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### Recounts and Ballot Challenges in the 2020 Presidential Election: Legal Expert Provides Insights

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# Recounts And Ballot Challenges In The 2020 Presidential Election: Legal Expert Provides Insights



**Bruce Brumberg, JD** Contributor ⓘ

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As the 2020 presidential election moves into its final act, both Donald Trump and Joe Biden are unleashing teams of lawyers to engage in litigation over the voting results in key swing states. Knowing the basics of election law is fundamental to understanding what is happening as state recounts occur and ballot challenges are made.

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In short, each state has its own rules, procedures, and deadlines for contesting election results and for holding ballot recounts. For example, in Wisconsin candidates can request a recount when the margin separating them is no more than 1% of the total votes cast, while Nevada allows a recount request for any reason. Some states, such as Georgia, allow voters to “cure” [invalid absentee/mail-in ballots](#) (e.g. fix a missing signature or information that doesn’t match records) within a specified period.

Credible resources for details on these state laws are available at the websites of the [National Conference of State Legislatures](#), [Ballotpedia](#), and [ProPublica](#).

For quick insights into election legal challenges, I interviewed [Rebecca Green](#) at William & Mary Law School. She is Professor of the Practice of Law and Co-Director of the [Election Law Program](#), a joint project of the William & Mary Law School and the National Center for State Courts.

### **What goes on in a ballot/voter challenge and in a recount, such as the steps and procedures that are followed?**

Post-election litigation is a regular feature of US elections. All states have laws governing post-election litigation like protests/contests and recounts. Post-election litigation is a creature of state law, so it’s impossible to make generalizations about what the process entails. Different states have different triggers, different rules about who can petition, what body hears claims, and so forth. Officials and judges will follow the letter of the law in these post-election procedures very carefully.

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**Can Donald Trump or Joe Biden successfully sue to stop vote counting, a recount, or challenges to ballots/voters?**

I echo the sentiment of [Ned Foley](#) (law school professor and Director of Election Law at Ohio State) who [wrote in \*The Washington Post\*](#) that the idea a candidate can stop vote counting is “sheer nonsense.” That’s not how our system works.

First states count all votes. That’s a process that requires determining voter eligibility at the start and then, if the voter is determined eligible, counting that vote (regardless of whether that vote is later challenged). When someone votes in person, that eligibility check happens when you check in at the polling place and receive your ballot.

In mail voting, that eligibility check comes when election officials process absentee ballots before opening them—checking the bar code, signature, etc. Unless a voter is deemed ineligible to vote, all votes are counted. Period.

If a candidate believes that there has been official misconduct or fraud, they are certainly free to challenge the vote count, but the challenge would not stop the votes from being counted in the first place.

**By election day there were [64 million mail-in ballots](#). Do mail-in ballots increase the probability that election results will be successfully challenged or invalidated in a recount for fraud or other reasons?**

Mail-in ballots have a paper trail, making them a verifiable way of voting. Many states use bar codes to ensure that the ballot sent out is the same ballot as the one returned, and all states have methods for verifying the identity and eligibility of voters who vote by mail.

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This year in several states, the GOP challenged extensions of mail vote deadlines. For example, in [Pennsylvania](#), the GOP challenged whether the state supreme court could lawfully extend the deadline for absentee ballots postmarked by election day to be received and counted. While it is possible the US Supreme Court could find that the Pennsylvania supreme court lacked authority to extend this deadline, it is a separate question whether the Court would invalidate the votes of people who relied on the state supreme court's extension.

### **If you were on the legal team for Donald Trump or Joe Biden, what would your strategy be?**

In a post-election litigation environment, lawyers typically wait to see what vote totals are. Typically, recount lawyers will develop different strategies depending on whether their client is ahead or behind after the initial tally.

Lawyers will seek to determine whether classes of ballots were either included or discarded incorrectly (depending again on whether your client/candidate is ahead). This involves collecting evidence and building a case, as well as working within the confines of what the state law allows.

### **If the ballot/voter challenges, tabulations, and recounts go on for weeks or even months, does that mean it is more likely that there are problems?**

The length of time post-election processes take generally correlates to how close the election is. When it is very close, every vote is scrutinized. That can take a while, particularly in a pandemic environment. Given all challenges election officials face, it's completely normal that the process may take a

while. Election officials will work hard to ensure that the process unfolds in an orderly and transparent way.

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### **What are the factors that courts seem to emphasize in rejecting ballots and/or stopping recounts?**

Courts don't stop recounts. Recounts happen and either upset or confirm the result; ballots are rejected if they are deficient—fail to follow the requirements of state law.

### **What presidential election issues do you see being heavily litigated? Is there potential for a lawsuit to reach the US Supreme Court for a ruling (e.g. *Bush v. Gore*)?**

In the normal course, post-election litigation does not reach the US Supreme Court. *Bush v. Gore* was an anomaly in that sense. It is possible that if this vote, as in the case of *Bush v. Gore*, comes down to an incredibly small number of ballots deciding the victor of the presidential election (in *Bush v. Gore*, it was 537 votes), the chances of the US Supreme Court hearing a claim to resolve the election go up. But that remains a remote possibility.

In the normal course, recounts proceed and vote totals rarely change by more than a few hundred votes. Once the counts are finished, we will have a better understanding of how litigation is likely to unfold and whether it's possible that such litigation could impact the outcome.

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*Professor Green's observation that recounts rarely swing elections is also made by other experts. For example, Professor Rick Hasen (University of California at Irvine School of Law) explains in his [Election Law Blog](#) that lawsuits will not flip the election unless the state is key to winning the Electoral College and the "state is so close (or there is such a massive failure in the election) that the election is within the margin of litigation."*

*In a [comment on Twitter](#), Wisconsin's former Republican governor Scott Walker makes the same point and expresses doubt that the expected recount in Wisconsin will take away Biden's lead in the vote. "After recount in 2011 race for WI Supreme Court, there was a swing of 300 votes. After recount in 2016 Presidential race in WI, @realDonaldTrump [President Trump's] numbers went up by 131. As I said, 20,000 is a high hurdle."*

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*I'd like to express thanks to the members of the [Election Law Society](#) at William & Mary Law School. The idea for some of my questions came out of their post-election briefing session with Professor Green. For another of my [Forbes.com](#) legal articles on related political topics, see [When Politics Erupt At Work: 8 Things To Know About Divisive Political Speech By Employees](#).*

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