

PUBLICATION

2020 Elections: November 9 Recap

Authors: Sheila P. Burke, Thomas Shaw, Steven Michael Hyjek
November 09, 2020

This information is current as of 8:30 a.m. Eastern on November 9, 2020.

The information below reflects current data with many elections yet to be finalized and some that may be subject to runoffs or legal challenges.

Recent Developments

Presidential Election

- Multiple news networks and print media have officially declared Joe Biden the president-elect with 290 electoral votes to President Trump's 214. While Alaska, Georgia, and North Carolina have yet to be called, Biden secured Pennsylvania by a sufficient margin to call the Commonwealth for Biden, allowing him to break the 270 electoral vote threshold to win the election.
- President Trump has not conceded the election and has vowed to continue legal challenges in various states.
 - One key legal fight is occurring in Pennsylvania, where President Trump is challenging the eligibility of mailed ballots received after Election Day and Republican poll watchers' access to ballot counting locations.
 - Pennsylvania law says that the mailed ballots should not be counted if received after Election Day. However, the Pennsylvania Supreme Court extended this year's deadline by three days.
 - The challenged ballots have been segregated from others based on a court ruling.
 - Network media reports indicate that if these ballots are denied, it would not result in President-elect Biden losing Pennsylvania to President Trump.
 - Denial of access to ballot counting locations by poll watchers is alleged by the Trump campaign with promises of evidence to be released this week in court filings.
 - Other legal challenges have been filed in Georgia, Michigan, and Nevada.
- In addition to legal action, President Trump has also requested recounts in several states. Historically, recounts have not impacted the overall result of a presidential election. However, many states rode on razor thin margins this election. So far, recounts have formally been requested in the following states:
 - Arizona
 - Georgia
 - Michigan
 - Pennsylvania
 - Wisconsin

- Certification of election results can begin as early as November 10, but must be completed by December 13, 2020 as per the Electoral Count Act of 1887, (Public Law 49–90, 24 Stat. 373), the U.S. federal law that establishes procedures for the counting of electoral votes.
 - Under this statute, electoral votes will be cast in each state no later than December 14, 2020. Historically, all legal disputes have been resolved by December 14.
 - The presidential election is finalized when the electoral votes are formally counted on January 6 in front of a joint session of Congress in the House chamber.
 - It is possible, though unlikely, that legal challenges over the results of several states could extend into early January.

The Senate

- Currently, Democrats and Republicans are still deadlocked for control of the Senate at 48 seats each. Elections in the following states have not yet been called:
 - North Carolina: Tillis (R) is leading by 1.7 percent (95,739 votes) against Cunningham (D).
 - Alaska: With 50 percent of ballots counted, Senator Sullivan (R) is leading with 62 percent of the votes counted compared to 30 percent of votes received by his opponent Dr. Al Gross (D).
 - Georgia: Both races will move a runoff election.
- Ultimately, the runoff elections in Georgia will decide who controls the Senate. While Republicans will likely take the lead at 50 seats after North Carolina and Alaska are decided, it is possible that both Georgia races could be won by Democrats, resulting in a 50-50 deadlock. If this occurs, Democrats will be considered at the Senate majority as a result of President-elect Biden winning the election and Vice President-elect Harris's status as the President of the Senate, providing a tie-breaking vote when needed.
- Until the races in Georgia are decided and the final ratios in the Senate determined, Senator Mitch McConnell will retain his position as the Senate Majority Leader.

The House

- Democrats are expected to maintain their majority in the House of Representatives. With that said, they will likely have the thinnest majority the House has seen in the past 20 years.
- As of now, Democrats are leading with 215 seats to the Republicans' 196 seats and with 24 seats undecided.

The Way Forward

Lame Duck Session of Congress

- The U.S. Senate will return to session on Tuesday, November 10, while the House of Representatives returns on Monday, November 16.
- Congress must pass appropriations legislation no later than December 11, 2020, when the current Continuing Resolution (CR) is set to expire, in order to keep the government funded.
 - It is anticipated that Congress will not pass any individual appropriations bills and will instead adopt another CR which keeps the government funded until late February or March.

- Current Senate Leader McConnell has expressed openness to some form of a COVID relief package to be adopted before Congress adjourns – though Republicans and Democrats remain far apart on the level of funding and focus of a COVID package, and whether to include liability provisions sought by the Senate Republicans and the Administration.
 - Adding to this dynamic will be the pressure on President-elect Biden to get Democrats to agree to some COVID package in 2020 along with uncertainty whether President Trump will agree to sign any COVID legislation adopted by Congress. This issue will no doubt receive considerable attention along with expiring legislation. Congress must also consider tax and health care extenders, which will impact millions of Americans.
- Pending judicial nominees from the Trump Administration are likely to be the subject of accelerated consideration by the U.S. Senate given uncertainty as to which party will be in the majority after the two Georgia Senate runoff elections on January 6, 2021.
 - As previously mentioned, if Democrats win one or both of these seats, they would claim the majority in the Senate once the President-elect and Vice President-elect are inaugurated. In that event, Vice President-elect Harris will act as a potential tie-breaking vote if both parties control 50 Senate seats.

Biden Transition

- As his first act in the transition, President-elect Biden will name his own Coronavirus Task Force on Monday, November 9 as an indicator of his effort to put an actionable plan in place upon his inauguration.
 - Subject to a number of variables, President-elect Biden and his team may play a role in Congress' lame duck efforts to consider (and potentially adopt) some form of COVID relief/policy legislation. It is not impossible that Biden could help bridge the gap between Republicans and Democrats on their competing packages by encouraging the Democrats to agree to something less than they hope to include in a lame duck COVID compromise bill. Democrats may be encouraged to agree to a more constrained COVID relief package, recognizing that they will have the chance to move a larger package early in the new session with President Biden in place.
- As the Trump campaign pursues its legal options, Biden's team will begin its transition efforts utilizing space in the U.S. Department of Commerce that the General Services Administration (GSA) has set aside.
 - Federal agencies have begun the process of preparing transition files to be provided to the Commerce Department location once the GSA confirms the election decision is final.
- Key Biden transition team leaders have been identified – see [this document](#) for their names and roles, which are tentative and await confirmation.
 - While speculation has begun about potential cabinet nominees, the Biden – Harris team has not identified any names and discouraged early predictions of nominees for cabinet positions.

Trump Lame Duck Administration

- President Trump remains the President of the U.S. until inauguration day regardless of legal challenges which may be mounted (and their results) or a possible concession by him in the future. As such, he retains the powers of the presidency, and it is important to consider how those powers will be used.

- Executive orders and regulatory powers:
 - The elections in no way impede the President's authority under the law for the issuance of executive orders, which may be overturned by executive orders of a succeeding Administration.
 - Regulatory actions of a lame duck administration are referred to as "midnight regulations." U.S. federal law mandates a 60-day waiting period before any major regulatory changes become law. Thus, some presidents try to publish new major regulations on November 21, which is 60 days before the new president's inauguration on January 20. The issuance of these regulations can be mitigated either by statutory language in a "must pass" bill like the CR to fund the government; or may be the subject of legislation in the 117th Congress, which convenes on January 3, 2021.
- Presidential pardons and commutations: Traditionally, presidents who will not return to office have issued pardons and commutations for federal offenses prior to the end of their terms in office. These pardons or commutations may not be issued for prior state-issued convictions or as future indemnification for any potential future-state criminal charges for any individual.
- Commander-in-Chief: The President has the authority to authorize National Security findings and/or to authorize the execution of covert or limited military operations, not governed by the War Powers Act, while he remains in office.
- Personnel changes: The President is within his authority to dismiss cabinet members, political appointees and Schedule C (non-civil service) employees.

2022 Midterm Election

- It is worth noting that the 2020 census will result in districts being redrawn.
- The Republicans have gained control of at least two state legislative bodies previously controlled by Democrats.
 - This becomes relevant as state legislatures around the country will begin plans in 2021 to develop new congressional district maps based upon the 2020 census.
 - The results of those congressional maps can affect party control of the U.S. House and U.S. Senate in the 2022 mid-term elections.