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Presidential Control over Disputed Elections

LISA MARSHALL MANHEIM*

An election that is “disputed” lacks two qualities after Election Day: a clear winner and a concession. These elections instead depend on legal processes—recounts, court proceedings, and more—for resolution. As a result, when a sitting President, running for reelection, becomes immersed in a disputed presidential election, he potentially enjoys an advantage over his opponent. He can attempt to exploit the powers of the presidency to push these legal proceedings in his favor.

As a practical matter, this advantage can be formidable. A sitting president can resort to his extraordinary bully pulpit, for example, to influence public sentiment. This advantage shrinks, however, with respect to the President’s official powers—the legal authorities that the President can wield by virtue of his role in government.¹ Here, a sitting President’s advantage over his opponent, at least after Election Day, is slight. As this Essay explains, the President’s powers over a disputed presidential election are not primarily legal in nature; they are political. And, accordingly, so are the means to push back.

Prior to Election Day, the President enjoys considerable power over how elections in the United States are designed, administered, and regulated. For example, the President can use his nomination and removal powers to affect the implementation of landmark voting rights statutes, which potentially reach into every crevice of election administration. He can refuse to offer nominees for leadership positions in order to hamstring agencies charged with election-related regulation. He can decide unilaterally whether to impose sanctions in response to important forms of election interference. The list goes on.² These forms of control are important. Yet their reach generally ends at Election Day. These powers do not allow a President to influence the resolution of discrete election disputes that might subsequently emerge.

Importantly, moreover, the President is able to exercise these limited powers over election administration not due to some freestanding power. Instead, he is able to wield this authority because Congress authorized it. As relevant, Congress passed the Voting Rights Act, the Federal Election Campaign Act, the International Emergency Economic Powers Act, and more. Each of these statutes empowers the Executive Branch. As a result, each statute, in one way or another, necessarily empowers the President.³

With respect to post-election disputes, however, Congress has enacted no statute granting analogous authority to the Executive Branch. Nor does the Constitution provide such power. Instead, the Constitution and Congress have combined to produce a framework for resolving elections—including presidential elections—that, once Election Day has come and gone, cuts the President out almost entirely. Consider, at the outset, disputes over how ballots cast for presidential electors should be counted, recounted, or otherwise resolved. During this stage, the states remain in charge, with courts often playing

an important adjudicatory role.⁴ Consider, next, disputes emanating out of the Electoral College. Here, Congress serves as the decisionmaker, with the Vice President (perhaps) serving as a meaningful actor.⁵ Finally, consider disputes that might survive even after Congress has met. At this point, January 20 provides an automatic cutoff. If, by that time, “a President shall not have been chosen,”⁶ there is no legal ambiguity regarding the tenure of the sitting president. It simply ends. Throughout this two-and-a-half-month process, between Election Day and the date of inauguration, the law empowers many actors to make decisions in the course of resolving the presidential dispute. It does not, however, empower the President. Even if these actors fail to fulfill their decision-making responsibilities—even if Congress, for example, fails to resolve disagreements emerging from the Electoral College⁷—the law does not respond to such a crisis by empowering the person who happens to be occupying the Oval Office.

The few areas where the President does have some official role in post-election disputes help to confirm just how limited this role is. To take one example, the President nominates candidates for the Election Assistance Commission (EAC). The EAC, in turn, provides information and funding to states seeking to improve their recount procedures. This work is important. But it all occurs outside the context of a particular disputed election, and the EAC lacks the ability to force jurisdictions to take one approach over another with respect to disputed elections. The Executive Branch also plays a central role in presidential transitions. This potentially charged arrangement is a result not only of historical norms and practical considerations, but also constitutional mandates and statutory requirements. The Presidential Transition Act, for example, requires the President, well before the election, to establish a “White House transition coordinating council,” which in turn takes on a host of transition-related duties. If a President, facing down a disputed presidential election, decides to slow down or even stall this process of transition, the law is sufficiently equivocal—or at least unsettled—to allow substantial latitude to him and others in the Executive Branch.⁸ Yet even if a President were to engage in such resistance through January 20, the effect would be to undercut the work of the incoming administration, not to prevent its installation. As this practical consequence helps to confirm, these discrete areas of presidential control are significant. Yet none of them empowers the President, in a meaningful way, to control the legal resolution of a disputed presidential election.

Of course, modern U.S. Presidents also enjoy an astounding collection of powers that do not necessarily relate to elections. These powers are so numerous, expansive, and unsettled on the margins that it would be impossible to identify them all in a definitive manner. Contemplating this broad range of legal powers running to the Executive Branch, a President may begin to wonder if he can redeploy these authorities in a manner that could push a disputed presidential election in his favor. Perhaps a President would look to leverage his influence over how funds are distributed to states, for example, or even his control over the military, in an effort to improve his chances after Election Day.

Yet even if a President were willing to go down this path, it is unclear how, exactly, he could use these broad powers to affect the resolution of a disputed presidential election. Such an observation assumes, of course, that the President works within the bounds of the law—an assumption that, as addressed below, may not necessarily hold.

In short, a President seeking to leverage his office in response to a disputed presidential election does not have, in his otherwise vast toolkit, law-based mechanisms likely to advance his cause. He likely will have more success turning to political pressure. In this context, the President finds a wealth of opportunity. A President first could turn to state and local officials, trying to pressure these individuals into conducting post-election proceedings in a manner that improves his chances. He could even attempt, for example, to convince a state legislature simply to throw out the popular vote and appoint his preferred electors.⁹ A President also could turn to Congress, in response to proceedings at the Electoral College, and try to convince congressional representatives to resolve any lingering disputes in his favor. And, of course, the President could lean heavily on the Vice President, who technically is elected separately from the President but whose own political fortunes almost certainly coincide. Unlike the President, these other political actors do have legal mechanisms at their disposal able to meaningfully affect and even resolve a disputed presidential election.¹⁰ A President hoping to exploit these legal mechanisms through sheer political clout has decent odds of making a difference; he is an extraordinarily important public figure and the *de facto* head of his political party. Yet even the most politically powerful President still lacks legal authority to compel these decisions. He must rely on other, independent actors to choose to make them. And it is very possible that countervailing political pressures or other forces, simultaneously directed at these same actors, would be strong enough to resist the President's efforts.

It is in response to such fortitude that an unscrupulous President might attempt, in a sense, to combine his political and legal leverage into something more ominous: to threaten to withhold funding, for example, to any state whose representatives are resisting his political pressure; or to attempt to use his control over the military and other federal actors to extort relevant officials. A President even could purport to declare state of emergency—something akin to martial law—that, he might try to claim, allows him to act beyond constitutional constraints. If a President takes such steps, however, he is no longer exercising lawful authority, even if he tries to frame his actions as such. Instead, he is exploiting his legal proximity to funding decisions, to law enforcement and the military, and to the presidential office more generally in a manner that cannot be reconciled with law. The President, in this scenario, is acting unlawfully. The legal question therefore becomes one of remedy.

In this situation, it is likely that the normal, legal avenues for recourse—via the courts, impeachment proceedings, and, of course, elections themselves—would be unavailable or inadequate. In that case, the question becomes less about the law, which in a sense has failed, and more about politics. Will the

other political actors stand for this lawlessness? Will the electorate? If not, what will they do—perhaps also outside the bounds of the law—to push back?

In light of these dynamics, the upshot becomes clear: to the extent that a President can exploit his office to influence a disputed presidential election, it is not through law-based means. The President has essentially no legal authority, by virtue of his office, to control the resolution of disputed presidential elections. He also has no legal authority to control the decisions of officials who will dictate the outcome of such disputes. The President instead must operate through legal channels (such as local election boards and the courts) that are equally available to the candidate who is opposing him; or he must act indirectly, through political pressure. And while the political playing field—between an incumbent and an outsider candidate—is hardly level, it is very much still a competition. In short, a sitting President likely does have a meaningful advantage over an outsider in a disputed presidential election. But that advantage starts, and very well may end, with politics.

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¹ For a discussion of the distinction between a President's official powers and other means of influence, see Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. (forthcoming 2021). See also Lisa Marshall Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1764–1765 (2019) (distinguishing between presidential orders that are legally binding and those that are not).

² See generally Manheim, *Presidential Control of Elections*, *supra* note 1. (identifying and examining how presidents use their official powers to influence the rules that govern elections).

³ See LISA MARSHALL MANHEIM & KATHRYN A. WATTS, *THE LIMITS OF PRESIDENTIAL POWER: A CITIZEN'S GUIDE TO THE LAW* 33–34 (2018).

⁴ See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 277–286 (2007); see generally also EDWARD FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016); Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1 (2013).

⁵ See Edward Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOYOLA U. CHI. L.J. 309, 342–343, 360–61 (2019).

⁶ U.S. Const. amend. XX.

⁷ See FOLEY, *BALLOT BATTLES*, *supra* note 4, at 117–49 (discussing this possibility in the context of the disputed 1876 presidential election).

⁸ See, e.g., Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006); Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU L. REV. 1573 (2001).

⁹ The circumstances under which it would be lawful for a legislature to directly appoint presidential electors *after* a popular election (as opposed to *in lieu of* a popular election) remain unsettled, though various Justices of the U.S. Supreme Court have suggested a willingness in this context to rule in favor of broad legislative authority. See, e.g., *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring).

¹⁰ See *supra* notes 4–7 and accompanying text.