the potential for volatility around the election, likely tied to the potential for an uncertain outcome and resulting litigation. One way to measure this is through futures prices tied to volatility. VIX volatility futures have risen in the last six weeks from a current level of 25 to an expected volatility level of 32 in November — with a subsequent decline in the ensuing months. Both of these directions (increased short-term volatility, followed by some normalization) seem rational in the wake of current trends. That said, there are significant constitutional protections to ensure a smooth transition of power. Despite the potential abnormality this time around, our approach to this election will not differ from other elections. That is, not to try to predict, but attempt to prepare for all potential outcomes. Then soon after the winners are determined across the different branches of government, implement the appropriate portfolios changes, if any.

*Special thanks to the named attorneys at Jenner & Block for their substantial contribution to this report. Additional thanks to Colin Cheesman, Investment Analyst, for data research.*

---

## LET OUR EXPERTS BE YOUR EXPERTS

Schedule a tour to learn more about growing your business with the support of the Investment Institute. Contact your **Northern Trust Relationship Manager** or the **Northern Solutions Group** at **855-645-8303** | **NorthernSolutionsGroup@ntrs.com**, or visit us at **NTAMInvestmentInstitute.com**

---

© 2020 Northern Trust Corporation. Head Office: 50 South La Salle Street, Chicago, Illinois 60603 U.S.A.

**IMPORTANT INFORMATION. For Asia-Pacific markets, this information is directed to institutional, professional and wholesale clients or investors only and should not be relied upon by retail clients or investors.** The information is not intended for distribution or use by any person in any jurisdiction where such distribution would be contrary to local law or regulation. Northern Trust and its affiliates may have positions in and may effect transactions in the markets, contracts and related investments different than described in this information. This information is obtained from sources believed to be reliable, and its accuracy and completeness are not guaranteed. Information does not constitute a recommendation of any investment strategy, is not intended as investment advice and does not take into account all the circumstances of each investor. Opinions and forecasts discussed are those of the author, do not necessarily reflect the views of Northern Trust and are subject to change without notice.

This report is provided for informational purposes only and is not intended to be, and should not be construed as, an offer, solicitation or recommendation with respect to any transaction and should not be treated as legal advice, investment advice or tax advice. Recipients should not rely upon this information as a substitute for obtaining specific legal or tax advice from their own professional legal or tax advisors. Information is subject to change based on market or other conditions.

Past performance is no guarantee of future results. Performance returns and the principal value of an investment will fluctuate. Performance returns contained herein are subject to revision by Northern Trust. Comparative indices shown are provided as an indication of the performance of a particular segment of the capital markets and/or alternative strategies in general. Index performance returns do not reflect any management fees, transaction costs or expenses. It is not possible to invest directly in any index. Gross performance returns contained herein include reinvestment of dividends and other earnings, transaction costs, and all fees and expenses other than investment management fees, unless indicated otherwise.

Northern Trust Asset Management is composed of Northern Trust Investments, Inc. Northern Trust Global Investments Limited, Northern Trust Fund Managers (Ireland) Limited, Northern Trust Global Investments Japan, K.K, NT Global Advisors Inc., 50 South Capital Advisors, LLC, Belvedere Advisors, LLC, and investment personnel of The Northern Trust Company of Hong Kong Limited, and The Northern Trust Company.