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HOW TRUMP COULD STEAL THE ELECTION

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This election has put the basic tenets of our democracy at stake. The vote will place unprecedented stresses on our system of electing a president. Whether the system will be able to withstand these pressures is another matter. American history suggests that our system is vulnerable to periodic breakdowns. Ordinarily the risk of breakdown is quite small; yet the upcoming presidential vote promises, in a manner not seen since 1876, to present the combination of stresses that could lead to catastrophic failure.

Unlike past elections, mutual good faith between the parties and trust in the process will not suffice to ensure a fair outcome. Leaders at all levels of government, as well as the public, must prepare for a high stakes battle to defend our constitutional government from political, legal, and administrative attack.

The problem begins—but does not end—with President Donald Trump, who has refused to commit to the American people that he will concede in the face of defeat. Concession is a bedrock of the peaceful succession of power. It is a ritualized homage to popular will in which a candidate acknowledges the legitimacy of their defeat. But we know it is not in Trump's DNA to do so, based solely upon what Trump has told us:

- ▶ Early in the 2016 race, then-candidate Trump lost the Iowa caucus to Texas Senator Ted Cruz. The next morning Trump demanded that Cruz's victory be nullified, tweeting, "Ted Cruz didn't win Iowa, he stole it."
- ▶ In 2016, when Colorado gave its convention votes to Cruz after non-binding caucuses heavily favored the Texas senator, Trump

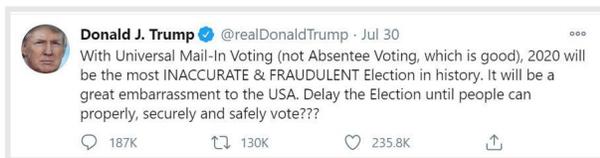
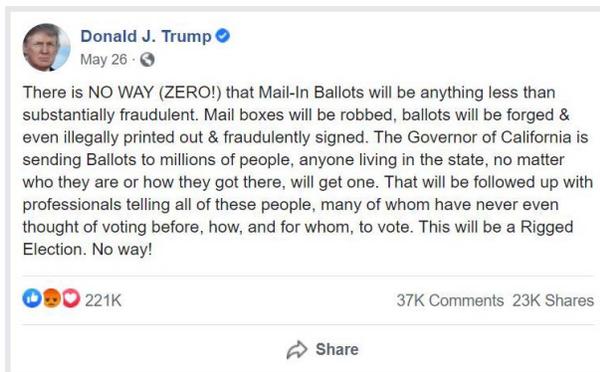
tweeted: "How is it possible that the people of the great State of Colorado never got to vote in the Republican Primary? Great anger - totally unfair!"

- ▶ In his third and final debate with Hillary Clinton in 2016, Trump refused to answer when moderator Chris Wallace asked him whether he would "absolutely accept the result" of an electoral loss. "I'll look at it at the time," Trump responded.
- ▶ In the summer of 2020, when again asked by Chris Wallace whether he would accept an electoral defeat, Trump reprised his equivocation, answering, "I have to see."
- ▶ In September 2020, when asked by a reporter if he would commit to a peaceful transfer of power after the election, Trump said: "Get rid of the ballots and you'll have a very peaceful—there won't be a transfer, frankly. There will be a continuation."

Alarming as the prospect may be of a sitting president refusing to concede defeat, Trump alone cannot crash the system. Instead, an unusual constellation of forces—the need to rely heavily on mail-in ballots because of the COVID-19 pandemic; divided governments in the key swing states of Michigan, Wisconsin, and Pennsylvania; and a hyperpolarized Congress—may work together to turn Trump's defiance into a crisis of historic proportions.

Consider, first, Trump’s attacks on mail-in voting. Mail-in balloting is nothing new. It dates back to the nineteenth century, and in the 2016 presidential election, nearly a quarter of all votes were cast by mail. What’s new in 2020 is less the practice than the volume. Because of the pandemic, an unprecedented number of Americans have opted to vote by mail to avoid the health risks of in-person voting. Some anticipate as many as 80 million mail-in ballots this year, which would constitute nearly 60% of the total 2016 ballot count.

President Trump insists that mail-in ballots cannot be trusted. In tweets, speeches and interviews, he has tirelessly attacked their integrity:



Is there any truth to Trump’s allegations? The short answer is, no. In a briefing on election security on August 26, 2020, senior FBI officials said they found no evidence of any coordinated efforts to tamper with mail-in ballots, emphasizing that, “It would be extraordinarily difficult to change a federal election outcome through this type of fraud alone.”

Yet mail-in voting is vulnerable to a different kind of fraud—disinformation emanating from the White House. Trump’s baseless attacks

have proven effective with the president’s Republican base; a June poll found that 72% of Trump supporters strongly or somewhat oppose mail-in voting. Some Trump supporters have demonstrated their distrust by symbolically burning their mail-in applications.

What does Trump hope to achieve by attacking the integrity of mail-in ballots? The answer lies in what election law expert Ned Foley has called “blue shift.” We might expect mail-in ballots to simply mirror the political spread of in-person voting, but they do not. Rather, they tend to break Democratic—they shift the outcome in the direction of blue candidates.

The 2018 midterms supplied several striking examples of “blue shift.”

- ▶ On election day in the Arizona senatorial race, Martha McSally, the GOP candidate, enjoyed a 15,000-vote lead over her Democratic rival Kyrsten Sinema. By the time Arizona finished its canvass of mail-in and provisional ballots, McSally had lost to Sinema by 56,000 votes—a shift of over 70,000 votes. (Arizona now permits earlier counting of ballots).
- ▶ In the Florida senate race, Republican Rick Scott’s election day lead over Bill Nelson shrank from over 50,000 on election day to an uncomfortable 10,000 by the time the state completed its canvass.

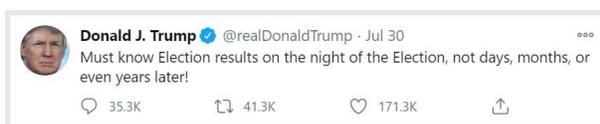
The effects of blue shift are likely to be even more dramatic in the upcoming election. Voters in densely populated urban areas—who vote overwhelmingly Democratic—will understandably hope to avoid the health risk of in-person balloting. By contrast, a larger percentage of Trump supporters—who tend to live in smaller towns and rural areas, and have shown more skepticism about the need to socially distance—will be willing to vote in person. Polling confirms this. A Pew Research poll released in August 2020

found that less than 20% of Trump supporters plan on voting by mail this fall, compared to almost 60% of Biden supporters.

Trump's attacks on mail-in ballots serve two distinct political goals. The first is voter suppression. It is to Trump's advantage to restrict the use of mail-in ballots. Emblematic is the president's response to a plan, introduced by Pennsylvania's secretary of state, to expand the state's use of secure drop boxes to enable mail-in voters to forgo reliance on the postal service. The Trump campaign and the Republican National Committee promptly sued to block the effort, citing—without evidence—the vulnerability of drop boxes to tampering. This effort failed, but it provides a glimpse at the kind of post-election suits Trump and his minions could bring to slow and muddy the count of mail-in ballots.

We have also seen the administration's determination to underfund and underequip the postal service, an effort that could lead to millions of ballots being disqualified for missing state submission deadlines. The 2020 primary season alone saw over 500,000 mail-in ballots across two dozen states disqualified for technical reasons such as late arrival. Congressional pressure recently led Postmaster General Louis DeJoy, a Trump loyalist, to suspend additional cuts to the service, but slashes already introduced—such as the dismantling of 618 of the 671 high-speed sorting machines that DeJoy had slated for removal—will not be reversed.

And yet the president's attacks on mail-in balloting serve a second and more ominous purpose, sketched out on July 30, the day he floated the idea of delaying the November election:



In the storm of coverage that surrounded the scandalous prospect of an election delay, this tweet passed largely unnoticed. Yet it offers a disturbing precis of the strategy Trump may brazenly deploy: Declare victory based on the November 3 returns and demand that the swing states ignore their mail-in results.

Consider how this dangerous strategy could play out.

It's November 3, 2020, election day. By midnight, former Vice President Joe Biden enjoys a substantial lead in the national popular vote but the electoral college vote tally remains tight. With races in 47 states and the District of Columbia called, Biden leads President Trump in the electoral college vote 252 to 240, but neither candidate has secured the 270 votes needed to win. All eyes remain on the swing states of Michigan, Wisconsin, and Pennsylvania and their 46 electoral college votes.

Trump enjoys a slim lead in these three states, but only because the election day returns do not include mail-in ballots. Unlike other states—such as Colorado—Michigan, Wisconsin, and Pennsylvania do not allow election officials to begin counting mail-ins until election day itself, or hours before. It will take days, even weeks, for the key swing states to finish their count. The election hangs in the balance.

Only not for Trump. Knowing fully that millions of ballots have yet to be counted, he brazenly declares himself re-elected based on his November 3 leads alone.

His reliable megaphones in the right-wing media repeat and amplify his declaration. At the same time, both domestic and foreign actors—in

particular, Russia—bombard social media with fake news and conspiracy theories designed to undercut confidence in the mail-in counts. And using the power and platform of the presidency, Trump ensures the count of mail-in ballots is plagued by delays, doubts, and confusion, deploying teams of lawyers to numerous states to impede and obstruct in any way possible.

These efforts prove successful, and the count of the mail-in ballots in the three swing states are plagued by delays.

Election officials, facing mountains of uncounted ballots and slowed by pandemic restrictions, struggle to meet the federally-mandated deadline of December 8, six days before the states' electors officially convene. Trump's lawyers and the Department of Justice continue to swamp the states with lawsuits demanding that tardily submitted or improperly signed mail-in ballots be tossed. The litigation chews up still more precious time.

The legislatures in Michigan, Wisconsin, and Pennsylvania are controlled by Republicans who have been loyal to Trump. Citing irregularities, mistakes, and raising alarm about the impending December 8 deadline, state Republican lawmakers take up the fight to declare Trump victorious, awarding him their states' electoral college votes.

Yet our three crucial swing states also have Democratic governors, who accuse Republican lawmakers of cynically denying the effects of blue shift, which has now catapulted Biden into the lead in all three states. And so the Democratic governors of Michigan, Wisconsin, and Pennsylvania certify Biden as their state's winner, and send the certificate cast by his electors on to Congress.

It is now January 6, 2021, the day on which a joint session of Congress opens the states' electoral certificates and officially tallies the votes. Normally this is a ceremonial function, but not today. Suddenly this new Congress—whose fresh members have been sworn in just three days earlier on January 3—must confront an astonishing situation. Michigan, Wisconsin, and Pennsylvania have each submitted conflicting electoral certificates—one awarding its electoral college votes to Trump, the other to Biden. The election hangs in the balance.

Seems far-fetched? In fact, the nation faced a nearly identical crisis in the notorious Hayes-Tilden election of 1876, when three separate states submitted conflicting electoral certificates. With neither Rutherford Hayes nor Samuel Tilden enjoying an electoral college majority, a divided Congress—a Democratic House and a Republican Senate—fought bitterly over which certificates to recognize. Congress tried to resolve things by handing the problem to a one-off special electoral commission, but partisan rancor plagued the work of that body, too. Inauguration Day neared and the nation had no president-elect. Instead it had two rivals both claiming victory. President Ulysses Grant weighed declaring martial law.

Catastrophe was avoided only by a last-second, disastrous compromise between the parties. Republicans agreed to remove federal troops from the South, paving the way for Jim Crow, and in return, Samuel Tilden, the Democrats' candidate, agreed to concede. Chastened by that experience, Congress passed a law—the Electoral Count Act of 1887 (ECA)—the same law that mandates that states settle electoral disputes six days before

electors officially vote. Meant to guide Congress should a state ever again submit more than one electoral certificate, the law has been used by Congress only once, in 1969, and in that case the issue was trivial, with no bearing on Richard Nixon's victory.

In January 2021, however, if the nation finds itself in a true electoral crisis, lawmakers will quickly realize that the 1887 law is glaringly deficient.

We can imagine the days of acrimonious debate, as each side charges the other with attempting to steal the election. The chambers vote on which certificates to accept, the outcome foreordained. The Senate, if it remains in Republican control, rejects the governors' certificate and accepts the legislatures'; the Democratically controlled House does the opposite.

Stalemate. Both parties appeal to the Supreme Court, but the Court—in sharp contrast to its intervention in 2000 in *Bush v. Gore*—is unwilling to step into the fray. Experts insist that the Court has no role to play in resolving an election dispute once it reaches Congress, a view that finds support in the ECA itself. With lawmakers in both parties declaring that they would not abide by an unfavorable holding, the Court chooses not to intervene.

Congress remains deadlocked, with neither party prepared to concede. Protests roil the country, as Biden and Trump supporters clash, often violently. President Trump invokes the Insurrection Act of 1807, deploying the military to protect his “victory” from the “radicals” and “anarchists” trying to destroy the nation. Inauguration Day looms.

Come noon on January 20, Trump's term in office constitutionally ends, and the nation has no president- or vice president-elect. By the terms of the Presidential Succession Act of 1947, Nancy

Pelosi is sworn in as acting president. Yet Trump insists that the Democrats are staging a coup, and threatens to hold his own separate inauguration ceremony with Supreme Court Justice Clarence Thomas delivering the oath of office. The nation finds itself in a full-blown crisis of succession from which there is no clear, peaceful exit.

Electoral Armageddon can be avoided, however, should Trump lose decisively. Yet beating Trump in the popular vote will not be enough. What is needed is for Trump to lose decisively in the electoral college and in the key swing states, and for that decisive loss to be clear—if not on November 3, then soon thereafter. A decisive loss will dramatically limit Trump's power to wage constitutional brinkmanship. But should Trump's defeat turn on narrow margins and on the late count of mail-in ballots in crucial swing states, his campaign against mail-in voting may well catapult us into an electoral crisis the likes of which we have not experienced in our history.

But we are not powerless to act.

If the election is close, then whatever happens after November 3 will likely be a test of raw political will, rather than the routine and largely ceremonial paper shuffling we're used to not hearing about. Indeed, Trump's strategy is to exploit these arcane processes precisely because they offer a veneer of procedural respectability to what otherwise might appear as a blatant act of electoral defiance. But make no mistake: Pursuing victory by stopping votes from being counted is not a legal strategy, it is theft. The strategy won't succeed because Republicans have smarter lawyers; it will succeed to the extent that the public tunes out, and allows Trump to decide whose vote counts. That is what Trump and his enablers at all levels of government are counting on.

Thus, public opinion and public action will play a critical role in thwarting that strategy. Among government officials, no one should concede that Biden has lost unless a Trump victory is clear based on all of the votes, including mail-in votes, that are cast. And above all, it's critical that ordinary people reject any false narrative impugning a Biden victory, and that they pressure their elected representatives to do the same.

In other words, be prepared to organize, advocate, and protest. Call your elected officials and make sure they are prepared to defend your vote, on and after election day. And if nothing else, stand firm in your own convictions and refuse to accept a narrative that deems your voice meaningless.