**Opinion**

Guest Essay

# Here Is One Way to Steal the Presidential Election

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What happens when you stress-test America’s system for electing a president? How well does it hold up?

After the assault on the nation’s Capitol three years ago, we worked through every strategy we could imagine for subverting the popular will by manipulating the law. What we found surprised us. We determined that the most commonly discussed strategies — such as a state legislature picking a new slate of electors to the Electoral College — wouldn’t work because of impediments built into the Constitution. We also concluded that the most blatantly extreme strategies, such as a state canceling its election and selecting its electors directly, are politically unlikely.

The scenario we see as the most alarming was made possible by the Supreme Court itself. In a 2020 [decision](https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf), the court held, in our reading, that state legislatures have the power to direct electors on how to cast their electoral votes. And this opens the door to what we think is the most dangerous strategy: that a legislature would pass a law that directs electors to vote for the candidate the legislature picks.

The question now is whether there is any way to close that loophole before a stolen election slides through.

The cases that led to the decision involved electors in 2016 who had voted contrary to their pledge. Recognizing that Hillary Clinton, the winner of the popular vote, would not be elected president, these electors worked to rally enough Republican and Democratic electors to vote for a Republican candidate other than Donald Trump, thus throwing the election into the House of Representatives.

Three electors from the state of Washington cast their votes for Colin Powell, the former secretary of State, rather than for Mrs. Clinton, who won the popular vote there. Mrs. Clinton also won the popular vote in Colorado, where one elector attempted to vote for John Kasich, the former Ohio governor who had run for the Republican presidential nomination that year. Those electors were punished by their states with fines and removal as electors. They challenged that punishment in the Supreme Court. (One of us, Mr. Lessig, [represented](https://hls.harvard.edu/today/lessig-who-argued-on-behalf-of-faithless-electors-responds-to-the-supreme-courts-decision/#:~:text=Faculty%20Scholarship-,Lessig%2C%20who%20argued%20on%20behalf%20of%20'faithless%20electors%2C',to%20the%20Supreme%20Court's%20decision&text=In%20a%20unanimous%20decision%20on,of%20their%20state's%20popular%20vote.) the Washington and Colorado electors.)

The court ruled in favor of the states. The electors, the Supreme Court decided, had no constitutional right to resist the laws in a state that directed how they must vote. The court held that the states could thus enforce those laws.

The danger now is that this decision has created an obvious strategy for a state legislature seeking to ensure the election of its preferred candidate, regardless of how the people voted. The state legislature would pass a law that requires electors to vote as the legislature directs. The default would be that electors vote as the people voted. But the law would reserve to the legislature the power to direct electors to vote differently if it so chooses.

Now imagine the election results in a state are close. Charges of fraud cloud a recount. Leaders in the state legislature challenge the presumptive result. In response to those challenges, the legislature votes to direct their electors to cast their ballots for the candidate who presumptively lost but whom the legislature prefers. Any elector voting contrary to the legislature’s rule would be removed and replaced with an elector who complied.

This is a critical innovation in the science of stealing a presidential election. There are plenty of mechanisms to ensure that the election selects the right slate of electors — recounts, contest proceedings and so on. But there are no protections against a state legislature simply ordering whichever electors are appointed to vote for the candidate that the legislature, and not the people of the state, choose.

The Supreme Court surely did not intend this result. Justice Elena Kagan’s opinion for the court ends with the promise that “here, we the people rule.” But the mechanism the court upheld means that it is actually the state legislatures that rule.

There’s little that can be done to eliminate this risk before the November election. Conceivably, a legislature could pass a law today openly asserting its power to direct how electors may vote, regardless of how the people vote. The justices then could act quickly to strike down that law, though the Supreme Court rarely acts to avoid such risks in advance. Absent that turn of events, in the rush between an election and the day when electors actually cast their votes, there may well be no time for the court to close the loophole that its opinion opened.

The more effective strategy to avoid this result would be for political leaders to reaffirm the principle that should guide every policy adopted by the states: that the electoral results in a state should track the will of the people, not the partisans who command a majority in the legislature.

If partisans on both sides embrace that principle in good faith, we will have confidence in the results of the next election. But if they reject it, then this is just the most potent of a handful of strategies that might be deployed to flip the result.

Rather than waiting until after the next election to fix this flaw, Congress and legislatures should act now to intervene. We are confident of only this: It is a rocky road ahead.