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How Worried Should We Be About Our Election System?

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The final outcomes on the wave of election-related legislation moving in state legislatures this year is not yet known, but the frequency and intensity of the effort and the baldly anti-democratic legislation already passed has been astonishing. The Big Lie from Donald Trump, its acceptance by the bulk of his base, and a Republican Party that has largely internalized that minority rule is its only path to retaining power have unleashed a torrent of legislative shots, aimed at impacting the elections of 2022 and then 2024.

But malevolent intent and effective impact are two different things. The efforts to limit the vote and take partisan control of election administration will now face an array of countervailing forces. The question, which of course cannot be answered with any degree of certainty, is whether the multiple sources of opposition in multiple venues of decision-making will be able to neutralize, or at least substantially mitigate, the negative effect of this offensive.

The laws attacking democracy fall into three categories.

1. **Making voting more difficult or burdensome.** This includes limiting mail-in and early voting, imposing onerous ID requirements, closing or restricting hours at polling places, reducing the number of drop boxes that can be used, and increasing the ability of partisan poll monitors to challenge and potentially harass voters.
2. **Seizing control of the regulation of voting procedures.** This includes limiting the responsibility and power of secretaries of state, promoting the power of partisan appointees more likely to do the bidding of their party, placing sharper oversight on election administrators and workers, and even creating criminal penalties for election officials exercising their judgment.
3. **Seizing the power to decide who wins elections regardless of the actual vote.** This includes placing the ability to overturn outcomes not acceptable to the party in power in the hands of the legislature. The unprecedented effort here is to deny the will of voters and change the outcome of elections when necessary to maintain control.

Based on discussions with a number of close observers, a rough consensus seems to be emerging that the elements of the bills that throw roadblocks into voting may be the lesser of the worries. Many of the worst aspects of the bills as introduced were dropped along the way. Limitations on

early voting still leave significant early voting in place. Drop boxes are lessened but still allowed. Even the tightening of voter ID provisions and time limitations for absentee ballots, given the lead time to prepare, may have less impact than their crafters would hope.

Kathy Boockvar, who served as secretary of state of Pennsylvania through the 2020 elections, adds, “The changes in voting practices don’t worry me as deeply as the power grabs; people will find a way to get out [to vote].” Tammy Patrick, senior adviser to the elections team at the Democracy Fund, who works with election officials around the country, agrees, saying, “We know that often when you put up barriers, voters get more tenacious.” Harvard Law professor Nick Stephanopoulos describes the current bills as “not Jim Crow 2.0, but rather Jim Crow light.”

But there is no similar optimism about the election subversion aspects of the bills. The transfer of control of election administration from professionals to legislative majorities, and the creation of new penalties for election officials, “won’t motivate any election official to do better, it will only serve to scare and intimidate,” noted Natalie Adona, assistant clerk-recorder and registrar of voters in Nevada County, California, at a recent event with election officials sponsored by the Brennan Center and the Bipartisan Policy Center.

Wendy Underhill, the director of elections and redistricting at the National Conference of State Legislatures, said, “Elections should be run by nonpartisan professionals; legislators do not know how to run elections.”

The newest element of the laws, and the most uncharted territory, is the effort to give state legislatures, where Republicans have their largest concentrations of power, the ability to intervene after the fact in elections and put their thumb heavily on the scale of who is declared the winner. Boockvar says that legislators giving themselves the power to decide election results is “very dangerous.”

Separate from legislation, several developments could have a major impact on how the 2022 and 2024 elections are conducted. The first is the introduction of nonofficial but somehow legislatively approved “audits” like the one being conducted in Maricopa County, Arizona. This is a new and somewhat zany development, and it bears watching whether other states replicate the stunt and entrust these procedures to private companies with connections to the 2020 election-deniers.

In addition, threats and intimidation are being directed at state and local election administrators with increasing levels of intensity. Georgia Secretary of State Brad Raffensperger has faced unrelenting abuse after he refused to rig the Georgia election for Donald Trump, and Michigan Secretary of State Jocelyn Benson has dealt with armed harassment. But the phenomenon is much deeper and more widespread.

In a recent report, “[Election Officials Under Attack](#),” produced by the Bipartisan Policy Center and the Brennan Center, election administrators detail pressure, intimidation, and harassment from Trump-inspired individuals and groups. Fully one-third of election administrators said they

do not feel safe in their jobs, and according to a survey by the Democracy Fund, as many as one-quarter to one-third of election administrators plan to leave their positions by 2022.

That potential loss of expertise endangers democracy, As Trey Grayson, former Republican secretary of state of Kentucky, explains: “If a wave of election workers quit or retire, this will present a huge danger because we will be losing both experience and commitment, to be replaced with what?”

Finally, there is a clear organizing effort under way for people associated with Trump and the Big Lie to run for secretary of state and other election-related positions. In Georgia, Rep. Jody Hice, a Trump recruit who voted to overturn the presidential results in the House, is challenging Raffensperger in the Republican primary. Arizona state Rep. Mark Finchem, who was at the January 6 rally outside the Capitol and is a chief supporter of the Maricopa “audit,” is running for secretary of state. In Nevada, former lawmaker Jim Marchant, who has clung to the conspiracy theory that the election was stolen from Trump, is campaigning to replace term-limited Republican Secretary of State Barbara Cegavske, who has repeatedly denied claims of election fraud.

Professor Josh Douglas of the University of Kentucky says: “Donald Trump was unable to steal the 2020 election in part because key election officials of both parties were dedicated to democracy and the notion that the candidate with the most votes should win. It’s particularly concerning that several conspiracy theorists are now seeking to fill those offices.”

Janai Nelson, who has been in the legal trenches for a long time as associate director-counsel of the NAACP Legal Defense and Educational Fund (LDF), adds: “This is an existential moment for our democracy. And this is not a Chicken Little take.” She draws connections between the bills being passed, the attacks on critical race theory, and the laws enabling attacks on protesters. “The real fear is the browning of America,” she says. “Reading these laws in the context of these other assaults, I think we are on the precipice of democratic demise.”

Georgia as a Critical Case Study

In 2018, then–Secretary of State and now Gov. Brian Kemp defeated Stacey Abrams in a statewide race that showed just how much of a changed landscape and voting battleground the state had become. Kemp defeated Abrams by 55,000 votes out of almost four million cast. Abrams claimed that the loss was due to years of voter suppression.

The most important part of the claim had to do with Georgia’s overaggressive purging process. While “purging,” or cleaning the voter rolls of people who have died or moved out of state, is legitimate and necessary, during Kemp’s tenure as secretary of state 1.4 million voters were purged from the list, including 668,000 in 2017 and 85,000 in the three months before the 2018 elections. In addition, Georgia has an “exact match” law, which means that voters’ names must exactly match their driver’s license or other documents, with no omitted middle names, changed married or unmarried names, or even missing hyphens allowed. Kemp challenged 53,000 voters under this law, and though ultimately courts restored them to the list, some may very well have been discouraged.

All of the shifting ground and large number of provisional ballots also created long lines on Election Day; Georgia's wait times were 49th out of 50 states, clearly discouraging some voters from participating.

Abrams decided not to legally contest the outcome; instead, a multiracial coalition of grassroots organizations successfully set out to change the equation for 2020. Eight hundred thousand new voters were added to Georgia's voting rolls, and a massive effort was waged to help people vote, despite continuing suppression efforts and the challenges of the pandemic. This mobilization effort, combined with the expansion of voting options in response to the pandemic and Georgia election officials standing their ground in the face of maximum pressure from Trump and his enraged allies, helped lead to Biden winning Georgia, and the subsequent victories of Sens. Raphael Warnock and Jon Ossoff.

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Georgia legislative Republicans have set out to "cure" these "problems." The state's new elections law limits the times available to voters to request absentee ballot applications, adds ID requirements for casting an absentee vote, and prohibits election officials from mailing all voters ballots or even applications. Other provisions sharply limit the number of drop boxes (from 94 to 23 in Atlanta counties), ban mobile/RV voting centers, and make it harder to cast a ballot if a voter goes to the wrong polling place. And of course, there is the well-known prohibition against giving water to people in line.

Five provisions of the law reflect the assertion of legislative control. They dramatically curtail the role of secretaries of state by taking away their role as chair of the State Election Board, making future secretaries nonvoting members, and giving the legislature the power to appoint the chair. Flowing from that, another provision will allow this tightly controlled body to revoke the power of administering elections from county election officials (say, in Fulton County, home to Atlanta), and appoint their own administrator. Finally, election officials are prohibited from taking money from private charitable sources, which was a lifesaver in counties and states across the country in 2020.

The NAACP LDF filed a lawsuit against the bill immediately upon passage, as has the Lawyers' Committee for Civil Rights Under Law, and the Justice Department last week filed its own suit. But how effective will the law be in achieving its sponsors' goals of lowering turnout even if it goes into effect?

There are actually a few good provisions in the law. It requires an additional Saturday for early voting, and it requires precincts with typically longer lines to add staffing and machines. Ilya Shapiro of the Cato Institute, a thoughtful participant in election-specialist discussions, correctly points out that the absentee ballot rules and the early-voting window in the new law are still wider and longer than in many other states. It is also clear, as we saw in 2020, that mobilization efforts have successfully overcome various kinds of restrictions.

Because of its centrality to election outcomes as a newly purple state, Georgia will be a microcosm of a larger set of contending forces: efforts to undermine voting on the one hand, and countervailing power pushing back in its defense.

Countervailing Power

This is by no means a one-sided game, and the wheel is very much still in spin. There are many sources of countervailing power that are and will be at work as all of this plays out. It is important to recognize all the ways in which the fight against these election trends will work to blunt these efforts, and the potential power they hold.

Federal legislation: A set of federal standards for voting, gerrymandering, and election administration, along with the restoration of the preclearance powers of the DOJ, could stop most vote suppression and manipulation in its tracks. Federal legislation is the most elegant and effective solution, according to Stephanopoulos. After the blockade of S. 1 by all 50 Republicans in the Senate, the main play is some version of the “Manchin compromise.” While that bill falls far short of the broad Democratic aspirations on voting rights, it would set minimum standards for early voting and absentee balloting, and preempt a great deal of partisan gerrymandering. A more recent bill introduced by Sens. Amy Klobuchar (D-MN) and Sheldon Whitehouse (D-RI) would add penalties for harassment and intimidation of voting officials.

It is doubtful that any version of a voting rights bill will gain significant Republican support, but it will lay a clear marker down that could clear the way for Democrats to move on their own. And even without a powerful congressional intervention, there is much that will be done.

Litigation and the courts: During the 2020 elections, a record 400-plus election-related lawsuits were filed. Many were filed by voting rights advocates to keep or force the process to be open. Overwhelmingly, the courts ruled to protect voting and affirm the results of the election. “The justice system did just what it was supposed to do, consistently and strongly,” says Boockvar.

The new laws being passed will be challenged at every turn by a growing number of organizations dedicated to protecting the right to vote. This includes the NAACP LDF, the Lawyers’ Committee for Civil Rights Under Law, Demos, and the Advancement Project, joined by new energetic efforts like Protect Democracy, Democracy Docket, Fair Fight, and others. Initial indications are that strong litigation efforts will be undertaken everywhere, and are likely to be well funded.

Since the 2020 election cases, more Trump-appointed judges have been seated, but a new crop of Biden appointees will be seated by 2022 as well. The Supreme Court is a huge wild card. In several cases on the 2020 election, the high court refused to entertain Trump-allied suits or give any encouragement to the Trump effort. However, some justices did signal that they were quite open to arguments saying that state legislatures, and not secretaries of state or state courts, had a strong claim to be the final arbiter of election procedures. This question will lie at the absolute heart of fights over the new legislation.

Close court-watchers seem to have some degree of confidence that the courts will again do their job. Jocelyn Benson, Michigan's secretary of state, says that "based on past experience, I have good confidence in federal courts." Janai Nelson adds: "Courts will have to look carefully and realistically at exactly what happened in the legislatures, including violations of procedures and the absence of the establishment of records that would justify the restrictions."

This week's 6-3 Supreme Court decision in the *Brnovich* case is, at the least, not a good augur for the future.

A very different Justice Department: We can be certain that the new laws will be fought with energy and sophistication from the outside. But another very important difference from 2020 will be the role of the Justice Department. The Justice Department was AWOL, or worse, in the battles over voting rights and election administration in 2018 and 2020. President Biden's DOJ will play an enormously different role.

On June 11, Attorney General Merrick Garland made an extraordinary set of commitments to voting rights, invoking the creation of the department as a way to enforce the 14th Amendment ensuring voting rights for all. He pledged to double the number of attorneys assigned to the voting section, and to review practices all over the country, including the new laws passed in legislative sessions of 2021. The suit filed against the new law in Georgia, and the creation of a task force specifically to deal with threats and intimidation of election officials are early examples of this aggressive approach to protecting voting rights.

The officials overseeing this effort, Associate Attorney General Vanita Gupta and Assistant Attorney General for Civil Rights Kristen Clarke, are voting rights fighters to their core. Having voting rights stalwart Justin Levitt recently named as senior policy adviser on voting rights in the White House will add to the energy. "The DOJ has resources beyond compare, and the people leading their effort come from backgrounds largely unprecedented in the department's history," says Nelson.

Election officials doing their job: One of the key elements of how the 2020 election and its aftermath turned out was the willingness of election officials, even Republican election officials, to do their jobs in the face of relentless pressure from the president and their own party to cheat. Can we count on that going forward?

There are clearly serious dangers here, both in terms of actual threats, and the loss of large numbers of professional administrators and their expertise, perhaps replaced by partisan fighters. But there are many steps that can be taken to protect election officials as they do their job, as laid out in the recommendations of the new Brennan Center/Bipartisan Policy Center report. These include challenging the laws that create penalties for election officials, increasing penalties for attacks on election officials, providing security and legal assistance to election officials if they are sued or penalized, and making a major outreach effort to recruit a new and diverse generation of election administrators.

A key question will be funding. In 2020, federal funding was a woeful \$400 million, a tenth of what was needed. But a remarkable coalition of private funders stepped into the breach.

Interestingly and not surprisingly, one of the elements of the Republican bills is to prohibit election officials from accepting private funds for election administration. But the chances of federal funding are clearly far better now, and if it materializes it will be a major assist.

Mobilizing and educating voters: In some ways, this was the most important deciding factor in 2020. Despite the virus, despite the legal thicket, despite continually changing rules, a record turnout of nearly 160 million voters was achieved. An enormous amount of the credit, particularly in key states like Georgia, Arizona, Michigan, and Pennsylvania, goes to the relentless efforts of organizers and advocates in the states. They pivoted from their usual toolboxes of voter registration and voter turnout, embraced digital strategies, and added a major effort to educate voters.

It is by now well understood that these efforts don't get created overnight. Solid grassroots organizing takes years to succeed, and it has traditionally been an underappreciated aspect of election success by funders and campaign operatives alike.

This lesson *appears* to have been absorbed. DNC Chair Jaime Harrison is touting a return to the 50-state strategy of Howard Dean, pledging to invest in local party structures and collaboration with grassroots groups. Many foundations operating in the democracy space have said they are committed to building this infrastructure. Organizations in new states are already in motion.

It is yet to be seen if the levels of funding needed will materialize, and whether the organizations in additional states will have the ability to protect and expand the vote as much as will be needed. But the early indicators are that it will be likely that funding, organization, and powerful motivation will combine again as they did in 2020.

There are many reasons to be deeply concerned about the attack on our democracy, taking place at the same time as the major political fight over the country's fundamental policy and direction. So much will be determined by how the tectonic plates of our country move. But in the case of the assault on voting rights and election integrity, the outlines of the attack are clear, but so are multiple avenues of defense, and real countervailing power as well. There are good reasons to believe that if the fight is taken on well, at many levels, the fight to preserve and improve our democracy can succeed.