Stanford Law School

Election Stress Test: SLS's Nate Persily Analyzes How America's Electoral System Can Weather 2024

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By

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Q&A with Professors Richard Thompson Ford and Pamela Karlan

Nathaniel Persily, James B. McClatchy Professor of Law at Stanford Law School

As the 2024 presidential election approaches, Nathaniel Persily, JD '98, the James B. McClatchy Professor of Law at Stanford Law School, forecasts a bumpy ride. On a recent episode of *Stanford Legal*, Persily, a leading expert in election law and the political process, discussed how the election could pose unprecedented challenges for voters and election officials alike. With nearly every state having altered its election laws since 2020 and a significant turnover in election administrators, "we are at a stage right now where there's a lot of anxiety about election administration," he says. "There's a significant share of the population that's completely lost confidence in our system of elections."

Persily is the founding co-director of the Stanford Cyber Policy Center and its Program on Democracy and the Internet, as well as the Stanford-MIT Healthy Elections Project. His scholarship and legal practice address issues such as voting rights, political parties, campaign finance, redistricting, and election administration, all topics covered in his co-authored election law casebook, *The Law of Democracy*. He has served in election analyst roles for nationwide media outlets, including NBC.

Persily was interviewed by *Stanford Legal* co-hosts Pamela Karlan, the Kenneth and Harle Montgomery Professor of Public Interest Law and co-director of Stanford Law School's Supreme Court Litigation Clinic (as well as a co-author on the *Law of Democracy* casebook), and Richard Ford, the George E. Osborne Professor of Law.

The following is a shortened and edited version of the full podcast transcript, which can be found here (https://law.stanford.edu/stanford-legal-podcast/election-stress-test-can-americas-electoral-system-weather-2024/).

Rich Ford: What are some of the main challenges that you see coming toward us in November and beyond?

Nate Persily: I would group a lot of my concerns about this election under the heading of "voter confusion." I'm worried about the lack of confidence that many voters have in the electoral system, and how recent changes are going to increase those anxieties. Almost every state has changed its laws since 2020 to deal with the elections, sometimes becoming more restrictive, sometimes more permissive. And close to a third of the election officials around the country have resigned since then. So we are going to have a lot of these novice election officials dealing with new laws in the polling place, and they're doing so in an environment of unprecedented pressure and scrutiny. Many of them have even received death threats. So while we still have some of the same concerns that we had in 2020, the first post-insurrection presidential election is being administered under unprecedented levels of a lack of confidence in the electoral system and also polarization about the electoral process.

Pam Karlan: Although this is a national election, it's being run by at least 8,000 different election administration units, if you will. In some places it's counties, in some places it's townships and the like. Does that pose special problems when you have a national election that's run in so many different ways in so many different places?

Nate Persily: Decentralization is, in some ways, the defining feature of the American electoral system. It's something that we complain about because the quality of democracy often will depend on where you live in the United States. But at the same time, it is a buffer against one party at the national level taking control, or even sometimes at the state level. This kind of local decentralization and autonomy does provide some kind of bulwark, but there are the concerns related to this election that are exacerbated by the decentralization. It has been widely reported that there are many counties or local jurisdictions in the U.S. that now have elected or appointed election officials who might likely not certify the results of this election.

What that means is that some of these local officials might not say, "these are the numbers of votes that were received by each candidate, and they are not official," and so therefore, the state cannot officially tally the the number of votes at the state level, and then declare someone to be a winner. The certification process is basically the stamping of approval of the numbers of votes that were received by the particular candidates, and it's legally significant, of course, when it comes to the presidency because the Electoral College then meets, and then based on the certified results, you get a slate of electors that is sent to the House of Representatives. So you have all kinds of different election officials that may be doing all kinds of different things, and so that decentralization, combined with this willingness now to break some of these established norms, could pose a problem.

Pam Karlan: Can you walk through the election process from beginning to end from a voter's perspective? For example, since the 19th century, Election Day in the United States has been the first Tuesday after the first Monday in November, but that's really changed over the last, say, 10 or 15 years. Do we actually even have an Election Day anymore?

Nate Persily: We have an "election month" at this point, and actually sometimes an election "two months" if you look at when the ballots are printed and then when people start voting. The transformation that has been underway as you said over the last two decades, but particularly reached its apex in the 2020 election, is the fact that a majority of Americans voted in some format before Election Day. Of course, COVID was an accelerant for that, but those were trends that were rising already. There are plenty of states like Oregon and Washington and Colorado and Utah that are all vote by mail.

We here in California are almost 80 percent or more vote by mail, as is Arizona, and there's been an expansion of vote by mail throughout the West and some of the Eastern states. So, the voting starts to take place in some states in short order after the Democratic National Convention in late August. I should say this is a bright spot in terms of election administration, because we hopefully will be able to determine problems early on. It also is somewhat of a buffer against, say, a hack that would just affect Election Day votes, since as much as 60 percent or more of the votes will be cast before Election Day.

You asked about the life cycle of an election: The candidates have now been effectively determined. The ballots will be printed. They will then be mailed out at least 30 days in advance, but much more than 30 days out for military voters and other folks abroad. You'll then have a period of early voting in most states, either through extensive vote-by-mail or in-person voting, and most of the in-person early voting happens in the two to three weeks before the election.

Some states will do what we call pre-processing of ballots, so that the mail ballots will actually be validated and verified and their signatures checked and things like that when they are received or close to Election Day. Once the polls close on election night, there's the process of counting the ballots. Different states have different rules as to, for example, whether mail ballots that are received after Election Day are counted. Then you have a process of counting. There are potentially recounts. You have local boards that then certify the results, and then there's a certification at the state level, which leads to—for the presidential election— a certification of vote totals that will then lead to the electoral slate being sent to Congress. We saw how that process works four years ago where the Congress will then essentially validate the election.

Pam Karlan: When people send in ballots that there's something wrong with them, or people show up at a polling place and it turns out they're not on the registration rolls, what happens?

Nate Persily: Under the Help America Vote Act, anyone who shows up at a polling place in a federal election has the right to cast a ballot. Now, if they don't have, say voter ID, or if they never registered in a state that requires voter ID, there may be other processes that are at work, but everyone has the right at least to cast a provisional ballot based on the Help America Vote Act. Those provisional ballots are then either adjudicated after the election or otherwise cured by the voters if there might be a problem. In some states if you go to the wrong polling place and then you vote the ballot, but you are actually registered, they will count the offices for which you were eligible to vote.

SLS Professors Richard Thompson Ford and Pamela Karlan, co-hosts of Stanford Legal

Rich Ford: On the one hand, the election officials you talked about are under a lot of pressure. At the same time, there are some election officials who maybe we should be skeptical of—who will be likely to refuse to certify the ballots if they don't like the outcome?

Nate Persily: The newer development in the last few months in terms of election administration is that there are some election officials who've been identified as either previously having refused to certify or likely to in this election. I am not as concerned about that as a lot of other people. There is a process to deal with that. Now, it's going to be messy, and that's why I go back to this idea of confusion and all the dust that's going to be created in this election. In the event an election official refuses to certify, you go to court and you order them to certify the election, and there is a process. But that will be another opportunity for people to say that there's dysfunction in the electoral system. My general view is that we really need to get behind the army of election officials who are administering this election because they need a lot of love and support right now.

Pam Karlan: Election Day has now become many days, or as you say: a month, two months in some places. In some places it can be a week or two before certification, and in some states there are requirements for recounts if the margin of victory between the top two candidates isn't large enough and the like. And that's all fine, right? I mean, we shouldn't be concerned that we don't know on election night who won.

Nate Persily: And not only that, we need to kind of build up our resilience in not thinking that there's a problem if we don't know whether all 160 million ballots have been fully counted by election night.

We saw last time how this played out where we didn't really know until about three days after the election that Joe Biden had won. And part of the challenge here is that because there's been a partisan bias in who is voting by mail and who's not voting by mail—and because of all the doubts that that Donald Trump has cast on vote by mail—it's not surprising that the outcome in particular states will change as the mail ballots get counted. That's one of the reasons why it's so important to do the pre-processing of ballots and why states really need to change their laws so that you can validate these mail ballots before Election Day and then count them with the other ballots. I do think places like California, which allow ballots to come in over two weeks after Election Day, that is probably too long and we need to kind of stop the madness a little bit. You still have to have those ballots postmarked by election day, of course.

Rich Ford: It's pretty typical that on election night, the media begin to project the winner. In the past, those projections have usually been accurate. How likely do you think it is that that's going to become a problem in this election where people have projected a winner before all the ballots are counted and all the rest of it?

Nate Persily: The models that we use in order to project from actual results have been relatively good. Now the hard part is in a very, very close election with a lot of outstanding ballots. The most dispositive moment, I thought, in the 2020 election contest was when Fox News called Arizona because that then created a kind of consensus that Joe Biden had won the election. We should be cautious about early calls of these states, particularly the battleground states, and that we should wait until we're really, really confident before those calls can come in.

Rich Ford: One thing that we hear a lot about is the impact of new technology on these elections: AI, deep fakes, Russian bots, etc. How do you see those playing out in the election?

Nate Persily: I think that AI does pose a real challenge to democracy, but not in the way that most people think. I think that the current model of fear with respect to AI is that a fake video of one of the candidates will be released in October that will sway a certain number of voters to vote a particular way. Let me be clear: There will be thousands of deepfakes and synthetic videos. They are out there now. The real question is, how likely is it that a significant share of voters are going to be persuaded by these things? I think that is not terribly likely. It is more a question of tribal reaffirmation as opposed to persuadability, but what I am concerned about, and what we're seeing already with Donald Trump's accusation that Kamala Harris used AI to inflate her crowd sizes, is that the scare and fear related to AI is going to further degrade our trust in true media. So, whatever one might say about the pervasiveness of deep fakes, they're going to represent a tiny, tiny share of the media consumption that most Americans have during the election, but the doubt that's created by that tiny share of synthetic media, that is going to be used by political elites to cast doubt on the remaining 99.999 percent of actual, true media. And that is a further degradation of the information ecosystem that we've seen over the last decade.

Pam Karlan: In addition to the content of the campaigns, are you worried about disinformation and AI being used to give voters misinformation about things like when to vote and the like? The modern day version of the robo calls telling people in your precinct people are supposed to vote on Wednesday, not Tuesday.

Nate Persily: We saw that already in the New Hampshire primary where a synthetic voice was used for Joe Biden where it was misleading people to vote. I think stuff like that will happen, and it's illegal and should be prosecuted. In some ways, I think the media amplification of it might be worse than what's actually happening. The thing that concerns me is that you've got voter confusion over a lot of the new laws, and then you've got novice election officials that are implementing them, and so, yes, if there is a very well done disinformation campaign related to the voting process, it might have an impact in certain areas. But I think it's going to be very hard to do that in an undetectable way, and what I'm more concerned about is the slow deterioration of people's faith in actual true media. That by the way is what we're seeing around the world.

Pam Karlan: There's also just old-fashioned voter intimidation. Are you concerned with that happening in this election?

Nate Persily: I'm concerned. I think it's going to have a kind of different flavor to it than it has historically, in part because it's growing out of the insurrection and what we experienced in 2020. There may be sort of informal bands of people who engage in intimidation, but my guess is that you will see sporadic instances, sort of tailor made to try to decrease trust in the election and also create a sense that there's chaos going on. I don't think that you're going to see thousands of voters who are going to be prevented from going to the polling place, but you could see some shenanigans where someone dumps a whole bunch of fake ballots into a drop box just to prove a point, or someone creates a meme or a story on social media about how a certain polling place is unsafe or something like that.

Rich Ford: A common theme here seems to be that we have every reason to have confidence in our electoral process, just as we have every reason to have confidence in the mainstream sources of information, but the threat is that that confidence will be undermined so that people won't trust the results. What do you think we can do in order to shore up confidence?

Nate Persily: We need to get the resources to our election officials so that they can do their jobs. That includes the basics that we've been talking about: processing and counting ballots in time, but it also includes resources for cyber security and for them to engage as authoritative sources of information to counteract some of the lies that might be propagated out there.

We need to also get local leaders to vouch for the integrity of the election process: local business and faith leaders, people without clear partisan affiliations. There's really no one at the national level right now who is trusted by both parties to be that person who is widely trusted, and as you said, because people retreat into their own media ecosystem, it's not as if we have Walter Cronkite anymore, who can say on the evening news, "that's the way it is."

It's also possible that the margin of victory will be large. Now, if we approach the election and the result is likely, I am worried about the willingness of the losing team to engage in violence or destructive behavior. This is one of the reasons why there's something that's called the election administrator's prayer, which is, "Oh God, whatever happens, please don't let it be close," because if it's close, then all of the vulnerabilities in the electoral system are seen as outcome determinative, and that's a situation that we really can't handle right now, given the lack of trust in the system.

Nate Persily is the James B. McClatchy Professor of Law at Stanford Law School, with appointments in the departments of Political Science, Communication, and the Freeman Spogli Institute of International Studies. He is the founding co-Director of the Stanford Cyber Policy Center and its Program on Democracy and the Internet, as well as the Stanford-MIT Healthy Elections Project. Professor Persily's scholarship and legal practice address issues such as voting rights, political parties, campaign finance, redistricting, and election administration – all topics covered in his co-authored election law casebook, The Law of Democracy *(Foundation Press, 6th ed., 2020), with Samuel Issacharoff, Pamela Karlan, Richard Pildes and Franita Tolson. He has served as a special master or court-appointed expert to craft congressional or legislative districting plans for Georgia, Maryland, Connecticut, New Hampshire, New York, North Carolina, and Pennsylvania. He also served as the Senior Research Director for the Presidential Commission on Election Administration. His most recent book is a co-edited volume with Joshua Tucker,* Social Media and Democracy: The State of the Field and Prospects for Reform *(Cambridge Press, 2020). Professor Persily is a member of the American Academy of Arts and Sciences, and served as a commissioner on the Kofi Annan Commission on Elections and Democracy in the Digital Age. He received a B.A. and M.A. in political science from Yale (1992); a J.D. from Stanford (1998) where he was President of the Stanford Law Review, and a Ph.D. in political science from U.C. Berkeley in 2002.*

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