



US Politics Watch

Civics – a new election battleground

An ING report in conjunction with Oxford Analytica
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No American alive can remember an election campaign like this one. The pandemic has distinguished it from all other peacetime elections since 1920 by changing the scale and nature of campaigning.

The latest turn came less than a month from Election Day, with President Trump returning to the White House after having spent the weekend in hospital testing positive for Covid-19. As a result, the remaining weeks will be dominated by the virus even more than before. One scenario is that a re-invigorated Trump will personify through his recovery an ability to lead the country past the pandemic and towards economic prosperity in a second term. Alternatively, the virus will leave him lethargic and unable to wrest momentum back from his opponent Joe Biden.

Much focus on the electoral process itself

The 2020 election is the first time for generations that there has been so much focus on the electoral process itself. That focus could eventually produce fundamental changes to the country's civic landscape. Issues that would have dominated the final stretch of earlier campaigns, such as the Republican decision to move ahead with confirming a replacement for the late Justice Ruth Bader Ginsburg on the Supreme Court or the uncivil nature of the first presidential debate, have been eclipsed by questions about whether the country's political system will be able to produce a fair outcome.

For the third time in twenty years, this election may be won by the candidate who has won fewer votes across the country than his rival, thanks to the Electoral College - and victory in the Electoral College may depend more than ever on which votes are actually counted by each state.

Even the structure of the Supreme Court is being called into question

This questioning does not stop with the democratic nature of the election system. Frustration with the filibuster in the Senate, which has so often guaranteed inaction in Congress, may finally see the end of this nineteenth century parliamentary technique. Even the structure of the Supreme Court is being called into question. Nothing in the Constitution says that it should have nine Justices and there is talk of increasing the number of Justices to alter the balance of the Court between liberals and conservatives.

Whoever wins the election, we are likely to see questions about the voting process both in the immediate aftermath, followed by a deeper examination come January, particularly if the outcome is not immediately apparent after Election Night. But rethinking the electoral process could open the door to deeper changes to the institutions of government over the longer term, especially if the Democrats control both the White House and Congress.

Oxford Analytica and ING Group teamed up again to examine the forthcoming election and the country's civic structure more broadly in order to assess how and whether the election will change the country's political institutions.

(More reports as part of the *US Politics Watch* series are available [here](#).)

Rethinking how America votes

Mail-in ballots – challenged by President Trump?

President Trump has made mail-in ballots the focus of his concern about the electoral process. These have long been used by people who were away from their usual polling station on the day of an election, either because of military service or business travel. In recent elections they have become more common as states increasingly provide mail-in ballots upon request without requiring an explanation of why they are needed. Indeed, several states now automatically send out mail-in ballots to all registered voters. Most

states send out absentee ballots between 45 and 30 days before Election Day, and these can be returned weeks before the campaign is over.

In the 2018 mid-term elections, one in four voters mailed in their ballot rather than voting in person at a polling station. The proportion of mail-in ballots is expected to be significantly larger this year, and the overall volume of votes will also be higher because this is a presidential election. Due to the Covid-19 pandemic, most states have expanded their mail-in or absentee ballot programs so that registered voters need not go out to their polling locations but can request ballots be sent to them in the mail. They return them the same way, using a signed and sealed envelope that is placed within a larger envelope. In this election, 84% of those eligible to vote will have the option to do by mail without having to give any reason as to why they cannot do so in person.

President Trump has repeatedly asserted that voting by mail poses a significant risk of fraud

President Trump has repeatedly asserted that voting by mail poses a significant risk of fraud, while also suggesting that the US Postal Service is vulnerable to interference and will be unable to cope with the volume of postal ballots. Although no evidence has been produced to substantiate these concerns, the President has succeeded in sowing doubt about the integrity of a means of voting that many people will use as a result of the pandemic.

“Another aspect of mail-in voting that has received less attention is that it lessens the impact of developments in the last weeks of the campaign”

Another aspect of mail-in voting that has received less attention is that it lessens the impact of developments in the last weeks of the campaign, when many voters will already have committed themselves. With two million ballots already cast by the end of September, the impact of a late-breaking surprise such as President Trump’s experience with Covid-19 would be muted.

Different counties in each state can have differing procedures for deciding which votes are acceptable

But mail-in votes need to be counted, which raises questions about whether they were placed in the secure second envelope, had the required signature correctly added, and were clearly completed. Different counties in each state can have differing procedures for deciding which votes are acceptable, and in a close election these will inevitably trigger lawsuits. An effort to standardise the availability and counting of mail-in ballots is likely after this election, regardless of the outcome, especially if challenges to the counting of mail-in ballots substantially delays final certification of the result.

Disputed outcome?

Most elections pass with little controversy. With the exception of 2000, when recounts in Florida extended into December, the races are decided on Election Night, and the losing candidate calls the winner to concede.

The 2020 elections may be different

The 2020 elections may be different. The sheer number of mail-in ballots expected in this election could extend counting by days or weeks. The result of a primary election for a House seat in New York City this summer took more than six weeks to determine due to legal battles over which mail-in ballots should be counted. Because vote totals may not be immediately available in swing states, there could be a large number of electoral votes outstanding by the next morning. As polling data suggests that a majority of mailed-in ballots are likely to come from Democratic voters, a Republican lead on election night could become a Democratic victory once these votes are counted. Equally, a state that counts its mail-in ballots before election day and releases those results as the polls close may see an early Democratic lead overturned.

A Republican lead on election night could become a Democratic victory

If President Trump disputes the results of the election, or if he prematurely declares victory on election night before all the votes are counted, it is uncertain what the political consequences would be. A recent exercise with political professionals about a contested election played out numerous scenarios of varying plausibility, most of which

included a lengthy legal battle prior to a final result. In 2000, the result of the presidential election was effectively determined by the Chief Justice of the Supreme Court.

Protests by his supporters could turn violent for a short while

In the absence of a clear victory for President Trump, the most likely outcome is that he claims that he has not really lost because the election was rigged, but then leaves office. Protests by his supporters could turn violent for a short while, but the longer-lasting consequence may be a hardening of the Trump base against a Biden presidency that encourages Republican obstruction in Congress. The result would be more gridlock.

Supreme Court conundrum

The death of Justice Ruth Bader Ginsburg came just as the presidential campaign was entering its final lap. The Republican-controlled Senate appears set to reverse the precedent it set in 2016 when it refused to confirm a new justice during an election, a move that was itself a reverse of the previous precedent of much longer standing, namely that the election year was no obstacle to choosing a justice. The text of the US Constitution does not rule on the matter.

“Despite the limited time available, they will try to confirm the nominee before the election, to aid their electoral chances and avoid further controversy”

Despite the limited time available, they will try to confirm the nominee before the election, to aid their electoral chances and avoid further controversy. The prize for doing is a Supreme Court with six conservative-leaning Justices who would influence the US legal landscape for years. Democratic

Democratic bitterness cannot be overstated

bitterness cannot be overstated: A Republican Senate majority that refused to consider a Democratic nominee in March 2016 on the grounds that it was too close to that year's presidential election are now seeking to confirm their own candidate, Amy Coney Barrett, just weeks or even days before this year's vote.

Were former Vice President Joe Biden to win the presidency and his party also take the Senate this year, there will be a strong temptation to offset the Coney Barrett nomination by expanding the Court from nine seats to eleven and then filling the two new seats with justices confirmed by a Democratic Senate. This has not been done for 150 years but would only require an amendment to the Judiciary Act of 1869, which established the current number of Justices at nine.

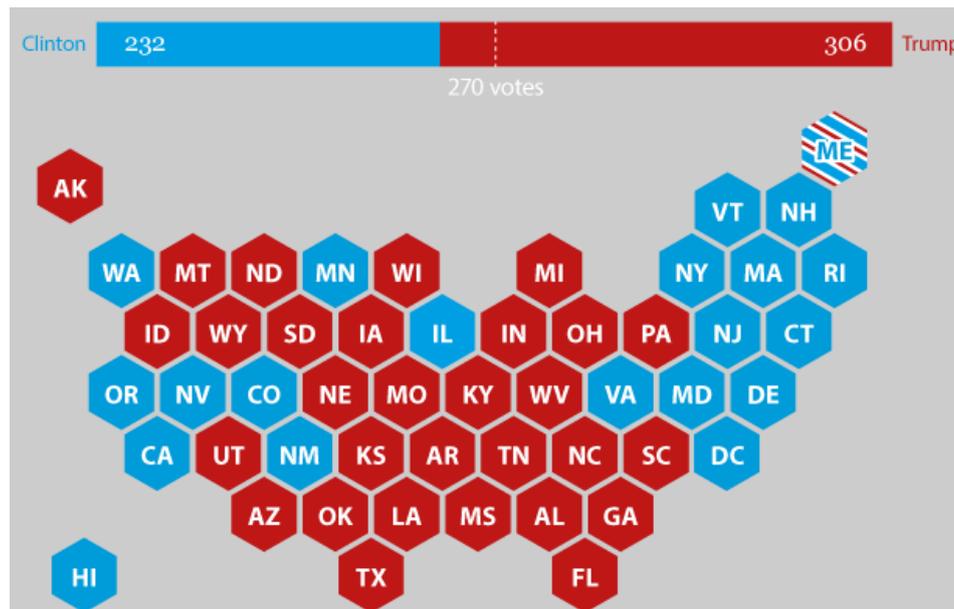
Possible changes ahead

Should there still be an Electoral College?

The US presidential election is not a single national election

The US presidential election is not a single national election. It is instead a series of 51 state-level winner-take-all elections (including Washington, DC). This is why presidential elections can be won by the candidate with fewer individual ballots in the country overall, as was the case in 2000 and again in 2016. Were this to happen in 2020, it would mean that half the presidential elections in the 21st century would have been won by the candidate with fewer votes. This is made possible by the Electoral College, sometimes described as the 'appendix' of the body politic.

Figure 1. Presidential election outcome, 2016



Source: Media reports, Associated Press

The Electoral College was originally designed to address the challenges of holding a national election in a pre-industrial age. At the Constitutional Convention in 1787, it was assumed that the country was too large to stage a nationwide election for a single office. Therefore, states would choose ‘electors’, distinguished men usually drawn from the state legislature who could be relied on to represent the interests of their area, who would meet in the state capital to consider the merits of the candidates before casting votes on behalf of their state in a national body known the Electoral College.

“the path to the White House still does not involve winning the majority of ballots cast”

As a result, the path to the White House still does not involve winning the majority of ballots cast, but instead depends on winning the most votes in the Electoral College. Each state has the same number of votes as it has Senators and

Representatives in Congress: the smallest states have three votes (reflecting two senators and a Representative) while California, the country’s most populous state, currently has the most with 55. Today, a candidate must win at least 270 votes out of a total of 538.

A quirk of American democracy

Over the last two hundred years, this has largely been a quirk of American democracy rather than a problem as, until 2000, the winner of the popular vote also won the Electoral College vote in every election except 1876. However, in 2000 and 2016 the results diverged, with George W. Bush and then Donald Trump winning the presidency despite receiving fewer votes than their opponents – In Trump’s case nearly three million fewer. In 2020, this could happen again.

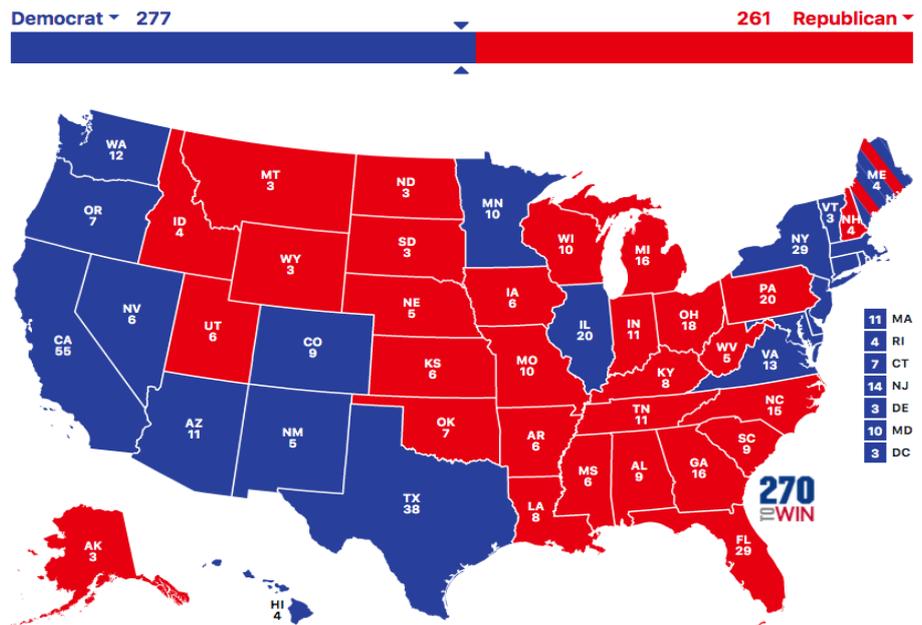
This creates two other sources of distortion. First, Electoral College votes do not reflect the electorate equally. California has 720,000 residents for each of its 55 votes, while the largely rural Wyoming has only 193,000 for each of its three votes. Second, the election is decided not by the votes in all states, but by those that have significant numbers of Electoral College votes and in which the race to win those votes is tight. These are “swing” states; in 2020 the most important swing states are Wisconsin, Arizona, Pennsylvania, and Florida.

Democrats end Electoral College advantage for Republicans

The Electoral College came close to abolition in 1970 and there is now renewed pressure to end its role. The difficulty in doing so lies in the partisan advantage that the Electoral College currently gives to Republicans by favouring small rural states, and the party is not willing to abandon this. Therefore, the most likely route to the abolition of the Electoral College is if it begins to favour Democrats rather than Republicans. Democrats are already on record as opposing the Electoral College, but Republicans would then have a reason to oppose it as well.

This scenario is most likely to emerge if Texas flips from Republican to Democrat. If Texas did so, and especially if Arizona followed a similar path, then the Democrats could win presidential contests even while losing most other swing states.

Figure 2. Possible future Electoral College under continued partisan realignment



Source: 270TOWIN

Changing Congress

The legislative branch is the most powerful in the US government, with authority over the structuring, financing, and policy direction of the executive branch. Yet the obstacles to the exercise of that authority are substantial because of the multiple collective action problems arising from deep partisan divisions and ideological polarization.

We have seen the withering of Congressional muscle

In recent years we have seen the withering of Congressional muscle, from its refusal and/or inability to conduct effective oversight of executive agencies, to failing to pass new legislation and a heightened reliance upon judicial policymaking – passing laws that are worded so that the courts are required to define exactly what they mean.

Does the filibuster have a future?

While wholesale institutional reforms are unlikely to emerge in the immediate aftermath of the 2020 election, if it results in Democrats controlling both the White House and the Senate then a change to the filibuster process is possible and even likely. Originally a device that required a Senator to continue speaking for hours on end to ‘talk out’ the time available for consideration of a piece of legislation and so prevent it from coming to a vote, today merely the threat of doing so is enough to doom a bill. As it requires 60 votes to overturn a filibuster, it effectively ensures that 60 votes are needed for a bill to pass if deployed.

After the Republicans raised its use from occasional to routine during the Obama administration, the Democrats seem finally ready to end the practice if the election enables them to do so.

With President Obama leading this campaign, Democrats argue that there is no mention of the filibuster in the Constitution, that its use has been heavily expanded in recent years, and that it now acts as an anti-democratic obstacle to governance. While the filibuster blocks both Republicans and Democrats from passing legislation with simple majorities in the Senate, it affects Democrats more, since they have a longer policy list that requires legislation.

“If the filibuster were to be eliminated, it would likely happen in the first few days of the new legislative session”

If the filibuster were to be eliminated, it would likely happen in the first few days of the new legislative session, when the Senate drafts its rules. If the filibuster is not immediately eliminated, then the only way to pass

legislation by a simple majority is to use a reconciliation bill. This is a process restricted to matters that affect the budget. This means that, for example, it could not be used to pass immigration reform, but it could be used to pass a tax cut (as it was in 2017). The Senate parliamentarian, a non-elected official, decides whether any particular policy item has enough of a budgetary impact to be included in a reconciliation bill.

Democrats are highly likely to try to eliminate the filibuster

Relying on reconciliation would prevent much of the Democratic agenda from being passed in the Senate, which leads to the conclusion that Democrats are highly likely to try to eliminate the filibuster if they win control of both the Senate and White House in November.

Judiciary – the Supreme Court fight

From Court to final policy arena

The Supreme Court has the ability to review all laws passed by Congress and deem them unconstitutional, although only if a law has been challenged in the court system and appealed up to the Court. While this does not frequently happen (most laws are passed unchallenged), for highly contentious issues it has become more frequent in recent years. The Affordable Care Act of 2010 (ACA or ‘Obamacare’) was upheld by the Supreme Court in a decision that was seen as “saving” the law - in a sense that was less about its legality than the political calculations of Chief Justice John Roberts.

Control of the Court has in the course of the last century rightly come to be regarded as vital to advancing a legislative agenda. If Biden wins and the Democrats control Congress, it can be assumed that most major pieces of legislation will be challenged in federal court by Republican state Attorneys General as unconstitutional.

Battle for the majority

Another pivotal battle in US politics

For this reason, control of the nine-Justice Court has emerged in recent years as another pivotal battle in US politics. The fundamental assumption of Presidents who nominate individuals to the Court and of Senators who vote to confirm those appointments is that Republican-appointed Justices will usually adopt Republican positions on cases before the Court, and that Democrat-appointed Justices will adopt Democrat positions.

This is not always the case; a high-profile case concerning Trump’s tax returns was decided by a majority of 7 to 2. However, many cases are decided on 5-4 lines, as happened for the ACA. This makes party control of the majority, and the position of the presumed “swing justice” fundamental.

Legitimacy in question

“A conservative Court could weaken or even strike down major Biden initiatives”

A conservative Court could weaken or even strike down major Biden initiatives. While the Court system is supposed to act as a check on the other two branches, the Constitution did not intend for

the Court to act as an effective veto on legislation simply because of policy disagreements. A Court that regularly overrules the other two branches on routine legislation could trigger a constitutional crisis.

In fact, that crisis may already be here.

In February 2016, following the death of Justice Antonin Scalia, the Republican-held Senate refused to consider Obama's nominee for a seat in the final year of his presidency. The Senate majority then argued that it was too close to the November election to do so and established a “rule” to give legitimacy to the principle. With Ginsburg's death, despite being far closer to the election, many of those same Republican Senators are now vowing to confirm President Trump's nominee. While there are arguments being made about why the rule from 2016 does not apply, the real reason is clear. In 2016, Republican Senators had the political power to deny a nominee put forward by a Democratic President; in 2020, they have the votes to confirm a nomination made by a President of their own party.

This calls into question existing Constitutional understandings

This calls into question existing Constitutional understandings. The Supreme Court receives its democratic legitimacy from its justices being selected by the elected President and confirmed by the elected Senate. But if the Senate can block justices from a President of the opposing party, then vacancies may go unfilled when the President and Senate are held by opposing parties.

With existing demographic and partisan trends, it is possible to see Democrats win the next three Presidential elections and Republicans hold onto the Senate throughout. In that case, would any nominee be chosen? What would happen if three justices died and the Court lacked a quorum? The Constitution is unclear.

Might the Democrats pack the Court?

The most visible potential reform is for the Court to be expanded to include more justices. Democratic Presidential candidate Pete Buttigieg had called for a larger Court with fixed terms as part of his platform, which could further (if differently) politicize the Court.

A major break in the traditions of US politics

This would be a major break in the traditions of US politics. “Packing the court” was attempted by President Franklin D. Roosevelt at the height of his political strength and was a failure. A major reform of the Supreme Court is a heavy legislative lift.

Fifty-two stars: What next?

The addition of new states

Perhaps the most long-lasting reforms possible in 2021 and beyond would be the addition of new states. There are more than 3.5 million US citizens and nationals living in the five US territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the US Virgin Islands) and another 700,000 in Washington, DC. None of them have representation in Congress.

That may change. A bill to introduce Washington, DC, as the 51st state passed the House of Representatives this year and appears to have the support of the entire Democratic Party. There is also pressure to offer Puerto Rico statehood. This would create four new senators and probably five new representatives.

This would mitigate somewhat the bias in the Senate towards rural states with populations that are older and less ethnically diverse than states with large urban and suburban populations. However, it would not entirely eliminate that bias, nor fix the disproportionate influence of small states in the Senate. This could be addressed by breaking up large states such as California, Texas, Florida, and New York into multiple states. However, such divisions have only happened once in the country's history, when West Virginia separated from Virginia during the Civil War, and is highly unlikely to occur soon. Of all the possible reforms in US politics, this is the least probable.

Civics in 2021 – an end to gridlock?

Legislation flows from politics, and politics is constrained by the institutional apparatus within which it takes place. With the current partisan alignment, those institutions give an advantage to the Republican Party. The tipping point in the Electoral College is about three percentage points to the right of the country as a whole; the tipping point in the Senate is about six percentage points; and the Supreme Court will soon have a conservative majority that could last for another two decades.

This institutional arrangement may soon change

However, this institutional arrangement may soon change.

If Trump wins re-election, we can expect that more rules will be created to further the Republican advantage, such as greater restrictions on mail-in ballots, voter registration, and ballot access. The Electoral College, Supreme Court, and Senate would remain the same.

If Trump loses and disputes the results, the political consequences would be uncertain. He would most likely leave office after a protracted legal battle around which ballots should or should not be counted, but an electoral system that is no longer able to provide a clear and timely result will be widely questioned.

If Biden wins and the Democratic Party wins the Senate, then there will be moves to change the institutions to tip the balance more towards the Democrats. The filibuster will almost certainly end, the Supreme Court may be expanded, and new states may be added to the Union.

All this would mean that Democratic legislation will face fewer institutional obstacles to implementation. One result will be less of the gridlock that dominated Washington in the 2010s. This in turn would open the door both to more significant changes in policy and in the dynamics of future elections.

Any of these changes would alter America's civic institutions as we now know them. To make these changes would be a bold step and a signal that any return to a more bipartisan approach to politics is unlikely.

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