DESPERATE TIMES CALL FOR DESPERATE MEASURES: THE NEED FOR FEDERAL LEGISLATION TO ADDRESS NEW POTENTIAL ELECTION DAY THREATS

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I. BACKGROUND

More than thirty election-security bills have been introduced in Congress, but most have been stalled in the Senate and no major legislation has been enacted.[1] The bills would require states to make greater use of paper ballots and paper trails, adopt effective audit procedures, and strengthen federal cybersecurity support for state and local election authorities. While almost all these bills would be useful, it is probably now too late for states to make significant changes in the election equipment they use for the 2020 elections.[2]

Federal, state and local authorities have also increased contingency planning to deal with, and prepare for, potential election day crises.[3] Among the possible crisis scenarios that have been "war-gamed" are the following:

- Hacks of voting equipment that could change actual vote tallies;
- Hacks of voter registration rolls that could disrupt voting or falsely indicate that particular voters have already cast their ballots;[4]

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[1] For an overview of the bills, see Maurice Turner, *Making Sense of the Election Security Legislation Landscape*, CTR. FOR DEMOCRACY & TECH. (June 19, 2019) https://cdt.org/blog/making-sense-of-the-election-security-legislation-landscape/ [https://perma.cc/9QAZ-6YGA].

[2] Although Congress approved an additional $425 million late in 2019 for additional funding for states to upgrade voting equipment, it came "many days late and many dollars short according to experts, who say billions were needed starting at least two years ago." Editorial Board, *There's a lot to like in Congress's new election security measures. But there's a big omission.*, WASH. POST (Dec. 25, 2019, 6:22 PM), https://www.washingtonpost.com/opinions/the-spending-bills-glaring-omissions-on-election-security/2019/12/25/24495180-25b4-11ea-ad73-2fd294520e97_story.html [https://perma.cc/D5ZJ-3NP2]. In addition, "states are generally reluctant to undertake major election equipment replacements within a year of major elections or primaries." *See,* Lawrence Norden, *How to Secure Elections for 2020 and Beyond,* BRENNAN CTR. FOR JUST. (Oct. 23, 2019), https://www.brennancenter.org/our-work/research-reports/how-secure-elections-2020-and-beyond [https://perma.cc/4UYS-4WWZ].

[3] *See, e.g.*, Joseph Marks, *The Cybersecurity 202: Officials just had their last chance to road test elections before 2020*, WASH. POST (Nov. 6, 2019), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2019/11/06/the-cybersecurity-202-officials-just-had-their-last-chance-to-road-test-elections-before-2020/5dc1aa4e88e0fa10ffd20b74/ [https://perma.cc/2SA4-ZDZG].

[4] Although many states that employ electronic poll books at polling places to check whether voters are registered now keep paper backups to use if that equipment becomes unavailable, it may not be possible in such circumstances to tell which voters have already cast their votes. While a wholesale switch to provisional ballots might be theoretically possible in such circumstances, the long lines that would result would likely lead many voters to go home without voting. *See* THE BLUE RIBBON COMMISSION ON PENNSYLVANIA'S ELECTION SECURITY,   STUDY   AND   RECOMMENDATIONS   50

- Attacks on the electrical grid to shut down polling sites and election systems;
- Social media disinformation campaigns that would confuse voters about the places and methods for voting and create fake news about attacks or disasters on election day;[5]
- Hacks of state and local election websites that provide information on polling place locations and hours of operation;
- The insertion of ransomware onto election equipment and systems; and
- Many other potential disruptive scenarios, along with the recognition that it is impossible to predict or mitigate them all ahead of time.[6]

Some election experts think that the possibility of foreign state-actor intrusions into election equipment that would actually change election outcomes is fairly remote.[7] Among other considerations, they believe that precautions have been buttressed since 2016, changing actual votes is hard, and doing enough of it to matter would be harder still.[8]

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https://www.cyber.pitt.edu/sites/default/files/FINAL%20FULL%20PittCyber_PAs_Election _Security_Report_0.pdf [https://perma.cc/4Q98-EJWC]. If hackers can falsely indicate that particular voters have already cast their ballots, paper backups and provisional ballots would be unable to resolve that issue. *See* Kim Zetter, *How Close Did Russia Really Come to Hacking the 2016 Election*, POLITICO (Dec. 26, 2019, 5:05 AM), https://www.politico.com/amp/news/magazine/2019/12/26/did-russia-really-hack-2016-election-088171? [https://perma.cc/UBJ4-9KUJ].

[5] In 2014, long before most Americans had ever heard of the Internet Research Agency, which led some of Russia's major social media disinformation campaigns in the 2016 presidential election, the IRA apparently engineered a sophisticated fake news operation about an invented chemical explosion in St. Mary Parish, Louisiana. The tactics included the manufacture of CNN web pages and video reports, and it led to widespread confusion. *See* Adrian Chen, *The Agency*, N.Y. TIMES MAG. (June 2, 2015), https://www.nytimes.com/2015/06/07/magazine/the-agency.html [https://perma.cc/3NEU-VGGV]. Although many wondered at the time why the Russians would have been interested in running such an operation in a small town in Louisiana, it now seems evident what the reason was: practice.

[6] For a discussion of possible election-day crises, see, e.g., Joseph Marks, *The Cybersecurity 202: Feds and police are war-gaming all the ways an election can be hacked*, WASH. POST (Nov. 5, 2019), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2019/11/05/the-cybersecurity-202-feds-and-police-are-war-gaming-all-the-ways-an-election-can-be-hacked/5dc0a27b88e0fa10ffd20b60/ [https://perma.cc/RG7U-3TFV].

[7] *See, e.g.,* Kelly Higgins, *Election Websites, Back-End Systems Most at Risk of Cyberattack in Midterms*, DARKREADING (Aug. 14 2018, 2:50 PM), https://www.darkreading.com/vulnerabilities---threats/election-websites-back-end-systems-most-at-risk-of-cyberattack-in-midterms/d/d-id/1332554 [https://perma.cc/RT7V-6CX9].

[8] *Id.*

As discussed in numerous government reports and press accounts, however, the goal of the Russians, and probably other state actors, is not to tamper with actual votes. Rather, the goal is to generally sow confusion and doubt in the U.S. and other democracies about the legitimacy of the democratic system itself, including taking steps that undermine the confidence in and outcomes of our elections.[9] Using the tactics in the cyber-scenarios set out above on election day would be far easier to accomplish and could inflict as much or greater harm as would changing vote counts.[10] Moreover, the use of these techniques in a limited number of key districts would likely be as impactful as broader attacks. The large-scale planning for these events suggests that the possibility of them occurring is far greater than the possibility of actual vote changes.[11]

The list of foreign adversaries that likely will employ these tactics has also grown since 2016. It now includes China, North Korea, and Iran.[12] Indeed, following the U.S. assassination of an Iranian general, Iran should be prioritized as an election interference threat.[13]

In addition to the newer risks set out in the scenarios above, there has always been the risk, and actual occurrence, of hurricanes and other natural disasters taking place on or around election days. There have also been many examples of "hanging chads" and other incidents that have led to election

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[9] *See* OFFICE DIR. NAT'L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 1 (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [https://perma.cc/BN4S-VZ5M] ("In trying to influence the US election, we assess the Kremlin sought to advance its longstanding desire to undermine the US-led liberal democratic order"); s*ee also, e.g.,* H.R. Rep No. 116-XX (2019), https://www.Intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf [https://perma.cc/3C7C-UXMJ].

[10] *See, e.g*., Marks, *supra* note 6 ("[H]ackers could destroy public faith in an election's outcome without changing any votes. And that's particularly concerning because many of these targets are far more vulnerable than voting machines.")

[11] *See, e.g.*, Marks, *supra* note 6.

[12] *See, e.g.*, Craig Timberg & Tony Romm, *It's Not Just The Russians Anymore As Iranians And Others Turn Up Disinformation Efforts Ahead Of 2020 Vote*, WASH. POST (July 25, 2019), https://www.washingtonpost.com/technology/2019/07/25/its-not-just-russians-anymore-iranians-others-turn-up-disinformation-efforts-ahead-vote/ [https://perma.cc/5JKK-4SZL].

[13] *See, e.g.,* Joseph Marks, *The Cybersecurity 202: Threat of Iran Cyberattack Remains High Even as Trump Backs Away From Potential War*, WASH. POST (Jan. 9, 2020), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2020/01/09/the-cybersecurity-202-the-digital-fight-s-far-from-over-officials-warn/5e16221b88e0fa2262dc98f8/ [https://perma.cc/86HX-ZAQN].

recounts.[14] The 9/11 terrorist attacks occurred on a primary election day in New York and led to a state-ordered do-over of the elections held that day.[15] In such circumstances, one might have thought that federal and state election laws would be clear on how to deal with natural disasters and terrorist attacks that occur on election days and might also provide guidance on how to proceed in the face of the newer threats described above. An examination of existing federal and state law, however, indicates that federal election day emergency law does not exist, that some, but not all, states have laws that purport to address emergency matters, and that the states that have addressed this issue take a variety of approaches.[16]

In particular, existing state laws vary greatly in terms of which government officials have the authority to postpone elections or order recounts, the allowable bases for doing so, and the timeframes in which this must occur. To further complicate things, some of those timeframes could result in postponed elections or recounts occurring beyond the dates by which federal office holders' terms expire. The timelines could also result in delays that could prevent states from taking advantage of the federal safe harbor that makes state determinations of its electors for president incontrovertible by Congress if they are certified by a certain date.[17]

While some experts worry that too much public discussion of these issues might itself feed into the goal of foreign adversaries to delegitimize election results and democracy, doing nothing to confront these problems could result in far worse outcomes. Though the traditional approach of leaving elections largely in the hands of the states might make sense in dealing with

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[14] This article focusses on postponements not recounts, but as with postponements, no federal legislation governs recounts; not all states have statutes that do; there are many different approaches among the state laws that do exist; and there are similar potential timing issues as set out below regarding postponements. *See generally Automatic Recounts*, NAT'L CONF. ST. LEGISLATURES (Jan. 30, 2020), http://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx [https://perma.cc/CV2B-TRLQ].

[15] *See, e.g.*, Adam Nagourney, *Primary Rescheduled for Sept. 25, With Runoff, if Necessary, Set for Oct. 11*, N.Y TIMES (Sept. 14, 2001), https://www.nytimes.com/2001/09/14/us/after-attacks-election-primary-rescheduled-for-sept-25-with-runoff-if-necessary.html [https://perma.cc/6PSM-D7B5].

[16] *See infra* note 25.

[17] The "safe harbor" statute provides that, if there is any dispute over which electors' votes should be counted, Congress must accept as conclusive any final determination under state law that is made at least six days before the date fixed before the meeting of electors. This means that it must be made within thirty-five days of election day. 3 U.S.C. § 5 (2018); *see also* Daniel P. Tokaji, *An Unsafe Harbor: Recounts, Contests, and the Electoral College*, 106 MICH. L. REV. FIRST IMPRESSIONS 84 (2008), https://repository.law.umich.edu/mlr_fi/vol106/iss1/14/ [https://perma.cc/K7KB-VG66]. The Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000) was issued on the safe-harbor date, and "was partially predicated on Florida's intent to avail itself of [it]." *Id.*

natural disasters where risks and responses may vary based on local conditions, the newer election day crises are likely to be similar wherever they occur. Inconsistent local responses, including none at all, could greatly impact public confidence in elections. Even if there are no statutory guidelines for these crises, legal challenges would still be filed in a fashion similar to *Bush v. Gore*, but on a potentially far greater scale and leave even more confusion in its wake.

II.   THE CURRENT LEGAL FRAMEWORK

There are many intersecting provisions in the Constitution and federal and state laws that address the workings of elections for federal offices, including their timing, postponements and recounts.

The Constitution provides that each state may prescribe its own rules for the "Times, Places, and Manner" of elections to the House and Senate.[18] But the very next clause takes this back, providing that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing (sic) Senators."[19] Although the wording that sets out Congress's authority over state elections for presidential electors is somewhat different, the Constitution also gives Congress full authority to set the date for such elections.[20] Taken together, these provisions give Congress full "residual and superseding authority" over most election issues, including their timing and postponement.[21]

Despite Congress's broad authority to override state laws concerning elections for federal offices, Congress has generally left such matters to the states.[22] The most notable exceptions for this article are: Congress has set dates

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[18] U.S. CONST. art. I, § 4, cl. 1.

[19] That Congress cannot override the place for "chusing" of Senators is probably a remnant of the original framework in the Constitution, before the 17th Amendment provided for the popular election of Senators, that they were elected by their state legislatures. The Constitution also provides that each house retains the authority to be the final judge of the elections of its members. U.S. CONST. art. I, § 5 cl. 1.

[20] U.S. CONST. art. II, § 1, cl. 4. ("Congress may determine the Time of chusing the Electors, and the Day on which they give their votes; which Day shall be the same throughout the United States.") The Constitution gives the states the authority to determine how do select electors, including by appointment, but all have chosen to use elections.

[21] *See, e.g.*, JACK MASKELL, CONG. RESEARCH SERV., RL2623, POSTPONEMENT AND RESCHEDULING OF ELECTIONS TO FEDERAL OFFICE (2004), https://fas.org/sgp/crs/RL32623.pdf [https://perma.cc/3Q4Y-XH4M]; CONG. RESEARCH SERV., RL 30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS, https://www.everycrsreport.com/files/20141204_RL30747_ffc309dc278cd2558 c38f0b8b1596c47c6046ea0.pdf [https://perma.cc/Q7QM-XPYT].

[22] Although it does not address election-day crises, Congress did enact sweeping voting

for when elections to federal office must he held, established a safe harbor date by which states must certify their electors for President or risk having Congress decide which among competing slates constitute the proper electors, and, in accordance with the constitutionally prescribed number of years each office is held, set the dates and times on which the terms for president, members of Congress, and senators must begin and end.[23] There are apparently no federal statutes that provide for election postponements.[24]

As noted above, many states have no laws that govern postponements of elections to either federal or state offices. The state laws that have been enacted vary greatly from state to state, as is also the case with legislation governing recounts. These differences include the permitted bases for ordering postponements, the officials who are authorized to make the call, and the length of permitted postponements.[25] In addition to state statutes that explicitly provide for election postponements in the event of emergencies, a number of states grant governors or other state officials the power to declare and suspend

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legislation in the Help America Vote Act of 2002. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666. Some pending bills would also make broad changes, including H.R. 1, which would require the states to use independent commissions to determine congressional redistricting.

[23] Federal law provides that elections for president and Congress are set at the first Tuesday after November 1st in the applicable years. 3 U.S.C. § 1 (2018); 2 U.S.C. § 7 (2018). The term of office for the president expires on January 20th of the year it is up and on January 3rd for members of the House and Senate. U.S. CONST. amend. XX, §1. The safe harbor date for states to certify electors is within 35 days of election day. After that Congress, through a vote of each house, could determine which electors to seat.

[24] *See, e.g.,* JACK MASKELL, *supra* note 21. Section 302 of HAVA does provide that "[a]ny individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law . . . may only vote in that election by casting a provisional ballot". Help America Vote Act § 302.

[25] *See, e.g.*, L. PAIGE WHITAKER, CONG. RESEARCH SERV., RS21942, STATE ELECTION LAWS: OVERVIEW OF STATUTES REGARDING EMERGENCY ELECTION POSTPONEMENT WITHIN THE STATE (2004), https://fas.org/sgp/crs/RS21942.pdf [https://perma.cc/HF68-HZS2]. For example, Florida allows the governor to suspend elections upon declaring a state of emergency for up to ten days; in Georgia the governor or secretary of state upon a declaration by the governor of a state of emergency can postpone elections in affected areas for up to forty-five days; in New York, if the State Board of Elections determines that fewer than 25% of registered voters voted as direct consequence of a disaster, an additional day of voting must be held within twenty days; and in Maryland, upon declaring a state of emergency, the governor can postpone elections in all or part of the state until a specific new date, and state and local election officials can petition a court to take any action it considers necessary to protect the integrity of the electoral process. *See* NAT'L ASS'N OF SEC'YS OF STATE, STATE LAWS & PRACTICES FOR THE EMERGENCY MANAGEMENT OF ELECTIONS 15–20, https://www.nass.org/sites/default/files/Election%20Cybersecurity/report-NASS-emergency-preparedness-elections-apr2017.pdf [https://perma.cc/MF22-3YEA].

the operation of state laws in emergencies[26] These statutes may also designate the responsible officials with the authority to postpone elections for federal offices when emergencies are declared.[27] It is worth noting that federal law allows the president and others to declare states of emergency as well, but none of the specified emergency powers explicitly relate to postponements of elections.[28]

III.   PROBLEMS WITH THE CURRENT LEGAL FRAMEWORK

The lack of federal law dealing with postponements and recounts in elections, and the patchwork quilt of state regulations, is not ideal as applied to traditional election day emergencies, including natural disasters and terrorist attacks.[29] At least as to those events, however, their actual or probable

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[26] L. PAIGE WHITAKER, *supra* note 25 at 4–6; *see also Election Emergencies*, NAT'L CONF. ST. LEGISLATURES (Nov. 12, 2018), http://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx [https://perma.cc/72QM-X45Y].

[27] *Id.*

[28] *See generally* BRENNAN CTR. JUST., A GUIDE TO EMERGENCY POWERS AND THEIR USE, (2019), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/BQ2H-D33D]. Of the 176 emergency powers set out in the report that may become available to the president upon a declaration of emergency, only one explicitly deals with elections, but not postponement. This is in an Executive Order, issued on September 12, 2018, in which the president made a finding that there is a threat to national security based on foreign threats to election infrastructure and disinformation campaigns. After each election, it requires reports regarding foreign interference and gives the president power to impose sanctions in response to such occurrences. Exec. Order No. 13848, 83 Fed. Reg. 46843 (2018). https://www.whitehouse.gov/presidential-actions/executive-order-imposing-certain-sanctions-event-foreign-interference-united-states-election/ [https://perma.cc/BCE9-UDNR].

[29] The coronavirus pandemic has put in stark relief just how inadequate state laws are in dealing with natural disasters and demonstrated the pressing need for federal legislation to address both natural and cyber threats to elections. In Ohio, because there were no clear standards for postponing the primary election that was scheduled for March 17, the governor engineered a lawsuit by private plaintiffs to seek its postponement. After the court rejected a request for a TRO, the governor delayed the primary by declaring a public health emergency. *See* Nick Corasaniti & Stephanie Saul, *Ohio's Governor Postpones Primary as Health Emergency Is Declared Over Virus,* N.Y. TIMES, (Mar. 16, 2020) https://www.nytimes.com/2020/03/16/us/politics/virus-primary-2020-ohio.html [https://perma.cc/K3P3-JJJD]. Though they faced similar coronavirus challenges, Florida, Illinois, and Arizona went ahead with primary elections on that same day, although voting levels in many areas in those states were well below normal and eight percent of poll workers failed to show up in Miami-Dade County. Nick Norasaniti et. Al. *Illinois Stumbles as States See Light Voter Turnout, With Many Ballots in the Mail*, N.Y. TIMES (Mar 17, 2020) https://www.nytimes.com/2020/03/17/us/politics/primary-voter-turnout-2020.html [https://perma.cc/MV27-FQBT]. In response to the confusion, and to fears that voting in the November presidential election could be significantly impacted, Senators Klobuchar and

impact on the ability of citizens to vote, including in which precincts, is fairly straightforward. When it comes to the cyberthreats set out above, the judgment calls that must be made would be far more nuanced.

For example, if a foreign adversary were to launch a social media disinformation campaign that falsely led people to believe that there had been a terrorist attack, or that misdirected people as to how and where they should vote, the impact on voting could be broad yet not easily measured. The difficulties could be the same with attacks on the power grid, the launch of ransomware attacks, and attacks on e-polling books. And whether actual vote tallies were impacted might never be clear or at least take time to uncover. If similar election-day crises occurred in multiple states, and some postponed their elections, but others had no authority or declined to do so, the impact on public perceptions of election integrity could be acute.

As to problems with time frames, although past postponements and recounts created issues about whether the elections could be completed in time to meet federal deadlines, the time needed to wait out storms or to recover from actual attacks is also relatively straightforward. The time frames needed to deal with these newer threats are far less clear.

On the difficult problem of placing the power to order postponements, although the states take different approaches, it is often the governor who has the power to make such calls. Entrusting this authority to elected officials, especially ones who might themselves be candidates for reelection, always presents the risk of abuse. But the ability of courts and the public to evaluate whether natural disasters have occurred, and their scope, is again more straightforward than assessing the impact on voting of the social media disinformation campaigns and the other newer threats set out above. Indeed, one election-day crisis scenario that many experts fear is that our sitting president, were he to lose in 2020, would (with support from Russian disinformation efforts) claim that the loss was the result of voter fraud.[30] In

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Wyden introduced legislation that would permit the use of mail-in ballots by all voters in the country, and the recently enacted coronavirus stimulus bill included $400 million to support mail-in ballot efforts. *See* Maggie Miller, *Senate Includes $400M For Mail-In Voting In Coronavirus Spending Deal,* HILL (Mar. 25, 2020) https://thehill.com/policy/cybersecurity/489435-senate-includes-400-million-for-mail-in-voting-in-coronavirus-spending. [https://perma.cc/F3DB-8S4X].

[30] These concerns have also been raised in the press and by at least one senior Democratic leader. *See, e.g*., Glenn Thrush, *Pelosi Warns Democrats: Stay in the Center or Trump May Contest Election Results*, N.Y. TIMES (May 4, 2019), https://www.nytimes.com/2019/05/04/us/politics/nancy-pelosi.html?smid=tw-nytimes&smtyp=cur [https://perma.cc/7K7G-RPAL]; Clark Mindock, *What would happen if Trump refused to leave office after 2020 election loss?*, INDEPENDENT (June. 16, 2019), https://www.independent.co.uk/news/world/americas/us-politics/trump-impeachment-

such circumstances, the question of where to place such power is a challenging one.

As also noted above, Congress has left most decisions about postponements and recounts in elections for federal offices to the states since the beginning of our republic. Although Congress has always had the authority to make more of these decisions itself, this long tradition of deferring to the states may make it politically untenable for it to now attempt to assert a greater level of control.[31]

But these cyber election-day crises will occur whether or not new laws and rules are enacted to deal with them. That there are real challenges to coming up with workable solutions is no reason to ignore them. As noted above, were such events to occur, elected officials and courts would take action to deal with them regardless of whether existing law provides clear answers. In the absence of clear statutory guidance, the chaos that would ensue could be colossal.

IV.   POTENTIAL FIXES

Because dealing with cyberthreats is both complex and politically sensitive, the purpose of this Article is not to propose complete fixes, but to draw attention to them and encourage immediate attention by Congress, public-interest groups, and other parties. That said, what follows are some general ideas on possible frameworks.

A. Use a New York Statute as a Model to Provide a Framework for Post-Election Day Responses

The biggest problem to be confronted—apart from changes to actual vote tallies—is scenarios that result in significantly fewer voters casting their ballots on election day. This could be the outcome of many of the cyberthreats discussed above, including hacks that cause electrical outages in key districts, or social media disinformation campaigns that mislead voters about how and where to vote or falsely indicate that there has been a terrorist attack. It could also be due to hacks of e-polling books that lead to long lines or falsely show that many have already voted.

In such circumstances, there would be enough votes for states to certify election results. For states to certify elections based on greatly reduced voting

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refuse-leave-office-nixon-cohen-white-house-a8814991.html   [https://perma.cc/9VRD-KCRY].

[31] The power of states under existing law to order postponements of federal elections is also somewhat unclear. *See Automatic Recounts, supra* note 14. Federal legislation would make this issue moot.

levels that result from cyberattacks, however, would lead to the very delegitimization of elections and democracy that Russia and other state actors are trying to foment. Unfortunately, existing state laws that allow contests and recounts after election days could not remedy this problem, because they generally apply only when election results are very close. Therefore, they would not apply where vote counts are reduced, but the results are not close.

A New York election statute, however, does contain a good framework for providing for new elections in the event that some of the scenarios described above result in significant numbers of voters not casting their ballots. The statute requires that an additional day of voting be provided when a state or local board of elections determines that, in particular voting districts:

> as the direct consequence of a fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster, less than twenty-five per centum of the registered voters of any city, town or village, or if the city of New York, or any county therein, actually voted in any general election.[32]

The additional day of voting would occur only in districts where the 25% finding was made and would count votes that had already been cast in addition to new votes.[33]

Whether 25% is the right figure is open to debate, but the approach that the statute employs would provide a good objective test for election do-overs following cyberattacks and would help to insulate such decisions from claims of political motivations.

B. Use a Double-Trigger Mechanism to Postpone Elections Before or On Election Day

Developing objective criteria to trigger the postponement of elections before or on election days in response to cyberthreats would be difficult, if not impossible. Just as with hurricanes and terrorist attacks, however, a severe cyberthreat may warrant postponing an election. For example, if false reports of terrorist attacks led many voters and poll workers to stay away from polling places, or electrical outages shut them down, going ahead with balloting might not be advisable or even possible.

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[32] N.Y. Elec. Law § 3-108 (1976) (L.1976, c. 233, § 1. Amended L.2008, c. 394, § 1, eff. Aug. 5, 2008).

[33] When New York postponed its primary election on September 11, 2001, in response to the terrorist attacks on the World Trade Center, the state required a complete do-over of the election, disregarding votes that had already been cast, and conducting a new election statewide. *See* Nagourney*, supra* note 15. The approach of Section 308, enacted subsequent to 9/11, seems more appropriate.

Accurately judging in advance or on election day the likely impact of potential cyberattacks on voter turnout would necessarily require predictions and subjective judgments. Compounding this problem, as discussed above, many state statutes that provide for postponements place the authority to order postponements in governors or other elected officials who themselves may be running for office in the very elections they have the authority to delay. The subjectivity of these judgments and the potential conflicts of interest would cut against the legitimacy of elections that postponements are meant to restore.

One way to deal with these concerns would be to employ a double-trigger mechanism that would require designated officials at both the federal and state levels to authorize any election postponement due to cyberattacks. In addition to providing an added check against too easily requiring additional election days, this would also help to address concerns that new federal legislation in this area would inappropriately federalize decisions that should be left to the states.[34]

Even though partisanship and divisiveness are present in many states, the state-level officials selected should probably be the governor or state board of elections. It is not clear where else to place the authority at the state level, and the second trigger at the federal level should provide a sufficient safeguard against actual and perceived abuses. However, due to the extreme rancor at the federal level, it would probably be best not to designate the U.S. president as the federal official to make these calls. One approach might be to place the federal-level authority in the hands of the congressional "Gang of Eight," which generally gets advance briefings of sensitive intelligence activities, or to designate a group from the national intelligence community itself to have this responsibility.[35] To reduce conflict-of-interest concerns, there should also be a prohibition against officeholders who are up for reelection being involved in making a decision to postpone, with backup officials named to take the place of candidates in such circumstances.[36]

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[34] Although some offer more unprincipled reasons why the Republican-controlled Senate failed to pass any major election-security bills in 2019, others see the reason as the traditional Republican opposition to federalizing election law, which has traditionally been left to the states. *See, e.g.*, Alex Pareene, *The Simple, Odious Reason Mitch McConnell Opposes Election Integrity,* NEW REPUBLIC (July. 31, 2019), https://newrepublic.com/article/154566/simple-odious-reason-mitch-mcconnell-opposes-election-integrity [https://perma.cc/9TUW-9NHT].
[35] The "Gang of Eight" consists of the top two members of each party from the Senate and the House and their Intelligence Committees. *See, e.g.*, Steve Benen, *Trump Briefed Graham On Airstrike, But Kept Dems In The Dark*, MSNBC (Jan. 3, 2020), https://www.msnbc.com/rachel-maddow-show/trump-briefed-graham-airstrike-kept-dems-dark-n1114936 [https://perma.cc/9LSM-25N2].
[36] State-level officials running for reelection, in addition to federal ones, would also be

The postponements should be limited to areas affected by the particular threats, and makeup dates should be set to take account of federal constitutional and statutory deadlines. As discussed in the next section, however, the time frames should be adjusted to provide more time for rescheduled elections.

C. Statutory Time Frames Should be Modified to Allow for More Time for Rescheduled Elections

New federal legislation should also adjust the timing of requirements related to voting by the Electoral College.[37] Although the Constitution requires that electors cast their vote on the same day nationwide, it leaves it to Congress to set that date. Also, although the Constitution sets January 20th of applicable years as the end date for presidential terms, it similarly leaves it to Congress to set the other relevant dates. Thus, Congress would have the flexibility to determine new timelines that would allow more time for rescheduled elections to be held.[38]

Under the current statutory provisions, except where noted, the applicable dates for the 2020 presidential election are as follows:

- November 3 – Election Day (the first Tuesday after the first Monday in November)
- December 8 – (Six days before the meeting of the electors) – Safe harbor date for states to certify their slate of electors so that the votes of those electors are binding on Congress.
- December 14 – Electors cast their votes for president and vice president.
- January 6 – Joint session of Congress to count the votes (set by the Constitution, but subject to change by Congress)
- January 20 – Inauguration Day (set by the Constitution)

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ineligible to play a role in these decisions. Even though, by the terms of the statute, the postponement would apply only to elections for federal offices, it's likely that states would follow suit with their own elections. Mandated disqualification is necessary at both the federal and state levels to mitigate conflict-of-interest concerns.

[37] These changes should apply to dates for all federal elections, including midterms. In turn, states would also likely change the dates for their own elections to avoid duplicative costs.

[38] The existing tight time frames are a problem for states that provide for postponements and recounts in federal elections. Regardless of the passage of federal legislation, providing for more time would be worthwhile. As noted above, the Court's decision in *Bush v. Gore* was based in part on ensuring that Florida could certify its electors by the "safe harbor" date, thus preventing Congress from being able to contest its slate of electors.

One bold change would be to move up election day by a month or even more.[39] There is no magic to the first Tuesday after the first Monday in November. In fact, many commentators already believe that election season lasts too long, which is especially apparent when the U.S. election timeline is compared to those of other democracies.[40]

Moving up Election Day but keeping Inauguration Day as is would lengthen the "lame duck" session of Congress following the election. Although some worry that officeholders who no longer face reelection may act inconsistently with the interests of their constituents, evidence on this is mixed and lame duck status may instead free legislators from the undue influence of special interests.[41]

In addition to or instead of changing Election Day, the safe harbor date and the nationwide date for electors to cast their ballots could be pushed back. In particular, the value of the safe harbor provision that makes states' slates of electors binding on Congress is doubtful. For one thing, there have only been two challenges in Congress to such slates, and both times Congress has affirmed the states' choices.[42] For another, the Court in *Bush v. Gore* cited meeting the safe harbor date as one of the reasons for cutting short the Florida recount in the 2000 election, but citizens of that state and across the country would arguably have been better served by more accurately counting votes that determined the election's outcome than by certifying questionable tallies.[43] With these changes, the joint session of Congress could be kept in early January, to allow time for Congress to conduct any proceedings needed

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[39] To the extent that rescheduling Election Day is too extreme, there are other opportunities to provide additional time for postponements, such as changing the deadline for electors to cast their votes.

[40] Ironically, the 20th Amendment, which moved Inauguration Day from March to January, was passed in part because technological innovations reduced the time needed for counting votes. *See, e.g.*, Thomas V. DiBacco, *The 20th Amendment's Rush to Inauguration*, WALL ST. J. (Nov. 20, 2016, 5:19 PM), https://www.wsj.com/articles/the-20th-amendments-rush-to-inauguration-1479680395 [https://perma.cc/E8SF-FQVJ]. In modern day, different technological developments—the rise of hacking and disinformation spread via social media—tend to necessitate a longer time period between Election Day and Inauguration Day. Because the Constitution fixes Inauguration Day but not Election Day, legislation can move only the latter.

[41] *See* Christopher Koopman, *Don't Fret the Lame Duck*, THE HILL (Nov. 20, 2018, 10:30 AM), https://thehill.com/opinion/campaign/417491-dont-fret-the-lame-duck [https://perma.cc/LUM2-5L55].

[42] *See Electoral College Fast Facts*, U.S. HOUSE OF REPS: HIST., ART & ARCHIVES, https://history.house.gov/Institution/Electoral-College/Electoral-College/ [https://perma.cc/T3WK-Y37H].

[43] Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam).

in the event that no candidate for president or vice president obtains an electoral vote majority.[44]

V. CONCLUSION

In an era of widespread hacking and social media interference by foreign adversaries, there is a pressing need for federal legislation to provide a nationwide framework to respond to significant cyberattacks on or around election days that are meant to disrupt contests for federal office. Leaving such matters to the states, which have taken inconsistent approaches, and sometimes none at all, to older election day threats allows Russia and other state actors to succeed in their primary mission of sowing distrust in the American democratic system.[45]

These issues are complex and politically sensitive. Thus, the intent of this article is not to offer complete solutions. Rather, its purpose is to identify the need for federal legislation capable of addressing these election day threats, to outline some preliminary suggestions, and to spur discussion and action in Congress and elsewhere about the shape of potential federal legislation.

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[44] The 12th Amendment to the Constitution provides that if no candidate obtains a majority of electoral votes, then the House chooses the president, with one vote per state, from the candidates with the three highest number of electoral votes. If no candidate for vice president obtains a majority, the Senate, by majority vote, chooses from the candidates with the two highest number of votes.

[45] Providing for postponements in case of cyber threats wouldn't directly address the problem of what to do if similar threats occur on the day of the new election. Since malevolent cyber activity is ever-ongoing, the possibility of repeat occurrences is likely greater than in the case of other threats, such as natural disasters. Nonetheless, since election postponements should be limited to the narrowest geographical areas possible, resources would only be expended in a small number of places, minimizing the destructive impact of additional disruptions.