



SPECIAL EYE ON THE MARKET ELECTION UPDATE: ABSENTEE BALLOTS, GOP JUDICIAL CHALLENGES AND MULTIPLE SLATES OF ELECTORS

During the President's speech on Thursday, he made it clear that the next step in the process will be a wave of GOP litigation in an effort to invalidate votes, with a special focus on the treatment and counting of absentee ballots. There is a lot more precedent and clarity around this process than the President acknowledged; in an effort to keep everyone informed, I put together a brief note on some of the legal issues in play. I will try and keep this as simple as I can by focusing on 8 critical swing states. Here is the bottom line:

There is only one state that (a) changed its absentee ballot deadline rules this year, (b) looks like it will be awarded to Biden and thus a target for a GOP court challenge, (c) had its outcome hinge on the counting of absentee ballots¹, and (d) had its rule change subject to a Supreme Court ruling that showed substantial concerns about the legitimacy of the extension rule change. That state is PENNSYLVANIA. We are particularly focused on Pennsylvania since all practical Trump victory paths include this state.

IF the post-Election Day absentee ballot receipts turn out to be the determinant factor in the Pennsylvania election, and IF Pennsylvania turns out to be the swing state that decides the national election results², the Supreme Court might re-litigate the prior case which ended in a 4-4 tie since Barrett was not seated yet. We believe that while the Supreme Court might rule against the extension, they would be reluctant to invalidate the post-Election Day absentee ballot votes themselves. Lastly, there is a chance that the Pennsylvania state legislature decides to submit a competing slate of electors to the Electoral College, which the newly seated Congress would have to sort out on January 6th. Our understanding of the Electoral Count Act is that in the case of a split Congress (D-House, R-Senate), tie-breaking rules would allow the Democratic Governor of Pennsylvania to pick the final slate of electors for his state. While the Pennsylvania state legislature reportedly disavowed this option last night, this is not a binding decision and it is still important to understand the rules and the process, since it could occur in other states.

¹ **Early this morning, the State of Pennsylvania reportedly announced that Biden is ahead, AND that this result does NOT YET INCLUDE any of the absentee ballots post-marked before Election Day and arriving afterwards.** In other words, Biden's lead in the state is based on absentee ballots received *before* Election Day in accordance with pre-existing Pennsylvania state rules.

² If Biden wins Georgia and Nevada, the Pennsylvania outcome would in theory not be determinant in the national outcome, even if Biden loses Arizona. However, there could be recounts in Georgia, Nevada, Wisconsin and Pennsylvania as well, so whether Pennsylvania ends up being determinant is not something we will know for several weeks.



Background on absentee ballot rules and court cases

- **Five states require absentee ballots to be received on or before Election Day: Arizona, Georgia, Michigan, Minnesota and Wisconsin³.** In these states, there does not seem to be any legal standing for the GOP to object to the timing of absentee ballot counting since they're only counting the ones received on or before November 3rd. To be clear, the GOP can object to other aspects of absentee ballots (signatures, affidavits, envelopes, Sharpies, etc; or that the state misapplied, misinterpreted or violated some other state law), but not the mere fact of them being counted after Election Day. In both Minnesota and Wisconsin, efforts to extend absentee ballot timeframes were rejected by the courts (see below).
- **One state allows absentee ballots to be postmarked before Election Day and received afterwards, but did not change its rules this year: Nevada.** As long as they are received within 7 days of Election Day, they are allowed to be counted, and we have not heard of legal disputes due to Nevada counting ballots after Election Day. However, there are unsubstantiated claims that absentee ballots were sent in by non-residents and the deceased, and that the state is not consistently requiring signature verification in Clark County
- **There are two states that changed their absentee ballot counting rules this year due to the pandemic, allowing ballots to be postmarked before Election Day and received afterwards: North Carolina and Pennsylvania.** In North Carolina, the time frame was extended from 3 days after Election Day to 9 days, and in Pennsylvania, the rule changed from "no ballots after Election Day" to 3 days after Election Day. **However, there is a critical distinction between the two states.** In PA, a State Court mandated the rule change, while in NC, the state legislature did so indirectly by appointing a state election commission to make the necessary decisions (the commission decided to grant the extension).
- **There have been 4 recent notable court cases on the issue of absentee ballot extensions in this election:**
 - In an emergency ruling, the Supreme Court voted 5-3 to **allow** the North Carolina extension. The only written opinion was a short statement from the dissenters, who argued that the election commission was not the same thing as the legislature itself, and thus could not set or change election rules for Federal elections
 - However, in Pennsylvania, Kavanaugh voted with the conservatives who voted to halt the Pennsylvania Supreme Court decision to extend the deadline for receiving absentee ballots by an additional 3 days. **Since the Supreme Court was tied 4-4, the Pennsylvania Supreme Court ruling was permitted to stand**
 - In Wisconsin, a lower Federal court mandated an extension to absentee ballot counting rules. A Federal Appeals Court reversed that decision, and the Supreme Court allowed the Appellate ruling to remain in place on a 5-3 basis, **terminating** the effort to extend ballot receipt rules in the state. Some Supreme Court justices who supported the Appellate ruling wrote individual opinions to emphasize that federal courts should generally not override state election laws, change the rules of Federal elections near Election Day, or extend voting periods without exhausting other less extreme remedies
 - In Minnesota, the Secretary of State entered into a consent decree to allow ballots to be accepted 7 days after Election Day, and the decree was agreed to by a lower state court. A Federal Appeals court ruled that the consent decree violated the US Constitution, since the legislature did not authorize the Secretary of State to modify/suspend state election code requirements under such circumstances, in which case the extension infringed on the state legislature's exclusive prerogative under the US Constitution to regulate federal elections. Thus, the federal court **suspended** the consent decree through which the Secretary attempted to change the statutory deadline for absentee ballots

³ Many states have special rules for **military and overseas voters** that allow their ballots cast by Election Day to be returned afterwards - sometimes as much as two weeks later. In 2016, over 650,000 military and overseas citizens voted via the special federal law governing the issue, called UOCAVA (Uniformed and Overseas Citizen Absentee Voting Act).



- **Where might the GOP have the strongest legal standing in objecting to the counting of absentee ballots received after Election Day?** As we understand it, the GOP's strongest case would be in Pennsylvania, since in 5 states (AZ, GA, MI, MN, WI), no ballots were received and counted after election day; in 1 state, counting rules never changed (NV); and in 1 state, emergency pre-election litigation already showed 5 Supreme Court votes in favor of the extension, although this could change were it re-litigated (NC). The NC case is also moot since Trump appears to have won there. In PA, the ballots received and counted after Election Day have been segregated by the state in case they need to be treated differently should court rulings change.
- **What if PA gets re-litigated?** Now that Barrett has been seated, there's a chance that if the PA case were re-litigated, that the Supreme Court would rule 5-4 that the extension was invalid. What happens then? My constitutional law contacts believe that the Courts would be reluctant after the fact to invalidate the PA outcome. In other words, while they might rule that the extension was invalid, the Courts would be reluctant to require the state to invalidate absentee ballots that people had cast on, or shortly before, Election Day pursuant to the Pennsylvania Supreme Court's order. Invalidating rules governing the electoral process after votes have been cast would raise due process concerns under the US Constitution. It would also seem inconsistent with the Court's Purcell principle, which counsels against rule changes in the vicinity of an election. Lastly, the traditional equitable factors that courts consider – like the public interest – when deciding to grant an injunction would likely weigh against invalidating the votes
- **Triple witching hour “multiple slate” scenarios, with the example of Pennsylvania**
 - In PA, the Governor is a Democrat, the Secretary of State is a Democrat and the legislature is Republican
 - If Biden wins PA, the Governor or Secretary of State would submit a slate of electors for Biden to the Electoral College. However, in principle, the state legislature could ALSO decide to submit a separate slate of electors to the Electoral College on or before December 14th, if in fact the absentee ballots received and counted after Election Day are determinant with respect to the PA outcome (i.e., Trump wins without them and loses with them). The Pennsylvania legislature may be even more inclined to submit a competing Trump slate if the Supreme Court rules that the Pennsylvania Supreme Court's order extending the deadline for absentee ballots was unconstitutional
 - This multiple slate issue would have to be sorted out by the newly seated Congress on January 6th using a complex set of rules spelled out in the Electoral Count Act (ECA) of 1887. **In the triple witching hour scenario, PA is the swing state that decides the entire Presidential election outcome, and this 130-year old rule would go into effect**
 - In the interest of brevity, I will not walk through all of the ECA rules right now, and just focus on how we believe it would be applied. In case of a split Congress (D-House, R-Senate)⁴, the decision would come down to a tie-breaker vote cast by the Governor of Pennsylvania, who is a Democrat; and if both chambers of Congress are controlled by Democrats on January 6th, the Biden slate would probably be picked as well. **The bottom line is that the party affiliation of the Governor would be the tie-breaker in multiple slate scenarios when there is a split Congress (which is where we may be headed)**

Acknowledgments. Many thanks to Michael Morley at Florida State University for his assistance on this section. Professor Morley teaches and writes in the areas of election law, constitutional law, remedies, and the federal courts. He is best known for his work on election emergencies and post-election litigation, nationwide and other defendant-oriented injunctions, the jurisdiction of the federal courts and their equitable powers more generally. He has testified before congressional committees, made presentations to election officials for the U.S. Election Assistance Commission and participated in bipartisan blue-ribbon groups to develop election reforms.

⁴ **There may be 2 Senate runoff elections on January 5th**, the day before the joint session in which Congress resolves any multiple slate disputes. If one or both of these Senate races were not resolved by January 6th, the prevailing balance in the Senate (which looks like 50-R, 48-D) would determine which party controls the chamber when resolving any disputes over electoral votes.



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