

THE PROTECTION OF THE 2020 ELECTION: THE VIEW FROM THE BIDEN-HARRIS CAMPAIGN

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With the inauguration of President-Elect Joe Biden and Vice President-Elect Kamala Harris only days away, there is value in reflecting once again on the extraordinary strength and resilience of American democracy. The shocking events of January 6, 2021 have prompted a stalwart defense of our electoral process throughout government and the leadership of business, religious and other communities. It has focused attention, as it should, on how we should see the 2020 elections—as an extraordinary achievement.

As familiar as they may be, the statistics frame the story. More than 158 million Americans voted, representing nearly two-thirds of eligible voters. Measured as a percentage of the voting-eligible population, voter turnout reached the highest level since 1900. This was true throughout the country. Every single state, and 98% of the nation's counties, saw higher turnout than in 2016. Forty-one states had the highest turnout of any election in the past 50 years.

But the outcome could have been disastrously different. Not since the Civil War has this country's electoral process been subject to such overwhelming and potentially crushing pressures: a once-in-a-century public health crisis, a deluge of both domestic and foreign disinformation, and a divisive politics reflected in legal battles over voting rights. Across the country, these upheavals put exceptional strains on voting systems that are already chronically underfunded and fragile.

In our roles leading the Biden presidential campaign legal team, we were charged with developing a voter protection program adapted to these exceptional circumstances. In more ordinary times, voter protection programs facilitate access to the polls, monitor for and challenge unlawful or groundless burdens on voting rights, and support election officials in their hard work of preparing for and conducting the voting process. These tasks were as important as ever this cycle, but they were far from sufficient. We quickly recognized that the 2020 program would require vastly greater resources and different approaches than in past cycles. Campaign Manager Jen O'Malley Dillon, a veteran of the Obama-Biden presidential campaign voter protection programs, assigned the highest priority to this work. Together, we determined the urgent priorities to be:

(1) Supporting election administrators in the critical task of running an election amidst the pandemic.

From the Biden-Harris campaign perspective, the key to a successful election was to support election officials in addressing the challenges that became apparent in the primaries in March so that a viable general election could be held. In the spring, it was uncertain whether state primaries would occur on schedule, and those that did occur encountered significant problems. In Ohio, it was unclear until 2 AM on the morning of the originally-scheduled primary whether the primary would occur at all. In Wisconsin, the legal struggle over a delay and the voting rules ended with a Supreme Court order only the evening before the primary that addressed such fundamental issues as when a ballot could be requested, when it must be returned, and whether it must be witnessed. On election day, a shortage of poll workers in Milwaukee resulted in the opening of only five of its typical 180 polling places. Green Bay went from 31 polling places to two; Waukesha from 15 to one. Thousands of Wisconsin voters who requested mail ballots never received them.

In Georgia's June primary—postponed twice because of the pandemic—more than 10% of the precinct locations in the state closed because of pandemic conditions. Hundreds of voters reported that they never received the absentee ballots and thousands of experienced and trained poll workers—many of them elderly citizens who face greater risks with coronavirus—opted not to volunteer during the primary. In Pennsylvania's June primary—the first election in that state held with no-excuse absentee voting—thousands of voters did not receive their mail-in ballots on time as local officials struggled to process 1.8 million applications.

These were examples of an election process in distress. Accordingly, as we looked ahead to the November general election, our core tasks were both to support election officials and to educate voters on the confusing and complicated electoral landscape. We therefore built a team of more a hundred of full-time staff, and tens of thousands of volunteer attorneys and poll observers. State-based voter protection teams advocated to state and local elections officials for expanded options for voters—extended early vote periods, longer early vote hours, and streamlined mail ballot applications — and then effectively educated voters about those options. In these efforts, they built on the months of work performed by state parties.

The voter protection team across the coordinated campaign also aggregated information to ensure that every voter in America could visit [iwillvote.com](https://www.iwillvote.com) to find out exactly how to participate in the election—from the types of voting available to the precise ID, if any, required at the polling place. The voter protection team also fielded hundreds of thousands of calls in 16 languages by telephone hotline, and fielded queries on an accessibility textline. Digital and traditional media advertising focused on the specifics of voting, with the voter protection team providing detailed information to assist voters.

In addition, the team also developed and executed a comprehensive plan to

contact voters who had attempted to participate in the election, but failed to do so effectively—whether because of a deficient ballot envelope or an incomplete request form. Tens of thousands of these voters later corrected their errors and ensured that their ballots would count.

The data tells us that these efforts worked. For example, when the Pennsylvania Supreme Court held that mail ballots without a secrecy envelope—so-called “naked ballots” —would not count, commentators predicted that more than 100,000 ballots would be disqualified on this basis, using data from the primary. We responded. Every Pennsylvanian contacted by the campaign heard multiple times about the need to use the secrecy envelope. As a result, fewer than 10,000 ballots lacked a secrecy envelope. More broadly, in priority states throughout the country, the rejection rates for mail ballots were down, even though significantly more voters cast ballots by mail. First-time mail voters typically are correlated with higher rejection rates. Not in the 2020 general election.

The results of these efforts were evident in November. Nearly 160 million Americans successfully voted. More than 100 million of these voters cast their ballots before Election Day, whether in person or by mail—nearly double the early voting rate of 2016. Election officials facilitated these options, meeting the increased demand for mail ballots and early voting options. A search of nearly any local newspaper in the country will yield reports of county and municipal officials working around the clock in the midst of a pandemic—first in the lead up to the election and then in the tabulating of ballots.

Many election administrators explored new ways to reach voters and facilitate participation. In Madison, Wisconsin, for example, election officials set up stands in every public park to register voters, answer questions about the voting process, and accept mail ballots. The City of Denver made mobile vote centers available to voters, easing the pick-up and drop-off of mail ballots. Dozens of municipalities partnered with professional sports franchises to use landmark stadiums and arenas as socially distanced vote centers and polling sites.

Of course, the campaign was not alone in supporting this critical work. Nonprofit and civic organizations mobilized to meet the challenge, by providing emergency expertise and funding to electoral jurisdictions. The campaign systematically urged interested supporters to contact these organizations to learn about their programs and assist those who were doing critical work, such as recruiting thousands of poll workers around the country. Campaign voter protection teams referred election officials seeking to solve particular problems to these sources of critical administrative expertise.

It is impossible to overstate the significance of the philanthropic response to the difficulties of this election. For example, working closely with an array of state and private partners, **Power the Polls** signed up an unprecedented 500,000 potential poll workers. **Campus Compact** and **the Association of Pro Bono Counsel** likewise devoted considerable and successful attention to

ensuring that municipalities had the requisite poll workers. The **Center for Tech and Civic Life** provided more funding than the federal government to a total of 2,500 election offices around the country, on a bipartisan basis. The **Voter Protection Program** brought together a nationwide, bipartisan coalition of attorneys general, election officials, and law enforcement organizations to support state and local election administration in the essential work of counting all eligible votes. The **Stanford-MIT Healthy Elections Project** developed COVID-specific training and polling place design materials for poll workers and election officials, as well as video explainers for the public. **Democracy Works** harnessed technology to provide voters with information about their polling place locations, deadlines to register to vote or request an absentee ballot, and in certain states, a tracker to track the status of a requested or mailed-in absentee ballot. **The Elections Group**, a consulting group established by two former local election officials, recruited other former election administrators to serve as consultants providing critical assistance and advice to local officials confronting the difficulties of administering an election in a pandemic.

Other independent efforts played vital roles, such as those mounted by Fair Fight Action and the AFL-CIO. It was very much a challenge that required “all hands on deck,” and organizations, both long-standing leaders on voting rights and new ones mobilized to address the emergency, answered the call.

(2) The Fight in the Courts

Legal battles in the courts were another salient aspect of the 2020 election, and can be categorized by phase: pre-pandemic, post-pandemic and post-election. We adopted one overarching strategic principle for engagement in each phase: legal action to protect core voting rights was essential, but we would win the polls and then be prepared to defend in the courts against attacks on the legitimacy of the results.

The role of the courts was somewhat limited in advance of the election, but vitally important in the aftermath. Cases pending before the pandemic—or resolved by agreement during it—did achieve some significant results. For example, cases challenging the disqualification of mail ballots on arbitrary bases without notice to the voter and an opportunity to fix the issue yielded positive results. National and state Democratic party organizations played important roles in many of these actions both before and after the President-Elect won the nomination. But pre-election efforts to use the federal and state constitutions to expand mail voting in the midst of a pandemic found the judiciary to be a less hospitable audience, particularly at the appellate level. A significant part of the issue was timing. The impact of COVID-19 on voting became clear only in March and, even then, it was uncertain whether that impact would remain through the November general election. Lawsuits contending that pandemic conditions demanded broader accommodations became ripe just months before the election, but then ran headlong into the Supreme Court’s decision in *Purcell v. Gonzalez*, which provides that federal courts should avoid modifying election rules close to an election.

Given the uncertainties and periodic setbacks of litigation, the Biden-Harris campaign made decisions based on the most conservative assumptions of

campaign made decisions based on the most conservative assumptions of what the law in various states would turn out to be. For example, the campaign supported suits to extend the ballot receipt deadlines for mail balloting in the pandemic, and yet pressed for voters to assume that Election Day was the deadline for receipt and therefore to obtain and return their mail ballots on the quickest possible turn-around time.

Perhaps the most important pre-election cases were those brought and lost by the Trump Campaign in Montana, Nevada, New Jersey, and Pennsylvania. In these cases, the Trump Campaign's claims that the "valid" votes of its supporters were diluted by the fraud it alleged was pervasive in these states' approach to mail voting consistently foundered. Courts repeatedly described claims of "widespread voter fraud" as "fiction," noting that, in one state where the Trump Campaign had brought suit, it could not "point to a single instance of voter fraud . . . in any election during the last 20 years." In these states, before general election votes were cast, the Trump Campaign had already brought and lost many of the same claims it would later unearth as purported bases to overturn the election.

It was after the election that the courts decisively protected the clear outcome of the voting—the result of a general election conducted with spectacular success after the challenges of the primaries. The Trump campaign had no case: no evidence of fraud, and no viable theory that the Biden-Harris ticket had somehow not won the election. When one federal appellate court stated that "[v]oters, not lawyers, choose the President" and that "[b]allots, not briefs, decide elections," it was singling out what most doomed the Trump attack on the electoral process: the process had worked. In the end, the Trump Campaign and its allies brought more than 60 lawsuits. All but one was an abject failure, and the sole victory affected no more than a few dozen votes.

This focus on winning at the ballot box and, and therefore making it impossible for the Trump campaign to succeed in the courts, also kept Republican-controlled state legislatures from giving into the President's demand that they illegally impose Trump-Pence electors. The outcome was too clear, and the process had worked too well, for this ploy to succeed,

(3) "Unconventional Challenges"

Over the course of the election season, as it became clear that Donald Trump and his campaign would insist that only "fraud" could cost him the election, the inescapable question was how far Trump would go in the abuse of his official authority to avoid the loss he feared. Any number of scenarios emerged in the speculation about what he might attempt to do. Some believed that he might deploy troops to polling places in swing states to intimidate voters, or direct federal marshals to impound all ballots cast by mail but received after the polls closed; or direct state legislatures under his party's control to approve Trump-Pence electors to replace those selected by the popular vote.

We did not believe that Trump could successfully do much of what was feared. But wishing to be prepared even for the unlikeliest possibilities, we

established a “special litigation team” under the leadership of three former United States solicitors general, Don Verrilli, Seth Waxman and Walter Dellinger, to address what we euphemistically called these “unconventional challenges.” These three oversaw a team of hundreds of lawyers that produced extensive legal analysis, in thousands of pages, and template pleadings that could be turned around on a moment’s notice to defend against an attack on the election.

This was a constructive exercise in two respects: Not only did it mean we were fully prepared with powerful defenses and the best possible legal team to mount them; it served to bolster our belief that these more extreme probabilities would not come to pass—that Trump simply could not execute on them, and that, if he attempted to do so, he would meet with failure in the courts. On the basis of this work, we could issue important assurances to our supporters and keep the campaign focused on winning at the polls with the confidence that a victory would stand. Our message was that we had the matter in hand, and that, as has been the strategy all along, the best defense against any realistic challenge was simply to win the election and to win it clearly.

4) “Disinformation”

In every campaign, making sure that voters understand the rules for voting—and that, once they cast their vote, it will count—is of central importance. The task in a pandemic, where we knew more voters than ever before would participate early or by mail, was particularly challenging. We shared the widespread concern that bad actors would take advantage of potential confusion by spreading disinformation; and that the largest social media platforms were particularly effective propagators of that disinformation.

Building upon existing infrastructure at the DNC, our coordinated campaign undertook extensive social listening efforts—to understand what narratives were being spread, which were sticking, and where all of this was occurring. It quickly became clear that, consistent with Donald Trump’s public messaging, his campaign and certain of his supporters with the largest social media followings were the greatest spreaders of falsehoods about voting, incessantly asserting that mail voting was unreliable and rife with fraud, and that the upcoming election would be “rigged.”

We used this social listening to figure out which myths needed correction; and which facts deserved emphasis for voters. When we saw flaws in the policies of Facebook, Twitter, and other social media platforms, we called them out. And when Mr. Trump and others violated those platforms’ policies to mislead people about the voting process, or its integrity, we asked that appropriate action be taken. We also worked with election officials and voting rights organizations to do what was possible to fight misinformation with good information—through intensive digital and other education programs. The historic level of voter participation speaks to the success overall of these efforts.

Conclusion

Lawyers do not determine the result of elections; voters do. In November, voters decided on our next President and Vice President by participating in a process that election officials structured and managed under the most exacting conditions. President-Elect Joe Biden and Vice President-Elect Kamala Harris won the election because of the historic levels of voter participation and these officials' conscientious performance of their duties.

We are very grateful to all those whose outstanding work supported the outstanding Biden Harris campaign and field operation. Our internal team—Jonathan Cedarbaum, Lynn Eisenberg, Danielle Friedman, Pat Moore, and Nick Nasrallah—worked virtually round the clock to ensure that no development was overlooked, no detail missed, and that our national and state teams were effectively coordinated. So, too, did our National Voter Protection Director Rachana Desai Martin and her deputy Zach Learner. And the campaign legal team benefited greatly throughout the fall campaign from Jen O'Malley Dillon's field and voter protection expertise and Ron Klain's strategic legal judgment.

We are also indebted to the outstanding legal team at Perkins Coie led by Marc Elias, including the many Perkins lawyers who defended the results so effectively in the states. Our "unconventional challenges" team, which we called "Team SG3," was truly exceptional, drawing on the first-rate work of lawyers at Wilmer Hale and Munger Tolles and hundreds of volunteers to plan for the contingencies and then support our post-election defense of the November 3 results. Throughout the country, lawyers for state parties and local counsel to our campaign and the DNC played an indispensable role in counseling and litigation.

But above all, this election is all to the credit of the voters, and the election officials who did what was necessary for them to be heard.

***Bob Bauer was Senior Adviser, and Dana Remus was General Counsel, to the Biden-Harris campaign.**

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