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Introduction: Thank you for joining us for the first episode of Season 3 of The American Law Institute’s Podcast Reasonably Speaking. Today, we are going to talk about the 2020 elections. Our panel of experts will begin by discussing the unprecedented legal volatility this year, then they will answer questions about what happens after Election Night—including when are results official; if there is a dispute, how should it be resolved; and what are the lessons for future years?

Our first panelist is Derek Muller of The University of Iowa College of Law. Derek’s research and writing focus on election law, principally federalism and the role of states in the administration of elections. Before joining academia, he practiced law at Kirkland & Ellis in Chicago.

Our second panelist is Franita Tolson of USC Gould School of Law. Franita scholarship and teaching are focused in the areas of election law, constitutional law, legal history, and employment discrimination. She has written on a wide range of topics including partisan gerrymandering, campaign finance reform, the elections clause, the Voting Rights Act of 1965, and the 14th and 15th amendments. Her forthcoming book, *In Congress We Trust: The Evolution of Federal Voting Rights Enforcement From the Founding to the Present*, will be published later this year.

We are also joined by Ned Foley. Ned is a professor as well as the Director of Election Law at The Ohio State University Moritz College of Law. In addition to teaching, Ned is a nationally recognized author and scholar. His latest book titled *Presidential Elections and Majority Rule: The Rise, Demise and Potential Restoration of the Jeffersonian Electoral College* was published earlier this year. Ned also served as the reporter on the American Law Institute’s, *Principles Of The Law Of Election Administration, Non-Precinct Voting and Resolution of Valid Counting Disputes*.

The American Law Institute
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Ned and Franita co-hosts the podcast, Free and Fair with Franita and Foley. In the days leading up to November 3rd, their podcast will continue to break down complex legal issues for listeners who care about democracy and elections. You can find a link to this podcast as well as to Kate's podcast, Strict Scrutiny on this episode page on the ALI website.

Finally, the moderator for today's episode is Steve Huefner, a colleague of Ned's at The Ohio State University Moritz College of Law. Steve also serves as the Director of Clinical Programs at Moritz as well as the Director of the Moritz Legislation Clinic. He previously practiced law for five years in the office of Senate Legal Counsel, U.S. Senate. His research interests are in legislative process issues and democratic theory, including election law. He served as the associate reporter on the American Law Institute's Election Administration Principles. I will now turn over the microphone to Steve.

Steven F. Huefner: Well Franita, Derek, and Ned, here we are taking stock of this unprecedented election with about six weeks until election day itself with voting already having begun in a number of states. Why don't we talk at least for a few minutes off the top about what your sense is of how stable the mechanics of this election are at this point? There have been recent decisions just in the last days in several states that have affected the way in which absentee voting might be conducted. Pennsylvania with a state court decision allowing absentee ballots to be postmarked by election day and counted if they were in by three days thereafter.

Huefner: Michigan, the next day with a decision that allows absentee ballots to be postmarked by the day before election day, but still come in thereafter, which is different from how the state statute reads. Are these changes that are occurring at this stage in the game a necessary response to the circumstances this year? Or are they problematic because they are destabilizing people's understanding of what is going to be required? Franita. Let me ask you that question first.

Franita Tolson: It's a great question because one thing that I was struck by is the pictures coming out of Virginia where early voting started today... Early in person voting. I think the long lines that we saw and the people that turned out is very exciting, because it means that people are engaged and they're

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turning out to vote, but I think it's also driven by a lot of this uncertainty that we're seeing in these court cases, in these changes with how votes will be tabulated and counted.

Tolson: I do wonder though the extent to which this is different from prior years. It may be different in a couple of ways. We may see people turning out in huge numbers on the first day of early voting as a sign that that'll be the way that turnout will be for every... Every day of early voting, and that may not have been true four years ago. There may have been more... Fewer people turning out at any given time. It might've been more space. This could have just be a sign that we're about to see unprecedented turnout during early voting, but also I wonder if it's different in a sense of every presidential election cycle. Indeed, every cycle we have these last minute changes and there'll be last minute changes on election day.

Tolson: To what extent is this different from what we've seen in prior years? I'm not convinced that we're quite there yet. I still see this as very similar to litigation we would have seen in any other presidential year. Well, one key difference may just be volume. There's probably way more litigation in more states at this stage of the process than in prior years, and that may be driving some of this turnout that we're seeing in early voting where people are just confused and concerned. They're like, "Let me just get this out of the way, because I don't know what's going to happen."

Ned B. Foley: What Franita said reminded me of what it was like to be here in Ohio in 2004 where there was an intense amount of litigation over the voting process up until the last minute. In fact, emergency litigation went to Justice Stevens at 3:00 AM on literally the night before election day, and then into that elec-... That morning. I think Franita's point is a useful reminder that as chaotic and disorderly as it seems at the moment, it's not completely unprecedented.

Foley: It does feel like the volume is more and something feels more stabilizing to me than 2004. I want to reflect on that a little bit more, but it's a point very well taken. Thank you Franita.

Derek T. Muller: Let me add I think... Steve the way you opened was thinking about maybe how it might affect voter behavior, if it injects certainty, uncertainty in the process and for me it pointed out that, yeah there's a lot of... Yeah, there's eagerness on the first day of early voting. I think that'll drop off, maybe it'll be intense all the way through, but I think it's also... Some of the things you identified Steve and what these courts are doing, a lot of it is sort of

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the mechanics of counting votes under the hood type stuff, so it's a lot of things outside of voters control, or things they wouldn't even know about.

Muller: I think about especially in Michigan where in the recent opinion, the court was saying, "Listen, once the voters drop their ballot in the ballot box, they don't know-." Or into the mailbox, I shouldn't say the ballot box in the mailbox. They don't know what happens at the end of the day. They don't know how long it takes for that ballot to get in to the post office, and it's something perhaps outside of their control, there might be these delays that might arise.

Muller: I think there's confidence I think for voters to be able to participate in the front end, and there's probably some... There's certainly litigation dealing with whether people can collect the ballots on behalf of unrelated folks to gather them and send them in, and ballot harvesting and things like that. But a lot of things that we're seeing are also back end, the things that we're not necessarily going to change or alter voter behavior, except maybe to instill some confidence in the process.

Muller: It's been an interesting dynamic, but there's a lot of post-election rules already being made well in advance of election day.

Tolson: Well, Derek raises an interesting point because that might... That may actually be a difference this year. He's right that in normal circumstances, people drop off their ballots and then they don't think about it anymore. They've done it. Now people are starting to think about it, and that may be driving some of this in person turnout because now they don't have full confidence in what happens after they drop the ballot off. Voting in person is a way for them to maintain more control over the process and so this may be a year where you do have more uncertainty in a sense of voters feel more uncertain and that's driving their behavior.

Foley: The one additional point I was thinking about was there is this narrative out there in the public about that the system is not working, that it's chaotic. We won't know the answer that it's going to break down this year. I hope that's not true, and I don't think it's necessarily true. It worries me a little bit that even if the litigation isn't inherently destabilizing any more than in the past, the mere existence of it feeds into that narrative and so if you've got candidates saying, "You can't trust the outcome, and the process is broken, it's even rigged."

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- Foley: The fact that the courts are changing the rules while people are doubting the process could feed the doubt and there might make it harder to come together over the result once we have a result because people could say, "Well, the rules changed at the last minute so who knows if we can trust the outcome?" That worries me a little bit.
- Huefner: Well, let me ask a related followup to that, which is the recent judicial activity that we were talking that I introduced may not be the last word. The Michigan decision is still the trial court, so the appellate process could result in a change there. There are suggestions that there might be a federal attack... Federal law based attack on the Pennsylvania ruling. What do you each think the prospects are that even these particular decisions aren't still not the last word on the processes of Pennsylvania and Michigan? I could use other examples from Ohio, which had some decisions just a few days before, how long will this go on this year?
- Tolson: To some extent I wonder if we are unrealistic in our expectations Steve because... So there's... As you all know, the Purcell principle frowns on last minute changes to elections because they don't want to destabilize the status quo, courts who come in to resolve these challenges. Yet these things get litigated until the 11th hour. In a lot of cases, the opinion depending on what level we are litigating it is a destabilizing factor. It does sort of contribute to Ned's point about people feeling like the system is chaotic.
- Tolson: I do wonder, is there a benefit that we get from acknowledging that these are things that will be litigated to the last possible moment and that there might be a change in order to prime voters for the reality that what you thought was... How you thought the system might work might not actually be the way that things transpire on election day. As opposed to pretending that courts are in the business of calling balls and strikes, not to be really inflammatory, but that's the Purcell principle. We're just going to try to keep things the same, but it rarely works out that way. Sometimes it does, but generally speaking even the very fact of litigation is to some extent destabilizing.
- Muller: There's no question that there is this timing issue that's happening, that a lot of the litigation is a short fuse in part because of coronavirus, or sometimes they've been waiting to see what the legislature will do. There have been instances where the legislature has acted. Sometimes the litigation is responsive to legislative inaction and it... I think the final point

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that I'll raise here, and Steve you sort of alluded to and talked about these may not be the final word.

Muller: Back in April when we had this challenge coming up before the Supreme Court about the judicial decision in Wisconsin to accept some late received ballots, among other changes in the Supreme court in a five, four decision in RNC vs DNC says, "That went too far. You shouldn't have done that. It's too close in time to the election, send it back."

Muller: I think one of the important principles of that case was the posture of the litigants, where the litigants said, "We're only challenging this one thing. We're not all the other stuff that happened below." I think it's going to be interesting moving forward to see what kinds of things the litigants say, "Listen, this is good enough for now. We're going to take it even though it's a trial court decision. We don't have the time. We don't have the opportunity costs to go appeal these things, let it be." Versus the handful of things they selectively say, "We need to challenge. We need to continue to pursue. We need to figure out what kinds of rules are in place ahead of election day." Or, "We need to sort of hit that tight window."

Muller: I think it's going to be an interesting strategy in these waning weeks of the election to see selective appeals in the litigation and what that leads to in terms of Appellate authority deciding, "It's too close in time. You should shouldn't change the rules at this point in time."

Foley: Yeah. I think Derek makes a good point and it builds off of, Franita's observation about the Purcell principle. What struck me about the most recent round of decisions is it seems the U.S. Supreme Court was trying to send a signal starting in April and then some... In the Wisconsin case, and then in some other cases, where basically been saying, "No, do not have litigation causing problems during this pandemic year. Let the state officials try their best to run this, but in the extreme situations maybe, but really don't rock the boat." And yet the boat is really rocking right now, which makes me wonder how much effectiveness the U.S. Supreme Court has it as the apex of our judicial system to call the shots. Because if all this rocking of the boat happens in the lower courts, the Supreme Court can't really stabilize things right away. The chaos factor maybe out of the Supreme Court's hands even if it would like to avoid this chaos.

Huefner: I guess I had sort of a similar response or a followup question to Franita, and that is whether it's not just our expectations that are a little misplaced, but even whether the Purcell principle itself is an unrealistic principle? It

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is not a hard and fast principle that says, "As of X date, we will no longer entertain judicial challenges." Instead, given the kinds of pressures that exist, is it simply unreasonable to have something like the Purcell principle? Or does it still play some valuable role? Or is the principle just used to put a thumb on the scale in a particular direction?

Tolson: Yeah I... I'm not a big fan of the principle because I don't think that the principle was applied in a neutral manner. I think that the court... It's basically a smokescreen for what the court's preferences are. To some extent I do think that there is some value in the course of you saying, "We are going to defer to the status quo." That just feels less disruptive to say that. But it fails to appreciate the fact that sometimes the status quo is disenfranchisement, And that's the problem that I have.

Tolson: I think it's the court's job to help police and protect the right to vote, not to necessarily protect the prerogatives of election officials to the extent that it will require some people not being able to enjoy their voting rights. If we're serious about voting, I think that the thumb should be on a different part of the scale, honestly. We also need to stop acting like Purcell is neutral. It's not necessarily neutral. The court can have this conversation in the context of balancing the benefits and burdens when it comes to exercising one's right to vote.

Tolson: If it is a situation in which the regulation makes sense, even if some people are ultimately disenfranchised, that does not mean that the court has to necessarily strike down the regulation, instead it's more of an assessment about whether or not the regulation makes sense in light of the burdens on the right to vote, as opposed to saying that, "We're going to treat the status quo as if it's neutral." It just sounds very [inaudible 00:18:59] to me.

Huefner: Well, or is it really a question of how much the last minute changes are in fact disruptive? Or to what extent do they in fact cause confusion to the vote? Or maybe not-

Tolson: Confusion based on what though Steve? They're just guessing. This sounds really confusing without any evidence that is actually confusing. We're going to keep these people from voting and we're going to treat the status quo as if it's some sort of, [inaudible 00:19:26]. I don't know if they captured that on radio, but ultimately I just feel this is a conversation where we need to start from a different place and we can still respect what state election officials are trying to do.

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Muller: Yeah, I think... I agree. For me. I think it's important to think in terms of this evidence-based claim of, what do last minute changes to election laws do? We can think about this in a number of respects. There's no question that last minute changes to ballot access results in having to reprint the ballots. Making mistakes like that. There's consequences like that.

Tolson: Right.

Muller: In terms of administration... Oh yeah. In terms of administration, you train poll workers ahead of election day, and if you make changes to things like the voter ID system that you've put in place or what the poll books look like for an active voter or signature verification, there's some costs there and then there's this more abstract also, something Ned's gotten to earlier thinking about voter lack of confidence and faith in the system, that it's someone stepping in and changing the rules, even if the courts might have a good reason for doing so or defending voting rights or providing opportunities for those.

Muller: I think the other side of it, and I think, again this is why some of the coronavirus cases are different. These are also situations where some of the Voter ID cases or things in the past we've talked about, they were litigated for two, three years and sometimes the courts just sat on them, and they showed no urgency.

Muller: I think at least the Purcell principle has offered an opportunity, both the litigants in courts to say, "Get your act together earlier on this stuff. If you think it's a problem, raise it." And of course if you think it's something serious enough to change it, issue a decision. I do think there is at least some benefits as sort of a salutary principle. I think it's getting... I think it's actually moving the courts a little bit faster, maybe not everywhere, but I think it does provide also that kick in the pants to the courts to say, "You got to move on these decisions. You can't just issue something at the last minute." Now we can fight about like what that window ought to look like, but I think that's also [inaudible 00:21:34].

Foley: I'll do one more point on the ballot access cases before we move on because I think... I just want to underscore what Derek said and amplify it because whether the Green party should be on the ballot or not, it seems to me no sensible electoral system or legal system would be fighting over this at the time that we are now fighting over this inside a Labour day.

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Foley: In fact, the Supreme Court in this Anderson case... Bob and John Anderson from 1980 said basically 75 days before the election is when you could... Should put these things to bed. There is something wrong going on in our legal system that we're still litigating over this particular issue at this late date. I haven't seen a reason that's coronavirus related that justifies that. In other words, structure with a question of whether you have a third party or not is really independent of the pandemic and the virus.

Foley: I have to believe there's some other breakdown, whether it's party polarization or something is going wrong in our overall system that the ballot access cases are an unfortunate signal about.

Muller: If I can just jump in briefly on that. I think you're right. These ballot access cases and obviously they're always with us, but there's no question that as we've moved early voting earlier, as we've required printing of more ballots earlier to mail them out, those sort of informal practices and deadlines of officials are running up against what might be the formal ballot access lines that have been in the law.

Muller: I think that we've run into a place where state legislatures, they just need to move some of these deadlines back, or Congress needs to provide some sort of uniformity about what this ought to look like in terms of the manner of holding elections. I think there's been this creep we've had over the years of more and more early voting, it's perfectly fine, but it also means more and more ballots have to be printed earlier, which getting to the printer earlier, which means we have to have firmer resolution of these things.

Muller: I think the States do need to start thinking more concretely about these timing issues. Some of these cases are going where the courts are issuing decisions hours before County said, "We have our drop dead deadline." And that I think that absolutely totally inappropriate. We should find a better solution.

Tolson: Can I chime in here really quickly in response to Nat and Derek? I agree. I agree it depends on what regulation is at issue, what the factual circumstances are. I think I'm just challenging the framework in which we're having a conversation, and a framework in which our baseline is we privilege the status quo. We don't have to talk about it like that. We can talk about all of the issues that Derek raises with, now that we have more

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early voting, we have to print and ballot sooner, states need to be more proactive of this.

Tolson: We can have this conversation in the context of the right to vote being fundamental. In fact, I think one of my problems with the April decision out of Wisconsin was the fact that the conversation, because of the privilege... The privileging of the status quo it placed the burden on voters to track... To overcome the difficulties of the mismanagement by the state in a way that made me uncomfortable. And they're talking about all of this in the context of the Purcell principle.

Tolson: Let's not do this disturb the status quo, even though the status quo is that the state screwed up, right. There were people who didn't get their balance in time and they faced the option of going and standing in line or being disenfranchised in the middle of a global pandemic. It just bombs me to read an opinion and it's like, well, voters have the burden of overcoming mismanagement by the state instead of acknowledging that, "Hey, the status quo is a problem. The state screwed up and maybe Congress do need to step in and normalize some of this so that we don't have some of these issues." I just... I don't like the fact that we're having this conversation in the context of Purcell.

Huefner: Well, let me shift away from the judicial changes late in this... In the game to the legislative changes. There's an argument that you've been making about the importance of legislatures holistically revisiting the whole timetable as well as all the mechanics, but setting that aside what at this point do you expect or hope... And those are very different questions that some state legislatures might yet do? Again at this relatively late stage to affect the way in which this election is conducted?

Foley: Well, if I can jump in, I wouldn't want to do too much again, because I do think there is some risk to confusion. I think Derek made a good point that under the hood things that don't confuse voters, maybe okay and some of the mechanics at the backend of the process, there's still enough time for, some of the front end stuff we really... The window has already closed, but the one rule in a couple of key states that was really important to shift is when local officials can start processing the absentee ballots that have come back.

Foley: Many of the States that have opened up absentee voting to the no excuse system have also adopted what's known as pre-processing checking voter registration, checking signatures where necessary, voter ID where

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necessary. All of that evaluation can happen before election day so that when the polls close, you can have an immediate count of all the absentee ballots that have come in the whole month of October.

Foley: Michigan and Pennsylvania are two states that do not allow for that, but instead basically pile up all these ballots not allowing them to be evaluated in this way until election day itself. That's an unnecessary inefficiency in the system, the secretaries of state and the local officials on a bipartisan basis in both states really want some legislative change on this and it hasn't happened yet. That would be the one legislative thing that would be most advantageous in my view.

Muller: I think some States... Just like in South Carolina just recently enacted a statute allowing for no excuse absentee balloting. Some states are moving in that direction where if we have absentee ballot rules or mail in ballot rules where you require an excuse, and the excuses can vary from state to state and how strictly they're adhere to can vary from state to state. I think there's no question that we've moved into a direction of saying, maybe that... This notion that we have to come up with some exception to request a mail in ballot is washing away slowly, not in every place, not every jurisdiction.

Muller: We also know the trade off. That voting early provide some opportunities or providing mail in voting provides opportunities. It provides potentially more risks for errors. Higher error rate, higher failure of the ballots accounted. These are all difficult trade offs that the state is trying to make in these times... Unprecedented times, if you will. I'm hoping that in some of these states as Ned mentioned, there are bipartisan consensus about how to move forward, but the clock is ticking about whether or not very much can happen in the weeks ahead.

Tolson: I'm with Ned and Derek as well to some extent about this idea that there are trade offs here that should encourage states to move with some caution in making these changes as we get closer to the election. I do wonder, and Ned has actually been pushing back against me on this for, I guess eight months now about, what we can learn from this moment. I think that's an important part of the story.

Tolson: Some of this won't be done by the election, but that doesn't mean that it shouldn't be done. I hope that we take this as an opportunity to have broader conversation about how to better manage our elections because if anything, COVID-19 has really illustrated the shortcomings of our system

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and all of us as people who study elections and study voting, we knew that there were problems, but I do think that the general public got a front row seat into how messed up things can really get.

Tolson: I wouldn't necessarily advocate broad change in the next 50 days or whatever it is because it's just... We're really close, but I still think we need to continue the conversation and think about how we can do this moving forward. There's a better way. It doesn't have to be like this. I think if anything, our current moment has taught us this

Muller: Well, I think Bush versus Gore was like a moment to pass the help America Vote act, right?

Tolson: Yeah.

Muller: It was us saying, "We've seen some problems, let's do something to change it." I think the question is for the new Congress, for the new state legislatures, are we going to be looking at small scale changes or even large scale changes sort of responsive to this? or is it going to be kind of a who's ever in control has an omnibus. We want to roll everything together in which case maybe nothing gets done.

Muller: I think that's also a question. There could be incrementalism and thinking about learning from this election and improving it versus just reverting back to the status quo of frustration I would say.

Foley: Well, I like the idea.

Tolson: I was just going to follow up on a Derek's point, but wow! Even a small change. What if every state said you can start counting before election day? Just like-

Muller: Well processing at least before-

Tolson: Yes. Processing before election day. That would be... That's a small change that will have a huge impact. It doesn't even have to be... Let's go to a system where Congress has more oversight over state election... State and federal elections, which is my preference.

Huefner: Well, we'll defer the post mortem conversation. What we really should learn after this election is over to another day. Let's turn our conversation to what you're expecting after election day in the period... In the days and

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weeks just after the election is concluded. What issues are you most worried about now?

Muller: I think one of the concerns I have is less the routine process of getting in the ballots, some of the slow counting, the things that happen that maybe we're going to be hyper focused on it. I'm less worried about the nuts and bolts side of things. I'm worried, I think more about the litigation and the rhetoric pieces. The litigation, I think could potentially be a very significant problem. It was a big problem in Bush versus Gore, and I think it could be magnified dramatically now that people have that still in their memories about what that looks like, and even legitimate litigation can look like a challenge of courts altering the outcome of an election. I think that's a real problem.

Muller: The other is sort of the rhetorical piece about that election was rigged or stolen or fraudulent or whatever it might be, and whether that rhetoric leads to any sort of action is another question. I think rhetoric that undermines confidence in the process is the other piece I'm particularly concerned about after the election.

Tolson: I can jump in here because I think the rhetoric point is a huge concern that I share as well in part because I think it will also contribute to our inability to distinguish normal administrative errors. The election officials are dealing with something that's pretty unprecedented in terms of volume of people who will be voting by mail, and just trying to navigate the challenges posed by the fact that we're in the middle of a global pandemic.

Tolson: I think the rhetoric will be such this rhetoric about rigging elections and the system being fraudulent will make it difficult to desegregate normal administrative errors, which will happen and happen every election from an actual election meltdown. I think that there'll just be this sense of panic that every little thing that happens is a sign that the system has somehow failed and that's just simply not true.

Foley: Yeah, no, I share that concern. I guess I'll be happy... This may sound strange, but I'll be happy if on December 14th, when the electoral college meets in every state, there is definitive resolution by then, whatever litigation might have happened up to that point or uncertainty, meaning that there's going to be no more fighting after December 14. That's one criteria in my mind.

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Foley: Then the second more ambitious and this relates to the rhetoric point is I'd like it to be settled not with the losing side simply believing that they have no choice, but to accept defeat as a matter of political power and fear, but they actually are willing to acknowledge that they weren't chosen. The other side was in fact the people's choice. If we could get that kind of resolution, even if it doesn't come until December, I think that's good enough to go forward and allow the new president and then the new Congress to govern with the mandate of an honest victory.

Foley: I guess if the candidates themselves aren't willing to say that the other side actually won and was the people's choice, if enough other players in the political system can say that so that that becomes widely accepted, if not universally accepted. That also feels to me good enough. That's what I'll be looking for, and I worry as Derek did that the litigation, if it takes hold, plus the rhetoric will prevent that kind of outcome, but I'm hoping that we could keep the train on the tracks, so to speak in that respect.

Huefner: Are there things that we can be doing now that would increase the chances that the train stays on the tracks as you put it in that period from November 3rd through December 14?

Foley: Well, the one thing that... I'd be curious what others think about this. I think as lawyers of this system, we have the knowledge that there are legal rules to do the counting and every state does a little bit differently, but there are fundamental principles involved. An absentee ballot can't just walk into the election offices and say, "You must count me." It's gotta be verified by some process. These are all designed to protect the integrity of the system, it's... The system actually does care about the integrity of itself as well as the opportunity for voters to have the ability to cast a ballot.

Foley: That's why I think there should be... The public rhetoric should be trust the system, unless there's evidence for distrust. There should not be distrust that's manufactured out of thin air that has no basis. We need an evidence based evaluation and the litigation can do that. The mere fact... As Derek said, the mere fact that there's a lawsuit doesn't mean the train has gone off the tracks, unless it causes you to miss some deadlines that can't be missed, which I hope doesn't happen, but yeah, I hope as lawyers, we can guide the public to understand what's going on so that we can say, "Look, yes, there's some uncertainty, but don't panic. This is actually the system working." And if we have an answer, trust the answer unless somebody gives you a really good justification for not trusting it.

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- Huefner: It is an unfortunate feature of this particular election, more so than others that I've observed that the rhetoric already has undermined the sense that the system generally works. There's reason for us always to conduct close inspections and to do audits and to be open to fact-based criticism of a particular process. But it does bear I think our observations and repeated stressing that the system is well tested and well designed, and there's still room for improvements and we want to keep looking for ways to enhance what we do. I like Ned's observation that unless there's evidence that something's not working, our default position should be that it is a reliable system.
- Tolson: I don't know. I think it's challenging. I agree with Ned. I think that that should be our default that the system works, but it's... We are in a moment where otherwise smart people will assume that the evidence of absence is the evidence of his existence, because there was no fraud that means it just hasn't been detected. In what other areas do you see that type of logic holds way?
- Tolson: But people believe that and so when you're pushing up against that type of argument and when normal rules don't apply, I think it's really difficult to disturb that, but that being said, all hope is not lost. I do like this language around election week or election month as opposed to election day, because I do think it conveys a sense that even if we don't know who won election night, that does not mean its fraud, that doesn't mean that something's wrong, that just means that they're still counting and that's fine.
- Tolson: I think maybe the answer... I hate to say, maybe we have to counter speech with more speech. Maybe in the face of rhetoric about things being rigged or things being fraudulent, it's just really important to emphasize those aspects of the system that are working. Yeah, they're counting and part of the reason it's taking longer is because they are making sure that the signatures match, they are making sure that each ballot is verified. Just emphasizing those aspects of the system that reinforced that. Not only is it working, but they're trying to make sure that the system maintains the sense of integrity that the system was designed to have.
- Tolson: As Ned mentions, election officials actually care about this thing and they want the system to work and they also want to convey the sense that the system is honest.

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Muller: One concern I have thinking about this post election day period though is especially as States move toward... Pennsylvania and Michigan, both did it or federal judges or state judges came out with decisions to this extent saying that votes received after election day can be counted as long as they're postmarked or in Pennsylvania's case, there's no evidence otherwise suggesting that they were mailed after election day.

Muller: I think there are good reasons to think that you should have the ballots in on election day, in within three days, in within a week, whatever it is. I'm a little concerned about first, lack of confidence in the system of ballots trickling in, over two weeks is a long time and saying, "We don't even know how many-" It's not that we're just processing ballots and we're trying to figure it out We're overwhelmed. It's we don't even know how many ballots we've got until three, five, 10, 14 days after the election. That's a concerning public information piece because we've also never had deadlines that go that long. Plus the volume I imagine we'll get after election day. if we talk about election night, we can talk about election month, maybe as counting, but receiving them after is a concern.

Muller: The other concern-

Tolson: Counting.

Muller: Counting. The other concern I have is thinking about on the litigation side. If courts change some of those rules after the election. And maybe we can talk about Roe vs Alabama and due process concerns, but I am a little bit worried about what happens when someone shows up and says, "Well, wait a minute. I know we have a rule in the state that says we accept all of... The ballots have to be here by election day."

Muller: We've known for months about all of the concerns that we've had, but now we want to sue and say, "All the ballots received within the next three days, as long as they were postmarked on election day." Or if not three days, seven days. I worry about some of those post election day challenges to invite sort of saying votes that would otherwise be excluded and are now supposed to be counted, or processes that were previously not used are now being used. I'm not sure what that looks like and that is the most worrisome piece about the litigation.

Muller: The pre-election stuff right now. I think we can all have good faith disagreements about the best or worst approaches, but I think... I get really nervous about changes after election day and the litigation posture there.

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Huefner: Well, let me use that transition to one more topic I'd like us to talk about today. We've observed how the amount of litigation may be larger in volume, but that we've seen plenty of litigation in the past, and it's part for the course in high stakes elections. Nonetheless, there does seem to be something about this election in which the rhetoric and potentially some of the legal fighting itself is threatening the underlying system. That it's not just about the outcome of this election, but that it's creating a genuine threat. At least the argument can be made to our democratic process.

Huefner: In fact, Dan Coats just published an op-ed, the former director of national intelligence for president Trump, making that point that what's at stake this election in a way that wasn't true in previous elections is not just which party will control the White House, it's not just which candidate will win, but whether we will emerge the backend with a democratic process that remains functional, that remains reliable. I'd like to hear your thoughts about to what extent that's a real threat and what we should be doing, if it is a real threat. Ned?

Foley: Well, I do think it's a concern. I would applaud Dan Coats his op-ed, I think that was very helpful public piece of communication. I don't want to be overly alarmist, and I worry about self fulfilling prophecies. We've had strange... Franita and I have had, again, an eight month conversation in which I've been really helped by Franita's perspective on keeping, reminding me that America wasn't really a fully functioning democracy until the voting rights act of 1965. We had other claims to democracy and self government and probably a working form of government. I don't want to lose all of the history that leads up to the voting rights act, but a lot of that was unfulfilled promises.

Foley: We may be in a period of fragility in terms of democratic norms and some backsliding, which I hope doesn't happen but if we get through this election and we improve civic education, and we do some other changes, the sky may not fall. I don't want to assume that the sky is going to fall.

Tolson: I don't think we have to assume that the sky is going to fall, but we have to concede that it might, as you can see, I am the more alarmist party between me and Ned, but yeah, nothing's guaranteed. To be honest, I know everyone was applied in this op-ed with the commission and everything. We love a commission. We love a commission to study something, because if we think something is going to change in response to this commission. I'm not just this... That isn't going to work no more. We have reached a moment where we need to come up with something

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else. If anything being Dan Ginsburg op-ed from a few weeks ago, resonated more with me because at least he's calling a spade, a spade by saying like, "Look, we need to stop saying that the system is fraudulent and rigged. There's very little evidence of that."

Tolson: We need to see more rhetoric like that from both sides. We always have a commission in response to every re-election. Let's study this, we study it half to death, even though we already have a diagnosis, we know what the problem is. The problem is the imperfection of American democracy and we're working for process. We need to put the work in and we haven't been putting the work in, we just go from election to election, assuming that everything will work out okay.

Tolson: The sky might fall. I am willing to say, I don't think that's alarmist. I just think that's realistic and so the question is, so what do we do? What do we need to do if the sky doesn't fall. When we have elections midterms in two years, are we still going to mosey along as if everything is okay, or are we going to acknowledge that our system is broken, we need to fix it, and we need to actively take steps to fix it?

Tolson: Because honestly the Trump presidency and the response in everything that's going on with our politics is really just a symptom of a larger problem of the weaknesses in our system. We can't... We need to stop pointing to individual people as the problem, recognize they're just a part of it and start really taking a close look at how to fix our democracy.

Muller: Yeah, I think yeah, the Dan Coats op-ed that gets at, I think, some narrow and specific concerns, I think too in thinking about the trust in the process. It's dealing, especially thinking about that, that it's not international interference, foreign interference for manipulation of votes, things like that. There's a lot of rhetoric about those kinds of concerns.

Muller: I think there's good evidence to suggest the ballots were not altered in the 2016 election. I think the States and DHS are moving in a better direction, a cooperative direction for this election that need to be publicized more. Maybe that's something we want to worry about. What kinds of subversive international efforts are there to sort of... From and China on behalf of Donald Trump, Joe Biden? There's just inevitable on the present questions that the Senate has been investigating now for the last four years. I feel like the Senate is issuing a, a report every six months on this to describe what's happening. To Franita's point we love our commissions to do these kinds of things.

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- Muller: I think it's hard no matter what kind of a commission gets together and says, "You know what? I feel the voting machines in Wisconsin were not hacked." It's just.. And that's a tough pill to swallow for some folks and I'm afraid I just, I don't have a great answer for that. We can put all the most brilliant minds in the room together to reach a consensus on that, but as Franita said maybe it is just... We need people coming out on the rhetoric piece anti and expose, I think so.
- Huefner: I find myself wondering if the most valuable thing of Dan Coats op-ed is not the possibility of a commission, but as simply going on record as saying that the rhetoric has the potential to be incredibly damaging, and the rhetoric without facts will destroy our system, and just to take that as a cautionary note. Sorry Ned, go ahead.
- Foley: No. Two quick points. One is if we don't have resolution by December 14 and we still have two claims to victory after that day headed to Congress on January sixth, I do think we'll need a commission for a short term resolution. Well it depends if it's absolutely clear that one party controls both sides of Congress, then maybe you don't need a commission to have resolution for this election. But if we have a divided Congress and two claims to the presidency that, "We need some help getting through that process." Hopefully we'll avoid that.
- Foley: I think that Coats' argument is useful just on that narrow piece. Longterm I'm more sympathetic to Franita's point that we need more of Ben Ginsburg's coming out and changing our... The nature of our... Of what bipartisanship or non-partisanship might mean because it's... Ultimately it's impossible for one party to hold up a two party system. If you have one party basically believing in democracy, [inaudible 00:58:48] democracy and the other party doesn't, and they can't even agree to that, that's just an unstable system. I don't know that a commission solves that long term problem. I think that's a much bigger, harder conversation and an important one.
- Foley: I would say commission in the short term, if necessary in the long-term a big rethink about the commitment to two party competitive politics.
- Huefner: Ned, on the short term point, I take it what you're thinking of there is something different from a study commission, it would be a commission that has some sort of mandate to issue guidance, maybe not... Obviously not binding, but it's just more than something to be studied I take it.

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Reasonably Speaking Episode Transcript: "Election 2020: When Are Results Official and What Happens if Results Are Disputed"

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Foley: Oh, absolutely. I mean the... I know that all four of us in different forums have talked about different aspects of this, but just to get us all on the same page for this conversation we're all hoping it's a very low probability of a very bad situation, which would be on January sixth both parties believe they've won the presidency. One party controls the Senate, the other party controls the House of Representatives and the two parties don't agree on how to interpret the existing law on what Congress should do with respect to those competing claims.

Foley: That's a real risk of a stalemate, and I think a commission could help... We wouldn't have mandatory authority, but it might be able to guide congressional leadership in both chambers and in both parties on how to avoid that stalemate so that we have resolution by January 20th.

Foley: I'd be curious as to what Derek and for Franita and you Steve thought just on that narrow or question.

Muller: I guess I'm only skeptical because something like that was tried in 1876, it didn't seem to work so well. I don't know that you can form a commission that is going to solve the problems of the dysfunction in Congress. If you punt it off to the commission, I think you just move it, one step removed and you yield some of the same problems, but I don't know I just... Maybe I just am not thinking as much about the low probability of that so I keep thinking, "We should have some certainty by December 14th." I'll feel better about it then.

Tolson: Yeah. My only response is that I'll just be sending an election administrator prayer. Don't let it be close because I don't know, I think our level of polarization is such that even if we have a commission it'll become politicized and I just worry about that. It's just... This moment just feels different to me Ned. If we were having this conversation in 2016 about things to do if we don't have resolution, I think I would be like, "Yeah, commission." Now I'm just like, "No, we need something else to try to get us past this moment."

Tolson: I think our best bet, I'm just like, "Please don't let it be close." Please don't let us be in a situation where we do have to entertain these very difficult questions about how do we get past our differences at a crucial point in time... At election time when we couldn't even do it in the four years proceeding the election. And that just... That is incredibly terrifying to me.

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- Tolson: I don't know, you may be right. A commission may help weigh through some of the issues that are... Would otherwise would be unresolved, but I'm just not certain that it would operate in that space in this moment.
- Huefner: Well, it's been great to be with all three of you. I think we're all in agreement that it will be a great relief if by December 14th, the outcome is clear that we should not expect for that clarity by November third. That if it's still not clear on November 14th, then we have our work cut out for us.
- Huefner: We've also laid a foundation for some future conversations at some point in some fashion thinking about lessons to be learned about the mechanics of the election. Then a broader question just about the way in which all of us might be engaged in promoting robust democratic processes as we move forward. With that, thank you, be well.
- Tolson: Thank you.
- Foley: You too.
- Muller: Thank you.
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