

POLITICAL PULSE

What to Watch on Election Night and Beyond

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Donald Luskin and John Fund

If Biden wins, we might know it on election night. If Trump wins, it could be weeks.

It's one week before an election that will likely be beset by fraud (see ["Video: Zoom meeting with election fraud expert John Fund"](#) September 3, 2020), *litigation* (see ["Video: Zoom meeting with election law expert Richard Pildes"](#) October 7, 2020) *and possibly a Constitutional crisis* (see ["Video: Zoom meeting with Constitutional scholar John Yoo"](#) September 25, 2020).

- [Here is our calendar of key dates and key states for the presidency and the Senate.](#)

November 3: Election day

[This year](#) ten states sent mail-in ballots to all registered voters (CA CO DC NJ HI NV OR UT VT WA (MT county-optional)). 14 states sent *applications* for ballots to all registered voters (CT DE IA AL MA MD MI MN NE OH RI SD WI WY). Mail-in ballots require significant processing to validate them even before they can be counted, and only two states (AZ FL) provide for processing prior to election day. Many states will accept ballots after election day, and US Postal Service first class mail delivery [takes six days, on average](#), so there will surely be election results that are not known for days or weeks, even assuming no fraud or litigation.

- [Former Vice-President Joseph R. Biden would become the prohibitive favorite on election night if he conclusively wins Florida plus one of either North Carolina or Arizona.](#) Those wins would be known on election night because Florida and Arizona do not count mail-in ballots received after election day, and Florida takes a head start in qualifying and counting them.
- [If Biden does not win Florida-plus-one, and if President Donald J. Trump wins those and every state he carried in 2016 – and his victory is as narrow in swing-states as it was in 2016 – we likely won't know that result with any certainty on election night. We'll probably have to wait for Michigan, Pennsylvania, and Wisconsin to sort out their mail-in ballots. All else equal, Trump can lose any two of them and still narrowly win.](#)
- Even if Biden wins Florida-plus-one on election night, we won't know the ultimate winner for sure. We can't rule out Trump offsetting Biden's advantage by winning a state carried by Hillary Clinton in 2016, such as Nevada or Minnesota, and Nevada will be

Update to strategic view**US ELECTION MODEL:**

Biden would become the prohibitive favorite on election night if he carries Florida and one of either North Carolina or Arizona. If Trump is the winner, it won't be known for a week or more when mail-in ballots are qualified and counted in battleground states he carried in 2016. All else equal he can afford to lose two of Michigan, Wisconsin and Pennsylvania, but not all three. Even if Biden wins Florida-plus-one, Trump could offset that by winning a state Clinton carried in 2016 such as Nevada, where results will be delayed by very heavy utilization of mail-in ballots. December 8 is the "safe harbor" date by which the Supreme Court will likely end litigation and recounts, as it did in Florida in 2000. December 14 is the date state electors cast their Electoral College ballots, and this is when we will know whether the president and vice-president will have to be selected in a "contingent election" in the new House and Senate in 2021.

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among the nation's heaviest users of mail-in ballots.

- *Litigation is already underway in several states.* Yesterday the [Republican party prevailed](#) in the Supreme Court to block Wisconsin's move to accept mail-in ballots after election day. [Democrats prevailed](#) last week when the high court deadlocked on a similar case concerning Pennsylvania (see "[The First Skirmish in the Chaos Election](#)" October 20, 2020), but the [GOP is seeking to have that case heard again](#) now that Amy Coney Barrett has been sworn in.
- *Such litigation will be ongoing on election day and beyond.*

November 6

Ballots due in Kansas. Postmark required. *This is a competitive Senate race for an open seat presently held by retiring Republican Pat Roberts.*

Ballots due in Kentucky. Postmark required.

November 9

Ballots due in Iowa. Must be postmarked day before the election. *Both a swing state and toss-up Senate race for GOP incumbent Joni Ernst.*

November 10

Ballots due in Nevada. Postmark required. Ballots with unclear postmarks must be received by the earlier date of November 6. *Nevada could be a win for Trump in a state he didn't carry in 2016. The sharp decline in the casino industry has seen the exodus to Mexico of many service-sector workers who, on average, would have likely voted Democratic.*

Ballots due in Minnesota. Postmark required.

November 12

Ballots due in North Carolina. Postmark required. *A must-win state for Trump and toss-up Senate race for GOP incumbent Tom Tillis.*

November 13

Ballots due in Ohio. Postmark required. After election night, no results will be reported until final certification, which must be by November 28. *This is a critical state that Trump carried in 2016, so this lack of telemetry will generate much uncertainty.*

Ballots due in Alaska. Postmark required. Mail-in ballots will not be counted until one week after the election. *This is a competitive Senate race for GOP incumbent Dan Sullivan.*

John Fund

John Fund is an expert on elections and election fraud. He is the author of [Stealing Elections: How Voter Fraud Threatens Our Democracy](#) and [Who's Counting?: How Fraudsters and Bureaucrats Put Your Vote at Risk](#). He is currently the national-affairs reporter for National Review Online and a senior editor at The American Spectator.

Last month John presented to TrendMacro clients in [a live Zoom call](#) to discuss the potential for fraud in this year's heightened utilization of mail-in balloting.

Contact TrendMacro

On the web at trendmacro.com

Follow us on Twitter at twitter.com/TweetMacro

Donald Luskin
Dallas TX
312 273 6766
don@trendmacro.com

Thomas Demas
Charlotte NC
704 552 3625
tdemas@trendmacro.com

Michael Warren
Houston TX
713 893 1377
mike@trendmacro.energy

December 8: Safe Harbor

The “safe harbor” date under [Title 3, Section 5, of the US Code](#). The validity of a slate of electors that had been subject to controversy must be accepted in the Electoral College count if a state governor has certified that slate by this date. In 2000, the Supreme Court decision [Bush v. Gore](#) was handed down on December 12, that year’s safe harbor date, ending the “hanging chad” controversy in Florida, and enabling the state to send its electors without further litigation. *This year look for the Supreme Court to do the same thing on this day in analogous situations – of which there are likely to be several.*

December 14: Electoral College

Meetings of electors in the state capitols under [Title 3, Section 7, of the US Code](#), in which they officially cast their votes for president and transmit them to the Archivist of the United States for tallying in the Electoral College. *This is the day the election could get really weird.*

This is the day on which electors vote for a particular candidate to whom they are pledged. If circumstances – say death, infirmity or allegations of corruption – were to cause either party to replace a candidate on the ticket, it would have to be by this day in order to avoid serious Constitutional questions when Electoral Ballots are officially counted by Congress on January 6, 2021.

That contingency aside, if voting disputes have not been resolved by this date – organically or by the Supreme Court – it’s possible that a state would be unable to identify its winning slate of electors, so that state’s vote would not be transmitted to the Electoral College. Depending on the states in which this occurs, both Trump and Biden could be deprived of the Constitutionally required majority of 270 Electoral College votes, in which case [under the 12th Amendment](#) the president would be selected in 2021 by the House of Representatives, and the vice-president by the Senate, in a “contingent election.”

We believe that Trump would likely be the winner in this circumstance, but can’t rule out that his vice-president would be Kamala Harris (see [“Video: What you’re not hearing about how a blue wave could re-elect Trump”](#) September 25, 2020).

However under this circumstance there would doubtless be litigation brought by the plurality winner as to [what constitutes a majority](#) in the Electoral College. This has never had to be settled by the Supreme Court. The High Court would also have to settle technical disputes that will surely arise in the House and the Senate as to procedural conduct.

A deeper crisis would be involved if a state were to send more than one slate of electors to the Electoral College, which could happen in a sufficiently contentious dispute. Again, the Supreme Court would have to intervene if the slates were dispositive to the final tally.

January 3

New Congress, the 117th, convenes. It will be this House, and this Senate – not the presently constituted ones – who would select the president and vice-president in a contingent election.

January 5

Runoff elections for two Senate seats in Georgia (one regular election, one special election, both currently held by Republicans), providing no candidate gets an absolute majority on November 3. *The winners would participate in the selection of vice-president in a “contingent election,” so the promptness of tallying these runoff elections and seating the winners could be subject to litigation and intervention by the Supreme Court.*

January 6

Ceremonial official counting of the Electoral Ballots, with 117th Congress meeting in joint session. Incumbent Vice-President Michael Pence would still be President of the Senate.

January 20

Inauguration Day. The President-elect becomes President of the United States.

In the worst-case scenario of a “contingent election” that fails to select a president, the selected vice-president would become “acting president” under the [20th Amendment](#) and [Title 3, Section 19, of the US Code](#), until a president could be selected.

In the worst-worst scenario, in which both the president and the vice-president were unable to be selected, the Speaker of the House would become acting president.

Bottom line

Biden would become the prohibitive favorite on election night if he carries Florida and one of either North Carolina or Arizona. If Trump is the winner, it won't be known for a week or more when mail-in ballots are qualified and counted in battleground states he carried in 2016. All else equal he can afford to lose two of Michigan, Wisconsin and Pennsylvania, but not all three. Even if Biden wins Florida-plus-one, Trump could offset that by winning a state Clinton carried in 2016 such as Nevada, where results will be delayed by very heavy utilization of mail-in ballots. December 8 is the “safe harbor” date by which the Supreme Court will likely end litigation and recounts, as it did in Florida in 2000. December 14 is the date state electors cast their Electoral College ballots, and this is when we will know whether the president and vice-president will have to be selected in a “contingent election” in the new House and Senate in 2021. ▶