

Democratic déjà vu? Assessing the prospects of US presidential election litigation

Blog post by Associate Ben Bassett, 5 November 2020

As Democrats and Republicans anxiously await the final tallies of mail-in and absentee ballots in Pennsylvania, Nevada, Georgia, and North Carolina to decide the closely fought US presidential election, both sides are bracing for what will come next: an onslaught of litigation that could make the controversial Florida recount during the 2000 election look like a garden party. While Democrats certainly have reason to be nervous, it is not a foregone conclusion that the US Supreme Court will get involved, and there is still a path for either President Donald Trump or Democratic nominee Joe Biden to be declared the winner in the coming days, not weeks. Nevertheless, both sides have either already filed or are in the process of filing a multitude of lawsuits with the hopes of declaring victory for their candidate.

So, what happens next?

Prior to Election Day, 300 election-related lawsuits had already been filed across the country by both parties, including a high-profile suit brought by the Trump campaign against the Pennsylvania Supreme Court's ruling that ballots there could be counted for up to three days after the election. Similar cases are already underway in states like North Carolina, where the US Supreme Court ruled to allow absentee ballots to be received and counted for up to nine days after Election Day.

The US Supreme Court has already intervened in a few election-related cases and many Democrats are worried that the fate of the election will be in the hands of the nine justices, just as it was in 2000 in the disputed election between Al Gore and eventual winner George W. Bush. The recent addition of Amy Coney Barrett to the bench, which now gives conservatives a solid 6-3 majority, has intensified Democratic fears.

While it is certainly possible that the High Court may indeed get involved, recent rulings give no definite indication the court will rule in Republicans' favour. For example, the ruling in the North Carolina case was by a 5-3 majority, with Chief Justice John Roberts and Justice Brett Kavanaugh, both conservatives, joining the three liberal justices in a decision that fell decidedly against the Republicans. The US Supreme Court's refusal to take up the aforementioned Pennsylvania case was the result of a 4-4 deadlock. It takes five votes to grant a stay (the outcome Republicans were looking for in that case, which would have delayed the three-day extension). However, Chief Justice John Roberts' decision to side with the three liberal justices resulted in judicial deadlock, thus preventing the court from taking up the case and allowing the Pennsylvania Supreme Court's extension to remain in place.

Trump's Pennsylvania lawsuit was not the only one filed in the Keystone state, as another suit asked a federal judge to throw out at least 1,200 ballots in a Philadelphia suburb, alleging officials handled mail-in ballots improperly. Similarly, in Michigan and Nevada, Trump's campaign has launched a lawsuit alleging that vote counts should be halted until courts can enforce rules that permit campaign observers to watch the ballots being opened and counted. The Trump campaign has also requested a recount in

Wisconsin, where Biden was declared the winner by some 20,000 votes. This recount is not expected to flip the state for Trump, as recounts generally see about 200-300 votes change, not 20,000 (such a development actually occurred in Wisconsin in 2016, where Hillary Clinton's campaign challenged Trump's narrow victory there). However, a recount still delays final results. Many Republicans are hopeful that if a similar case to the one regarding mail-in ballot counting extensions in Pennsylvania is presented in the coming days or weeks, Barrett will deliver the tiebreaking vote that could see the court take up the case and possibly rule in favour of Republicans.

When considering the timeline for these legal challenges, a key date to remember is December 8th, when according to the US Constitution, state officials must certify their results and have them treated as conclusive in Congress. Thus, each party could theoretically be pursuing litigation to challenge the election results for the next month.

In all of the states where lawsuits have been filed, the vote tallies are close. This should provide a boost to Trump's campaign and his supporters as this strengthens their arguments to examine every polling station, every mail-in ballot. However, none of these lawsuits has actually stopped any vote counts as of yet.