

Preparing the Public for a Contested Election

by [Deborah Pearlstein](#)

July 14, 2020

While perhaps once thought too far-fetched to discuss out loud in serious company, [concerns](#) that Donald Trump will refuse to leave office even if he loses the November election have gained increasing mainstream attention in recent months. Indeed, it would be foolish to assume that such a possibility is out of the question. The president has spent the past four years making clear his [desire](#) to remain more than two terms in office, and has worked especially diligently of late to lay the rhetorical groundwork for declaring the results of the federal election – particularly one reliant on absentee voting – illegitimate.

Some have tried to offer reassurance about the capacity of existing laws and institutions to manage any such crisis, [arguing](#) that, whatever happens with the November vote, the current president’s term “automatically” ends as a constitutional matter on January 20. Or, as [Vice President Biden](#) and [others](#) have noted, the military would not hesitate to “escort [Trump] from the White House with great dispatch” should he resist after an election loss. Alas, as the past four years of extraordinary norm-breaking should have made clear, nothing is “automatic” in our constitutional democracy. However much faith one has (and should have) in the officer corps’ commitment to protecting the Constitution, not even the constitutionally faithful can always tell the moment the constitutional Rubicon is crossed. More, as explained below, it is far from clear that the military escorting Trump from the White House would be a constitutional, much less desirable, result. In the meantime, creating the public expectation that matters are clearer than they are risks only compounding public fear and suspicion when those expectations go unfulfilled.

Others have begun working quietly to game out various contingencies, sorting through what would happen if, for example, Wisconsin’s Democratic governor and Republican-controlled legislature disagree about how that state’s electors should be awarded. These efforts, largely involving campaigns, academics, and former federal officials, are without

question wise and essential. But mitigating the risks of an uncertain transition period requires not only careful internal planning, it requires clear public expectation-setting about the most reasonable constitutional course. And where, as is often the case, the Constitution or law has left matters unclear, it requires public advocacy for any clarifications Congress or others might still have time to make.

To see why this matters, let's take just one example, the case several recent commentaries have contemplated: Biden has clearly prevailed in the November 3 election, the Electoral College vote duly recorded by Congress as required by the Twelfth Amendment. Trump nonetheless refuses to quit the White House on January 20, 2021, and orders servicemembers in the White House Military Office (or any other member of the military) to protect him from attempts to have him removed. Here, the military's duty is clear. The Twentieth Amendment to the Constitution provides: "The terms of the President and the Vice President shall end at noon on the 20th day of January." Beyond the oath all members of the military take to "support and defend the Constitution," servicemembers also have a [duty not to obey](#) an order if "a person of ordinary sense and understanding" would know it to be unlawful. Should Trump order any member of the military to aid him in thwarting the new president's lawful ascension to power, or indeed, order the military to do anything at all after the constitutional expiration of his term on January 20, all the military need do is follow the law: refuse to carry out any Trumpian order.

Yet neither the Constitution nor any other law of which I am aware empowers the military to then – without further direction – forcibly detain or remove Trump from the White House. The military is not a domestic law enforcement agency. And whatever the (entirely untested) scope of the president's constitutional authority at such a moment, the new president (Biden in this scenario) has ample reason to avoid involving the military as such, not least to avoid the [Trumpian mistakes](#) of Lafayette Square: protect the military from unnecessary engagement in domestic politics, preserve troop morale, and reassure our international enemies and allies that the United States has weathered the election with an intact commitment to civilian democracy. Creating a public expectation that the ordinary course is for the military to resolve this is [not the right answer](#).

Before sorting through who the new president *should* call in such a circumstance, let's add the far more likely wrinkle many concerned election watchers identify that Trump's refusal to cede power on January 20 arises in a circumstance in which the results of the election are still [actively and formally contested](#). The courts are hearing pleas to intervene on the dispute over Wisconsin's contested electors, as well as (for good hypothetical measure) challenges involving entirely predictable allegations that Georgia voters were unconstitutionally denied access to the polls. Bill Barr's Justice Department has stationed a pot pourri of federal law enforcement agents around the White House in anticipation of rapidly materializing, not entirely peaceful protests. And Trump calls for maintaining the status quo until the pending cases are resolved, *Bush v. Gore*-like, before the Supreme Court.

The exigency of violent protests and the historical familiarity of the Court resolving a contested election might well lead reasonable members of the media and public to conclude Trump is right, the proper course is to maintain the status quo pending judgment. But this would be profound constitutional mistake. For one thing, it is possible that the Court will conclude that the proper allocation of electors is a political question, a matter the federal courts lack the authority to resolve. Perhaps more likely, the Court decides it can resolve the relevant disputes, and then produces a sharply split decision, substantially along party lines, which is simply not accepted as legitimate by some significant (perhaps even violent) fraction of the electorate. It is far from clear the Court has the reserved legitimacy capital, as it were, to weather effectively another *Bush v. Gore*. Or perhaps the Court rules unanimously against Trump, who then rejects the Court's action as illegitimate.

The Court is no panacea. But far more important, the wait-and-see-what-the-Court-says approach is not a wait-and-see approach at all. At this point we would have crossed the constitutional Rubicon, allowing a man who had not (yet, or perhaps at all) been lawfully elected president to remain in office in violation of the Constitution and laws of the United States. Creating a public expectation that the Court is the right arbiter in such a post-January 20-circumstance thus is also not the right answer.

The Constitution and laws do offer an answer here, unfamiliar though it might be. Under the Twentieth Amendment, if no president or vice president has been chosen by January

20, the law passed by Congress providing rules for presidential succession applies; under the [current succession law](#), the speaker of the house, upon resignation of her office, becomes acting president with all “the powers and duties of the office of President.” The military and, for that matter, all officials subject to presidential power in the executive branch must follow orders from her. The prospect, however remote, of such a temporary outcome means the potential acting president should be prepared with a not insubstantial punch list of first action items – including the removal of Trump-appointed cabinet officials to be replaced by legally eligible career acting officials (so that ordinary federal law enforcement agencies can function ordinarily), and an order, unless civil violence makes their presence absolutely necessary, requiring any activated military troops to stand down. The right course is for civilian agencies to resolve the matter, according to law.

Yet however legally justified such a course may be, it seems hard to imagine Nancy Pelosi’s leadership being met with universally calm acceptance in such a moment without sufficient public groundwork in advance. In the best of circumstances, public [constitutional literacy](#) is low, concern about [election legitimacy](#) increasing, and misinformation abundant. Election contestation questions are among the least familiar and can be among the most constitutionally complex; information inside and outside government will be incomplete; and none of these scenarios is normal. Both mainstream and social media could do a great public service by making how-elections-work commentaries a steady part of their pre-election preparations. NGOs and public officials can play a useful role as well. And just as soon as quiet scenario-gaming exercises are concluded, a much-less-quiet public-facing education campaign should begin.

Image: US President Donald Trump leaves the White House on foot to go to St John’s Episcopal church across Lafayette Park in Washington, DC on June 1, 2020. (Photo by BRENDAN SMIALOWSKI/AFP via Getty Images)

About the Author(s)

Deborah Pearlstein

Professor and Co-Director of the Floersheimer Center for Constitutional Democracy at Cardozo Law School. Follow her on Twitter (@DebPearlstein).

