

OA 434 – last pre-election!!

Here's their game plan. It's based on a single, stupid premise: that incomplete and artificial vote counts on Election Night showing Trump ahead "count" and that complete vote counts "overturn" that result. That's madness. IT IS NOT THE LAW. Share this far and wide. The model is off of 2000 Bush v. Gore, but even then, that was a completed count and then there were *recounts*.

Fox news admits that's nonsense

<https://www.foxnews.com/politics/election-trump-biden-when-will-results-known>

PRE-SHOW: HOW & WHY we vote today. What voting Democratic can do for you, even if you're in Oklahoma or Alaska, along with how to stay sane.

Tuesday we also talk about updates in cases we've been following, including E. Jean Carroll

A. VOTE DEMOCRATIC

-we want to (i) make sure your vote counts and (ii) minimize blue shift

1. Washington Post

It's too late to mail in your ballot.

<https://www.washingtonpost.com/business/2020/10/27/usps-delays-election-day/>

a) if you **do not have a mail-in ballot**, check out

<https://iwillvote.com/>

see if there is an early in-person voting site, and vote in person if you can safely do so. **NOT IF YOU'RE SYMPTOMATIC OR AT-RISK.**

-if there is not, you'll have to vote on election day. Again, safely.

b) If you **do have a mail-in ballot** and **you haven't sent it in**

-follow good, common-sense procedures

<https://slate.com/news-and-politics/2020/09/vote-by-mail-guide.html>

-if you have a mail ballot, drop it off at an authorized ballot box or local board of elections site in person. Google it. MS, MO, TN don't have drop boxes. **All 47 other states have it.**

<https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>

-if you can't find a ballot box or drop site, take it with you and vote in person

-talk about that below

c) If you **do have a mail-in ballot** and you **have sent it in**

-if you sent it a couple of days ago, google "status of ballot [my state]"

e.g., in Maryland

<https://voterservices.elections.maryland.gov/VoterResults>

-this NY Times interactive chart tells you what happens if you vote in person instead
<https://www.nytimes.com/interactive/2020/10/27/upshot/election-results-timing.html?smtyp=cur&smid=tw-nytimes>

MOST states you just vote, and it will invalidate if your mail-in ballot is subsequently received – automatically, particularly if you surrender your mail-in ballot

Ask EVERYWHERE

Wisconsin §6.86(6)

<https://docs.legis.wisconsin.gov/statutes/statutes/6/iv/86>

“An elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on election day.”

Overrides by default –22

AK, CO, CT, DE, HI, ID, KY, LA, MA, ME, MN, MO, MT, NH, NY, NC, ND, OK, OR, SD, VT, WA

Can cancel with affidavit and vote that same day – 3 / 26

GA, MI, NM

Provisional ballots counted the same night – 2/28

AR, WY (same night) – (2)

Provisional, counted later *unless* you surrender, then you vote the same night – 9 / 37

DC, FL, IA, NV, PA, TX, UT, VA, WV (if you don't surrender) – (9)

All registered voters were sent a mail ballot. According to the Board of Elections: “You can dispose of the ballot for the 2020 General Election you received in the mail. We will provide you a ballot at the Vote Center.” You can also bring your ballot with you and have poll workers dispose of it.

Minority: you have to cast a provisional ballot & it gets counted later – “blue shift” (14)

AL, **AZ**, CA, IL, IN, KS, MD, MS, **NE**, NJ, **OH**, RI, SC, TN

B. Why it matters: Kavanaugh signals that this court WILL hand a disputed election to Trump

OA425:

<https://openargs.com/oa425-the-election-that-could-break-america/>

Taken up by attorney Neil Buchanan

<https://verdict.justia.com/2020/06/25/trumps-upcoming-refusal-to-leave-office-the-very-bad-news>

It's based on a single, stupid premise: that incomplete and artificial vote counts showing Trump ahead “count” and that complete vote counts “overturn” that result.

The only reason this works is because of the “blue shift” research by Edward Foley

[https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol-51/issue-2/7_Foley%20\(309-362\).pdf](https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol-51/issue-2/7_Foley%20(309-362).pdf)

Supreme Court's ruling on Wisconsin

https://www.supremecourt.gov/opinions/20pdf/20a66_b07d.pdf

District court injunction:

<http://openargs.com/wp-content/uploads/District-Court-Injunction-Wisconsin.pdf>

Once received, to cast an absentee ballot by mail, the voter must (1) complete the ballot in the presence of a witness, (2) enclose the ballot in the envelope provided, (3) sign the envelope and obtain a signature from the witness and (4) return the ballot for actual receipt no later than 8 p.m. on election day. [Wis. Stat. § 6.87\(2\)](#), [\(4\)\(b\)](#), [\(6\)](#).

In April (primaries):

As the virus first started to spread in Wisconsin in February and March, even greater uncertainty surrounded the extent, seriousness and nature of **[*19]** COVID-19. By March 12, Governor Evers had issued a statewide health emergency; and on March 24, the Secretary of Wisconsin's Department of Health Services had issued a "Safer at Home" order, which banned all public and private gatherings, closed nonessential businesses, and required that everyone maintain social distancing of at least six feet from any other person.

Obviously, all this occurred within just a few weeks of Wisconsin's April 7, 2020, primary election. In mid-March, certain WEC Commissioners began expressing concern about the state's ability to conduct a fair and safe election; local clerks reported that they were running out of absentee ballot materials and felt overwhelmed by the volume of absentee ballot requests; and various mayors urged that the election be delayed. Between March 18 and March 26, three lawsuits were also filed with this court requesting various relief relating to Wisconsin's impending primary election.

Shortly after, this court granted the following narrow, preliminary relief: (1) extending the online registration deadline by 12 days to March 30; (2) extending by one day the window to request an absentee ballot; (3) adjusting the witness certification **[*20]** requirement under [Wis. Stat. § 6.87\(2\)](#); and (4) extending the absentee ballot receipt deadline by six days to April 13 at 4 p.m. See [Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-249, 2020 U.S. Dist. LEXIS 48394 \(W.D. Wis. Mar. 20, 2020\)](#); [Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-249, 2020 U.S. Dist. LEXIS 57918 \(W.D. Wis. April 2, 2020\)](#). Most of this relief was challenged by emergency appeal to the Seventh Circuit (extension of the registration deadline being the exception). That court declined to stay relief granted as to the extension of absentee-ballot-requests and receipt deadlines by mail, but granted a stay as to the adjustment to the witness signature requirement. [Democratic Nat'l Comm. v. Bostelmann, Nos. 20-1538, -1546, -1545, 2020 U.S. App. LEXIS 25831, at *8-9 \(7th Cir. April 3, 2020\)](#). A further, emergency appeal was accepted by the U.S. Supreme Court, which sought a stay of this court's injunction only to the extent that it permitted ballots postmarked after election day (April 7) to be counted if actually received by April 13. Brief of Petitioner, [Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ___, 140 S. Ct. 1205, 206 L. Ed. 2d 452 \(2020\)](#) (No. __). The Supreme Court granted the stay, ordering that a voter's absentee ballot must be either postmarked by election day and received by April 13 or hand-delivered by election day. [Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ___, 140 S. Ct. 1205, 206 L. Ed. 2d 452 \(2020\)](#) (per curiam).

So that was the policy that was in place for the primaries: (1) extended registration deadlines and (2) on mail-in ballots, they can arrive up to 6 days after the election so long as they're postmarked on election day.

How could they overturn the plain language of the law? Because PLAIN LANGUAGE ISN'T EVERYTHING, and not even the Supreme Court thought it was.

Result? (P. 28): “Overall, 1,555,263 votes were cast in the April election. This court's injunction extending the absentee ballot physical receipt deadline from April 7 to April 13 appears to have resulted in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely. (DNC Pls.' PFOFs (dkt. #419) ¶ 10.) In addition, the court's injunction extending the registration deadline arguably resulted in an estimated 57,187 voters successfully registering in advance. (*Id.* ¶ 197.)

So now, fast forward to October. COVID is way worse in Wisconsin. Like, 30 times worse. So plaintiffs went to the same court and asked for basically the same result. And here's what they got:

THEY LOST ON A BUNCH OF STUFF, including mailing ballots to all registered voters, relief from witness signatures, and proof of residency requirements, and more. **THIS WASN'T JUST A DNC WISH LIST**

- (1) Moved mail-in registration deadline one week from Oct. 14 to Oct. 21
- (2) Receipt deadline extended 6 days if postmarked by election day (Nov. 3)
- (3) Miscellaneous stuff you don't care about

The very conservative 7th Circuit stayed the injunction. The very conservative Supreme Court refused to lift that stay.

Why? We don't know. Roberts wrote to say “this is different than the Pennsylvania case.” Gorsuch wrote a concurrence that Kavanaugh joined; it's a masterpiece of saying nothing.

Go ahead and read it. It's 3.5 pages long and has just two citations, both of which are misleading. The only case it cites is *Burdick v. Takushi*, 504 U. S. 428, 433, 438 (1992)
https://scholar.google.com/scholar_case?case=2203153069610266193

That case is about Hawaii's law prohibiting write-in votes. They cite it for the proposition that it's okay for states to regulate elections, so long as those restrictions are content-neutral, which is a 'duh.'

Literally the only other citation is to Article 1, Section 4, Clause 1 of the Constitution
<https://constitutionallawreporter.com/article-01-section-04/#:~:text=Text%20of%20Article%201%2C%20Section,the%20Places%20of%20chusing%20Senators.>

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators

That is being cited as direct support for the proposition that “the Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules,” which is.. damn near the opposite.

-The Wisconsin legislature has not met since April, as the dissent points out.

Kavanaugh wrote a separate opinion. It's terrifying. **EACH AND EVERY ONE OF THESE HAS NO CITATIONS.**

p.6: Voters who, for example, show up to vote at midnight after the polls close on election night do not have a right to demand that the State nonetheless count their votes. Voters who submit their absentee ballots after the State's deadline similarly do not have a right to demand that the State count their votes.

p. 7: Those States want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election. **And those States also want to be able to definitively announce the results of the election on election night, or as soon as possible thereafter.**

WORST. Quotes from NYU Law Prof. Richard Pildes:

KAVANAUGH says: “Moreover, particularly in a Presidential election, counting all the votes quickly can help the State promptly resolve any disputes, address any need for recounts, and begin the process of canvassing and certifying the election results in an expeditious manner. See 3 U. S. C. §5. The States are aware of the risks described by Professor Pildes: “[L]ate-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode.” Pildes, How to Accommodate a Massive Surge in Absentee Voting, U. Chi. L. Rev. Online (June 26, 2020) (online source archived at www.supremecourt.gov).

The “longer after Election Day any significant changes in vote totals take place, the greater the risk that the losing side will cry that the election has been stolen.”

That’s true. Let’s look at the article

<https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/>

And look at his lawfareblog article

<https://www.lawfareblog.com/reducing-one-source-potential-election-meltdown>

If the presidential election this fall is close, with the margin of victory turning on a couple of close states, it is not hard to imagine President Trump seemingly pulling ahead on election night and in the important next-day coverage but then falling behind over the next week or more as those decisive states shift to the Democratic column when the full canvass of votes becomes complete. And it does not take a fertile imagination to picture what would then erupt in the courts, on social media and maybe in the streets. The same is true if a red shift turns a seeming victory for (presumptive) Democratic nominee Joe Biden into a second term for Trump.

Those are fucking lies.

The very worst, page 9, footnote 1. Andrew Seidel texted me as soon as this opinion came out and told me I had to go read it, and he was right.

1A federal court's alteration of state election laws such as Wisconsin's differs in some respects from a state court's (or state agency's) alteration of state election laws. That said, under the U. S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections. Article II expressly provides that the rules for Presidential elections are established by the States "in such Manner as the Legislature thereof may direct." §1, cl. 2 (emphasis added). The text of Article II means that "the clearly expressed intent of the legislature must prevail" and that a state court may not depart from the state election code enacted by the legislature. *Bush v. Gore*, 531 U. S. 98, 120 (2000) (Rehnquist, C. J., concurring); see *Bush v. Palm Beach County Canvassing Bd.*, 531 U. S. 70, 76–78 (2000) (per curiam); *McPherson v. Blacker*, 146 U. S. 1, 25 (1892). In a Presidential election, in other words, a state court's "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U. S., at 113 (Rehnquist, C. J., concurring). As Chief Justice Rehnquist explained in *Bush v. Gore*, the important federal judicial role in reviewing state-court decisions about state law in a federal Presidential election "does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id.*, at 115. The dissent here questions why the federal courts would have a role in that kind of case. *Post*, at 11, n. 6 (opinion of KAGAN, J.). The answer to that question, as the unanimous Court stated in *Bush v. Palm Beach County Canvassing Bd.*, and as Chief Justice Rehnquist persuasively explained in *Bush v. Gore*, is that the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.

NORTH CAROLINA – went from +3 to +9 days

<https://beta.documentcloud.org/documents/20400331-20a72-order>

PENNSYLVANIA DECISION – will segregate

OA 435

You have to vote.

Are you nervous? – Flip a coin twice. More than 2x as likely to lose the Senate as the Presidency.

Articles about Biden having it in the bag make the Senate races HARDER

<https://onlinelibrary.wiley.com/doi/abs/10.1111/lsq.12127>

Congressional Elections in Presidential Years: Presidential Coattails and Strategic Voting

Robert S. Erikson

“The aggregate evidence for coattails and balancing in presidential years is reinforced by the analysis of National Election Studies (NES) survey respondents. That analysis shows that politically informed voters are more likely to vote for Congress against the party that they believe will win the presidency.”

A. How to watch tonight

1) Blue shift

538

<https://fivethirtyeight.com/features/why-pennsylvanias-vote-count-could-change-after-election-night/>

Right now, our forecast estimates that about 6.8 million votes will be cast in Pennsylvania, on average, and the average popular vote result gives Biden about a 5-point edge over Trump, 52 percent to 47 percent. If that panned out, that means Biden would win about 3.6 million votes to Trump’s 3.2 million (with a few additional votes for other candidates). And if the vote count followed what we saw in the primary, less than half of Biden’s votes would be in by 3 a.m. on election night, whereas around 70 percent of Trump’s would be reported.

That means we could be looking at a situation where Trump has about a 16-point lead, 58 percent to 42 percent, based on approximately 60 percent of the total expected vote. But over the course of the next few days — again, assuming the same pattern we observed in the primary — Biden would win two-thirds of the remaining votes, which would precipitate a 21-point shift in the overall margin from 3 a.m. on election night to the final result, as the chart below shows.

2) How election decision desks make calls

-they’re transparent

<https://www.nbcnews.com/politics/2020-elections/how-election-data-is-collected>

-everyone except Fox uses National Election Pool (NEP)/Edison Research, an independent 3rd party
The NEP is a consortium of major news networks — ABC, CBS, CNN and NBC — that pools together resources to gather vote and exit poll data. The NEP works with the consumer research firm Edison Research to collect timely and comprehensive election data on Election Day and in the following days, weeks and months until results are certified by all states. The NEP licenses data to several news outlets, including Reuters and The New York Times, among others.

Using proven probability-based sampling methods, the exit poll is a survey of voters conducted as they exit their polling places. It is the only survey measure of real voters and it's conducted at hundreds of polling places. The exit poll also includes extensive interviews with in-person early voters and telephone surveys of early and absentee voters. Edison Research is the sole provider of exit poll data to the NEP.

-Fox uses AP, so they're not making shit up

<https://www.foxnews.com/politics/election-trump-biden-when-will-results-known>

B. Why you should vote Democratic in EVERY state

-you don't know you're in a swing state

-narrow losses are better than big ones – Texas – O'Rourke lost by 2.6% in 2018, Clinton lost by 9 in 2016

-you want to blow up the filibuster and pack the court, right?

-Chuck Schumer: it's all about having the power, this is the downside

-Mitch McConnell remains majority leader: will block every single judicial appointment

* example: Stephanie Gallagher

-will block every single cabinet appointment

-what it's like to go through life without a Secretary of State?

-President Lisa Murkowski?

Redistricting??

<https://fivethirtyeight.com/features/control-of-redistricting-is-up-for-grabs-in-2020-here-are-the-races-to-watch/>

-Deep red states, who gives a shit?

-Wisconsin, NC – states that are purple or even outright blue that are gerrymandered

-can we stop those? Can we take control in VERY blue states

Our analysis found that 117 congressional districts (27 percent of the entire House) are likely to be drawn by Republicans, while 47 (11 percent) are likely to be drawn by Democrats. Another 132 (30 percent) will be drawn by independent commissions or by both Republicans and Democrats working together. And seven districts (2 percent) are at-large districts that cover their entire state (thus, there are no lines to draw). **303 of 435, 132 on the ballot.**

- Without question, **Texas** is the biggest redistricting prize up for grabs this year; accounting for population growth, it is expected to have 39 congressional districts next decade. While Republicans currently control all three stakeholders in the congressional redistricting process — the state Senate, state House and governorship — the **state House is competitive this year**. Democrats need a net gain of just nine seats to take control of the chamber — and there are 22 districts that the party thinks it can flip, including nine that **Democratic Senate candidate Beto O'Rourke carried in 2018**. If Democrats flip the House, they would gain the ability to block GOP-

proposed maps, forcing either Republicans to compromise or a court to draw the lines.

- **New York** is projected to have 26 House seats next decade, but it has relatively [new and complex redistricting rules](#) under which a bipartisan commission proposes maps, but the state legislature and governor decide whether to approve them. However, if they reject the commission's maps twice, the legislature can effectively draw its own. Only one wrinkle: If the same party controls both chambers of the legislature (as Democrats currently do), a two-thirds majority is required to pass a new congressional map. That means Democrats need to [win a supermajority in the state Senate](#) (they already have one in the state Assembly) in 2020 if they want to be able to impose a map without any Republican votes. And with 10 Republican senators retiring, including many from competitive seats, Democrats have a good chance of picking up the two additional seats they need.
- In **Pennsylvania** (likely home to 17 congressional districts), Democrats are guaranteed a seat at the table in redistricting thanks to Democratic Gov. Tom Wolf, who was reelected in 2018. If they flip both the state Senate and state House this year, they could draw congressional lines however they want. However, Democrats would need a net gain of nine seats to take the state House (despite having plenty of vulnerable members of their own) and [sweep every competitive district](#) in the Senate. So the most likely outcome may be that Wolf will share redistricting power with Republican legislators.
- **North Carolina's** House and Senate will draw the state's projected 14 congressional districts; the governor doesn't get a say. [Both chambers are competitive](#) in this year's elections, meaning either party could have full control of redistricting (divided control is very possible as well). Right now Republicans have majorities in both chambers, but Democrats could change that by flipping five seats in the Senate and/or six seats in the House.
- By contrast, the fate of **Virginia's** 11 congressional districts will be decided by [Amendment #1](#), a ballot measure to reform redistricting. (Control of state government in Virginia is decided in odd years and so isn't in play this year.) Amendment #1 would set up a bipartisan commission of state legislators and ordinary citizens to draw Virginia's new congressional map. The state legislature would still have to approve it, but if they don't, the state Supreme Court would create its own map. [Polling so far](#) shows that Amendment #1 will probably pass, but if not, Virginia's Democratic-controlled state government would draw the lines.
- Republicans currently control all three redistricting entities — the state Senate, state House and governorship — in **Missouri**, worth eight congressional seats. But Democrats have an outside shot at breaking up

that monopoly if two things go right for them. First, Democrat Nicole Galloway would need to overcome her [polling deficit](#) to defeat Republican Gov. Mike Parson. Then, Democrats would *also* have to break up the Republican supermajority in the state Senate, which they could do by flipping two seats — perhaps vulnerable [Senate districts 15 and 19](#). Otherwise, Republicans could simply override Galloway's veto of their maps.

- The power to draw **Minnesota's** projected seven congressional districts is currently divided: Democrats control the governorship and state House, while Republicans control the state Senate. The question of redistricting control will boil down to whether Democrats can flip the state Senate (the governor isn't up for reelection this year). Democrats have [six viable pickup opportunities](#) but only need to net two seats to attain a majority, giving them a good shot of drawing the maps alone next year.
- **Iowa** will use a [unique process](#) to redraw its four House districts. The nonpartisan Legislative Services Agency draws a map, and the legislature gives it an up-or-down vote. If the legislature rejects two of the LSA's maps, though, they can amend the third or draw their own, putting the ultimate power in politicians' hands. Right now, that means in Republican hands — the GOP controls the state Senate, state House and governorship. However, Democrats need to net [only four seats](#) to take control of the state House, which would probably make it more likely that one of the LSA's maps is accepted.
- At first glance, control of redrawing **Kansas's** four congressional districts appears to be split between Democratic Gov. Laura Kelly and the Republican legislature. However, the GOP currently has veto-proof majorities in both the state Senate and state House, meaning they could enact a new map without Kelly's input. Those supermajorities are [very much at risk](#) in the 2020 elections, though. **If Democrats net three Senate seats or even just one House seat this year, they'll ensure a new map can only pass if Democrats approve.**
- Finally, only two congressional districts are at stake in **New Hampshire**, but almost every possible scenario is on the table. All three redistricting stakeholders (the state Senate, state House and governorship) are on the ballot, and all three are competitive. If [polling](#) showing Republicans close to flipping both chambers of the legislature is correct, Republicans could gain total control of redistricting. If Democrats pull an upset and defeat Republican Gov. Chris Sununu, they would. However, the status quo (shared control between Sununu and a Democratic legislature) may be the most likely outcome.

C. E. Jean Carroll
1:20-cv-07311-LAK

https://www.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.32.0_1.pdf

Episode 420

<https://openargs.com/oa420-doj-defending-trump-in-carroll-case/>

-remarkable opinion

a) not an employee

b) not within scope of employment

-how did they distinguish Ballenger?