

Will Trump's Attempted Electoral Coup Succeed?

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Joe Biden has won states worth [306 Electoral College votes](#), 36 more than the 270 needed to win, and received in excess of 5 million more popular votes than Donald Trump. Yet Trump insists the election was stolen from him and he is the victor.

Trump started attacking the election months before it happened. He leveled unsupported charges of massive voter fraud from mail-in ballots to create doubt about the integrity of the election. Knowing that Democrats would cast mail ballots in the midst of the pandemic, Trump told his supporters to vote in person on Election Day to prematurely inflate his vote totals.

When he had an apparent lead on election night, Trump claimed victory and demanded that the vote-counting stop. Sure enough, as the tabulations continued, the mail ballots counted after Election Day put Biden over the top.

Trump is setting the stage for an electoral coup. Republicans and the Trump campaign have filed [frivolous lawsuits](#), alleging mostly technical violations of voting procedures, which would not change the outcome of the election even if they were meritorious.

The real goal of this litigation is to create the perception of widespread voter fraud to whip up distrust for the election results. This would “give state legislatures political cover to appoint their own electors,” [Robert Reich](#) wrote.

Trump's lawyers are seeking court orders to [delay the certification of the votes](#) in key states so GOP-controlled legislatures can appoint Trump electors notwithstanding Biden's victories. Trump's legal team has filed litigation in Pennsylvania, Michigan, and Arizona to prevent state officials from certifying the vote count.

On November 13, judges in Pennsylvania, Michigan, and Arizona [dismissed Trump lawsuits](#). State judges in Michigan have [refused Trump's requests](#) to delay the certification of the vote count. Judge Timothy Kenny rejected the petition of two Republican poll watchers to delay ballot count certification in Detroit, calling misconduct allegations “not credible.” The plaintiffs' request for an outside audit of the voting tallies would cause such a delay that electors might not be chosen by the mid-December vote in the Electoral College. Kenny, who [characterized some accusations](#) as “rife with speculation and guesswork,” said, “It would be an unprecedented exercise of judicial activism for this court to stop the certification process.”

The same day, the law firm [Porter Wright Morris & Arthur abruptly withdrew](#) from the federal lawsuit they had filed in Pennsylvania on Trump's behalf earlier in the week, out of concerns they were being used to undermine the integrity of the electoral process. Also last week,

[Snell & Wilmer withdrew](#) from representation of Arizona's Republican National Committee.

"These law firms have been under tremendous pressure as it became clear these claims were baseless, and that they were part of a broader campaign to delegitimize the election," [Wendy Weiser from the Brennan Center for Justice](#) told ABC News.

Both Democratic and Republican election officials in virtually every state reported to [The New York Times](#) that there was no evidence fraud or other irregularities affected the election results.

Moreover, on November 12, a joint committee of the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) confirmed the reliability of the election results, calling the November 3rd election "[the most secure in American history](#)." The high-level committee concluded, "There is no evidence that any voting system deleted or lost votes, changed votes or was in any way compromised."

On November 17, CISA Director Christopher Krebs denied that there was a manipulation of the election systems, [tweeting](#), "59 election security experts all agree, 'in every case of which we are aware, these claims either have been unsubstantiated or are technically incoherent.' " Later that day Trump fired Krebs for making a "highly inaccurate" statement, but Trump provided no evidence of his allegation.

Even Trump advisor Karl Rove wrote in a November 11 [Wall Street Journal op-ed](#) that Trump's challenges "are unlikely to move a single state from Mr. Biden's column, and certainly they're not enough to change the final outcome."

Attorney General William Barr is aiding and abetting Trump's attempted coup. Just weeks before the election, the Justice Department changed its longstanding ban on voter fraud investigations before an election. Although he told department officials after the election that he didn't see [massive voter fraud](#), Barr saluted and marched to Trump's orders. On November 9, Barr empowered [federal prosecutors to investigate](#) "substantial allegations of voting and vote tabulation irregularities." Sixteen federal prosecutors in charge of monitoring the election wrote to Barr that there is [no evidence](#) of substantial voting irregularities.

Richard Pilger, the Justice Department official in charge of voter fraud investigations left his job in [protest against Barr's order](#). But just the fact that the Department of Justice is authorizing investigations is designed to cast a cloud over the election. Indeed, a [Politico/Morning Consult poll](#) found that 70% of Republicans now think the election was not fair or free, compared with 35% of Republicans before the election. The purpose of Trump's strategy of falsely alleging fraud from mail ballots combined with Barr's baseless edict establishes fake doubt about the reliability of the vote tallies.

The Constitution gives state legislatures the power to decide how electors are selected. [Article II](#) says, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." [U.S. Code, Title 3, Section 1](#) requires that electors be chosen on Election Day. However, when a state "has failed to make a choice on [that] day," then "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct," under [Section 2](#).

But the states did not fail to choose the electors on Election Day. As a result of the voting

process, which ended on November 3, Biden garnered more than 270 electoral votes. Trump's own Department of Homeland Security affirmed that the election was the most secure in U.S. history. Even if charges of fraud were supported, that would not amount to a failure of state voters to choose electors on Election Day. Thus, state legislatures have no authority to select Trump's electors in the states Biden won.

Trump supporters are targeting Pennsylvania, Michigan, Wisconsin, and Arizona – all of which Biden won – by raising allegations of fraud in hopes of persuading their state legislatures to override the will of the voters and appoint pro-Trump electors. All four states require that [electors be awarded](#) to the winner of the state's popular vote on Election Day.

In October, the Republican majority leaders from Pennsylvania's Senate and House [co-authored an op-ed](#) saying that the GOP-controlled legislature would not select electors to overrule the popular vote. They wrote, "The Pennsylvania General Assembly does not have and will not have a hand in choosing the state's presidential electors or in deciding the outcome of the presidential election." But on November 10, members of the Pennsylvania legislature announced their [intention](#) to investigate voter fraud allegations.

The Republican leader of Wisconsin's assembly has long maintained that the [legislature would not override the will of the voters](#) and he reiterated that view on November 13. But the Wisconsin legislature is also investigating the election.

Republican leaders in Michigan's legislature say legislative intervention would [violate state law](#) although the GOP-controlled legislature has mounted an investigation of the election. Michigan's majority leader said, "It is not the expectation that our analysis would result in any change in the outcome."

On November 17, in a dramatic and overtly political move, the two Republican elected officials on the four-member board of canvassers in Michigan's largest county [blocked certification](#) of Wayne County's vote count. But hours later, after [powerful public comment and fierce outcry](#) on traditional and social media, board chair Monica Palmer and William Hartmann reversed their "no" votes and the board unanimously certified the tally.

Trump called Palmer after the board meeting and also spoke with Hartmann. The next day, the two GOP board members [tried to rescind](#) their "yes" votes, claiming they were pressured into certifying the election with the promise of an audit of voting tallies in Detroit, which is 80% black. Jocelyn Benson, Michigan's Secretary of State, said the resolution requesting an audit was not binding. The small number of votes that could be affected by the audit is not enough to change the election results.

Benson's spokeswoman [stated](#), "There is no legal mechanism for them to rescind their vote."

On November 19, Trump invited the Republican leaders in the Michigan legislature to visit the White House on November 20. The Michigan Board of State Canvassers will review and certify the county certifications on November 23.

Arizona's Republican House speaker [affirmed](#) that the legislature is "mandated by statute to choose according to the vote of the people," but left open the possibility of changing electors if there is "some type of fraud – which I haven't heard of anything." At this point, he added, "I don't see us in any serious way addressing a change in electors."

Although Republican leaders in those four states deny they intend to replace Biden electors with Trump electors, allegations of fraud – however spurious – could reverse those intentions. Senate Majority Leader Mitch McConnell is [hinting that Trump could win](#) in the Electoral College.

States must count electoral votes and settle election disputes by December 8, the “safe harbor” deadline. On December 14, members of the Electoral College in each state will meet to elect the president.

If legislatures in Pennsylvania, Michigan, and Wisconsin attempt to appoint Trump electors against the will of their voters, the Democratic governors in those states would refuse to sign the certification of electors and submit Biden slates. Arizona has a Republican governor, who may well sign a slate of Trump electors notwithstanding Biden’s victory in that state, according to Harvard law professor [Lawrence Lessig](#).

On January 6, Vice President Mike Pence will preside over the opening of the certified results before a joint session of the new Congress. If there are competing slates of electors in Arizona, Pence might decide to recognize the slate signed by the governor, Lessig says. If both a senator and a member of the House of Representatives sign an objection, the Senate and House would vote on whether to uphold the objection. In all likelihood, the House would vote to sustain the objection. If the Senate votes to overrule the objection, the slate signed by the governor would be counted. Even without Biden electors from Arizona, however, Biden should still have more than 270 electoral votes. But if the state legislatures in Pennsylvania, Michigan, and/or Wisconsin submit competing slates of electors, that dispute would also end up in Congress.

If neither Biden nor Trump secure 270 electoral votes, the [12th Amendment](#) provides that the House would decide who becomes president. Each state gets one vote and since there are more red states than blue ones, Trump would win.

In the event that an electoral clash reaches the Supreme Court, all bets are off. In a [recent concurrence](#), Brett Kavanaugh adopted the position that state legislatures are unconstrained in their selection of electors regardless of the popular vote. Kavanaugh based his theory on Chief Justice William Rehnquist’s concurrence in [Bush v. Gore](#)– the case that selected George W. Bush as president in 2000. But that theory has not attained majority support on the high court.

Indeed, in [Chiafalo v. Washington](#) earlier this year, a unanimous Supreme Court cited the “tradition more than two centuries old” that “electors are not free agents; they are to vote for the candidate whom the State’s voters have chosen.” *Chiafalo* affirmed the power of states to punish “faithless electors,” who don’t vote in accordance with the popular vote.

But in light of the [willingness](#) of Samuel Alito, Clarence Thomas, and Neil Gorsuch to stay the counting of votes mailed by November 3 but arriving by November 6, in spite of the Pennsylvania Supreme Court’s allowance of the three-day extension, those three might vote for Trump in a case of dueling electors. And Amy Coney Barrett could provide the fifth vote to hand the presidency to Trump.

Trump is apparently taking steps to quash popular opposition to his attempted electoral theft. On November 9, he [fired Defense Secretary Mark Esper](#). Last summer, Esper refused to support Trump’s proposed deployment of active-duty troops against anti-racist protesters

in the wake of the public lynching of George Floyd. Esper opposed the invocation of the Insurrection Act to call out active-duty military on U.S. soil. Mindful that massive protests would erupt if he succeeds in launching an electoral coup, Trump wants his loyalists in place to attack anti-coup demonstrators. Service members, however, have a duty to [disobey unlawful orders](#) and may refuse to follow Trump's illegal directives to repress protesters.

On November 14, thousands of Trump loyalists, including the Proud Boys and other right-wing groups, assembled in Washington D.C. and claimed that Biden was stealing the election. Trump drove by on his way to play golf and gave the demonstrators a thumbs-up. Later that day, in a violently [inciteful tweet](#), Trump urged police not to "hold back" and to crack down on "antifa scum."

During the campaign, while he leveled false accusations of massive voter fraud, Trump refused to commit to a peaceful transfer of power. His refusal to concede and his strategy to illegally overturn the election results by stealing Biden's electoral votes confirm his intention not to go peacefully.

"Since 1800, when the incumbent John Adams was defeated, every president who lost a reelection bid has left office," Berkeley Law School Dean Erwin Chemerinsky told *Jurist*. "Not every transition was graceful, but every one occurred. We have seen so many instances around the world where that didn't happen. I am hopeful that our institutions will work again and keep Trump from impermissibly remaining in office."

The results of the election must be honored and the presidency awarded to Joe Biden. Hopefully, that will be accomplished with all deliberate speed and the absence of bloodshed. Donald Trump must leave the White House on January 20. As Elena Kagan wrote in the last line of the *Chiafalo* opinion, "Here, We the People rule."

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