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# Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States

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# IDENTIFYING AND MINIMIZING THE RISK OF ELECTION SUBVERSION AND STOLEN ELECTIONS IN THE CONTEMPORARY UNITED STATES

# Richard L. Hasen\*

#### INTRODUCTION

The United States faces a serious risk that the 2024 presidential election, and other future U.S. elections, will not be conducted fairly, and that the candidates taking office will not reflect the free choices made by eligible voters under previously announced election rules. The potential mechanisms by which election losers may be declared election winners are: usurpation of voter choices for President by state legislatures purporting to exercise constitutional authority to do so, possibly blessed by a partisan-divided Supreme Court and acquiesced to by Republicans in Congress; fraudulent or suppressive election administration or vote counting by law- or norm-breaking election officials; and violent or disruptive private action that prevents voting, interferes with the counting of votes, or interrupts the assumption of power by the actual winning candidate.<sup>1</sup>

Until recently, it would have been absurd to raise the possibility of such election subversion or a stolen election in the United States. Few cases have emerged in at least the last 50 years in the United States of actual election subversion by election officials,<sup>2</sup> leading to an election loser being declared the

Perales told investigators that when absentee ballots were delivered to City Hall, he and G.P. determined through "trial and error" the best way to open and reseal envelopes without defacing them.

"Routinely and systematically," they opened the ballots to determine whom the voter selected. If the votes were for incumbents, the ballots were resealed and counted. Ballots for non-incumbents were discarded, he claimed.

The election fraud allegedly occurred in 2007 and 2009. Challengers narrowly lost both elections. One of the challengers saw his home firebombed and another had his car vandalized during what they said was a campaign of intimidation.

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<sup>&</sup>lt;sup>1</sup> See infra Part II.

<sup>&</sup>lt;sup>2</sup> I am unaware of any statewide or federal elections since at least 1970 in which there is credible evidence that election officials were involved in illegally manipulating election results to turn an election loser into an election winner. There are isolated examples of such election subversion on the local level in small U.S. elections. For example, in the small Southern California town of Cudahy, California, former city code enforcement head Angel

election winner, despite other unique pathologies of American election administration.<sup>3</sup>

Ironically, the conduct of former President Donald J. Trump in repeatedly and falsely claiming that the 2020 election was stolen has markedly raised the potential for an actual stolen election in the United States. Millions of Trump's Republican supporters now believe the false claim of a stolen election, and some Republican elected officials have pursued bogus sham "audits" and taken other steps that undermine voter confidence in the fairness of the election process. Threats of violence and intimidation have led to unprecedented attrition among election administrators, and some exiting officials are being replaced by those who may not have allegiance to the integrity of the election system. Those Republican election officials who stood up to Trump in 2020 and saved the United States from a potential constitutional and political crisis have been censured, stripped of power, and challenged for office by those embracing the "Big Lie." Together, these actions serve both to delegitimate the election of Democrats including President Joe Biden in 2020 and to open the door to election manipulation in future elections. Elected officials, election officials, and others believing or purporting to believe the false claim that the 2020 presidential election was stolen may seek to justify subverting future election results in response to earlier purported fraud.<sup>4</sup>

The solutions to these problems are both legal and political. Legal changes should include: (1) paper ballot, chain-of-custody, and transparency requirements, including risk-limiting audits of election results; (2) rules limiting the discretion of

Jeff Gottlieb, Hector Becerra, & Ruben Vives, *Feds Detail Scale of Graft in Cudahy*, L.A. TIMES, July 13, 2012, <a href="https://www.latimes.com/local/la-xpm-2012-jul-13-la-me-cudahy-20120713-story.html">https://www.latimes.com/local/la-xpm-2012-jul-13-la-me-cudahy-20120713-story.html</a> [https://perma.cc/4FSG-NWFC].

Earlier periods in U.S. history include examples of such election subversion on the federal level. Professor Ned Foley, who has meticulously studied the history of disputed elections in the United States, concludes that Lyndon Johnson likely won his U.S. Senate race from Texas in 1948 due to ballot box stuffing of the infamous "Ballot Box 13" in Alice, Texas. See EDWARD B. FOLEY, BALLOT BATTLES 206-17 (2016); *see also id.* at 217-228 (discussing potential but uncertain election administrator tampering in Illinois and Texas in the 1960 presidential election between John F. Kennedy and Richard Nixon). There are no more recent examples, although there are examples of disputed elections in which the losing side is convinced that election rules were manipulated to resolve the dispute. *See id.* at 257-78 (discussing controversies over a 1984 congressional race in Indiana resolved by Congress and a 1994 Alabama state Supreme Court race). And of course, there remains controversy over how the Supreme Court resolved the disputed 2000 presidential election in *Bush v. Gore. See id.* at 279-305.

<sup>&</sup>lt;sup>3</sup> Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 263 (2020) ("First, the United States election system features deep fragmentation of authority over elections. Second, protection of voting rights in the United States is marked by polarized and judicialized decision making. Third, constitutional protections for voting rights remain weak").

<sup>&</sup>lt;sup>4</sup> See infra Part I.

those who certify the votes, including Congress through reform of the Electoral Count Act; (3) rules limiting the over-politicization of election administration, especially by state legislatures; (4) increased criminal penalties imposed on those who tamper with federal elections or commit violence or intimidation of voters, elected officials, or elected candidates; and (5) rules countering disinformation about elections, particularly disinformation about when, where, and how people vote. In addition, it will be necessary to organize for political action to reenforce rule-of-law norms in elections. This means advocating for laws that deter election subversion and against laws making stolen elections easier; politically opposing would-be election administrators who embrace false claims about stolen elections; and preparing for mass, peaceful protests in the event of attempts to subvert fair election outcomes.<sup>5</sup>

Part I of this Essay describes the path to this unexpected moment of democratic peril in the United States. Part II explains the three potential mechanisms by which American elections may be subverted in the future. Part III recommends steps that can and should be taken to minimize this risk. Preserving and protecting American democracy from the risk of election subversion should be at the top of everyone's agenda. The time to act is now, before American democracy disappears.

## I. HOW WE GOT HERE

Republican claims of widespread voter fraud committed mostly by Democrats, people of color, and union members are not new, but they accelerated after the disputed election between George W. Bush and Al Gore in 2000. These statements from a segment of conservatives and Republicans (and resisted by other conservatives and Republicans) persist despite all reliable evidence that voter fraud in the contemporary United States is rare and that when such fraud occurs it tends to happen on a small scale that does not tip the result of elections. The purported "evidence" of widespread voter fraud consists primarily of describing isolated instances of fraud as the "tip of the iceberg" or by taking administrative error or slack in election administration as conclusive proof of malfeasance.

The statement of Trump supporter and attorney Rudy Giuliani is typical of the genre of unsupported vague allegations. He told CNN's *State of the Union* program during the 2016 presidential election campaign: "I'm sorry, dead people generally vote for Democrats rather than Republicans. . . . You want me to [say] that I think

<sup>&</sup>lt;sup>5</sup> See infra Part III.

<sup>&</sup>lt;sup>6</sup> For details, see RICHARD L. HASEN, THE VOTING WARS ch. 2 (2012).

<sup>&</sup>lt;sup>7</sup> See RICHARD L. HASEN, ELECTION MELTDOWN ch. 1 (2020) (describing lawsuit against Kansas law requiring documentary proof of citizenship to register to vote, and former Kansas Secretary of State Kris Kobach's characterization of the evidence of noncitizen voting to support such a law the "tip of the iceberg"); *id.* at 24 (quoting the federal district court judge examining the evidence put forward by Kobach and concluding: "There is no iceberg . . . only an icicle, largely created by confusion and administrative error").

the election in Philadelphia and Chicago is going to be fair? I would have to be a moron to say that."8

The primary purpose of such voter fraud claims, at least until the Trump presidency, was two-fold: first, such claims served as the basis to pass laws, such as voter identification laws, aimed at making it harder for people likely to vote for Democrats to register and to vote. Second, such claims riled up the Republican base and helped with fundraising by convincing supporters that Democrats were cheating and did not deserve to legitimately serve in office. The claims fueled party tribalism and animus, convincing both sides that the other was trying to manipulate election outcomes. 10

The Trump presidency moved the voting wars from a tired debate over the relative threats of voter fraud compared to voter suppression to a new level of delegitimation of the election process itself, raising the danger of election subversion.

Trump's voter fraud claims were a hallmark of his presidency. He remarkably claimed that there was voter fraud in the 2016 election that he won against Democrat Hillary Clinton, falsely stating that at least 3 million noncitizens voted in the election, all for his opponent. Not coincidentally, the number of purported fraudulent votes matched the margin by which Clinton beat Trump in the national popular vote for President.<sup>11</sup>

Once in office, Trump formed a presidential commission on voter fraud that was populated with commissioners, including former Kansas Secretary of State Kris Kobach (who served as vice-chair below Vice President Mike Pence), the Heritage Foundation's Hans von Spakovsky, and former Department of Justice lawyer and frequent FOX News contributor J. Christian Adams, known for making false and exaggerated claims of voter fraud. The Commission had only two meetings before it was disbanded, after numerous lawsuits over the Commission's transparency and its work. Its purpose appeared to have been to make findings of the potential for widespread voter fraud to serve as the predicate for Congress

<sup>&</sup>lt;sup>8</sup> Mahita Gajanan, *Donald Trump Claims Election Will Be Rigged at Polling Sites*, TIME, Oct. 17, 2016, <a href="http://time.com/4532679/donald-trump-election-rigged/">https://time.com/4532679/donald-trump-election-rigged/</a> [https://perma.cc/MG2E-EUXQ].

<sup>&</sup>lt;sup>9</sup> Although suppressing likely Democratic votes appears to be the purpose of many such laws, such laws did not always have such a suppressive effect, in part because the laws provoke backlash and countermeasures. *See* HASEN, *supra* note 7, at 44-45 & n.64. <sup>10</sup> *Id.*, ch. 1.

<sup>&</sup>lt;sup>11</sup> Aaron Blake, *Donald Trump Claims None of Those 3 to 5 Million Illegal Votes Were Cast for Him. Zero*, WASH. POST, Jan. 26, 2017, <a href="https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero/">https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero/</a>

<sup>[</sup>https://perma.cc/E7UM-S635] ("Of those [supposed 3 to 5 million fraudulent] votes cast, none of 'em come to me. None of 'em come to me. They would all be for the other side. None of 'em come to me.").

passing a law allowing states to require documentary proof of citizenship before people would be eligible to vote. 12

As the 2020 election neared with Trump's reelection chances uncertain and with the COVID-19 pandemic raging in the United States, Trump markedly increased his rhetoric charging that the upcoming election would be "rigged" or "stolen," focusing primarily on vote-by-mail. <sup>13</sup> The rate of voting by mail unsurprisingly exploded during the pandemic because many voters and election officials saw it as a safer way of balloting than voting in-person at polling places, <sup>14</sup> and Trump himself voted by mail—even allowing his ballot to be "harvested" by someone else to deliver it to Florida election officials—during the 2020 presidential primaries. <sup>15</sup> Despite Trump's statements about fraud and the unprecedented nature of conducting a modern presidential election during a pandemic, no evidence emerged anywhere in the United States of significant fraud or other problems in the administration of the 2020 U.S. presidential elections. <sup>16</sup>

Trump used social media including Twitter and Facebook to repeatedly spread false claims of fraud, going so far as to claim that the only way he could lose the election was if it was "rigged." The "cheap speech" revolution that lessened the news media's important intermediary role in helping voters receive truthful content facilitated the spread of Trump's false claims directly to tens of millions of

<sup>13</sup> For a detailed chronology, see RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT 1-19 (forthcoming 2022).

results/2020/11/14/934220380/as-trump-pushes-election-falsehoods-his-cybersecurity-agency-pushes-back [https://perma.cc/6XS7-SSLW] (citing joint U.S. government statement concluding that the 2020 election was "the most secure in American history. . . there is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised"); Samantha Putterman, Amy Sherman, & Miriam Valverde, *Rudy Giuliani, Trump Legal Team Push Conspiracy Theories, Baseless Claims about 2020 Election*, POLITIFACT, Nov. 20, 2020,

https://www.politifact.com/article/2020/nov/20/giuliani-trump-legal-team-push-conspiracy-theories/ [https://perma.cc/B9GA-54HU].

<sup>&</sup>lt;sup>12</sup> Hasen, *supra* note 7, at 25-31.

<sup>&</sup>lt;sup>14</sup> "In Georgia, more than 1.2 million people have requested absentee ballots for the state's June 9 primary—compared to just 36,200 requests for the 2016 presidential primary." Reid J. Epstein, Democrats' *Vote-by-Mail Effort Won in Wisconsin: Will It Work Elsewhere?*, N.Y. TIMES, May 10, 2020 (updated Sept. 14, 2020), <a href="https://www.nytimes.com/2020/05/10/us/politics/Wisconsin-election-vote-by-mail-.html">https://www.nytimes.com/2020/05/10/us/politics/Wisconsin-election-vote-by-mail-.html</a> [https://perma.cc/A4FJ-3K7K].

<sup>&</sup>lt;sup>15</sup> Miles Parks, *Trump, While Attacking Mail Voting, Casts Mail Ballot Again*, NPR, Aug. 19, 2020, <a href="https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again">https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again</a> [https://perma.cc/U462-VVSX].

<sup>&</sup>lt;sup>16</sup> Pam Fessler, Miles Parks, & Barbara Sprunt, *As Trump Pushes Election Falsehoods, His Cybersecurity Agency Pushes Back*, NPR, Nov. 14, 2020, <a href="https://www.npr.org/sections/live-updates-2020-election-">https://www.npr.org/sections/live-updates-2020-election-</a>

followers. Trump spread over 400 false claims of rigged or stolen elections to his supporters following the election in 2020. 17

The turning point on electoral fraud claims came after Trump lost the presidential election in November 2020 to Democrat Joe Biden. Few people who followed Trump closely expected he would ever concede defeat; the question was whether he would merely grumble about voter fraud and acquiesce to his defeat or double down on his false claims.

Trump did more than double down. He pursued a political and legal strategy aimed not just at sowing doubt but at subverting the outcome of the presidential election. This strategy, which has no precedent at any point in American history, <sup>18</sup> had many parts, but the best evidence now available showed that this was less about saving face and more about reversing election outcomes.

A key part of Trump's strategy aimed to activate the Trumpian Republican party base by continuing to relentlessly spread false claims of a stolen election on social media and through friendly cable television and news outlets such as FOX, Newsmax, and the One American News Network.<sup>19</sup> The claims included traditional false claims of ballot box stuffing and fraudulent ballots, outlandish ones about Italian space lasers being used to manipulate votes,<sup>20</sup> and tired tropes of votes being stolen in Democratic cities in swing states with large populations of people of color. On November 27, 2020, for example, Trump tweeted: "Biden can only enter the White House as President if he can prove that his ridiculous '80,000,000 votes' were not fraudulently or illegally obtained. When you see what happened in Detroit, Atlanta, Philadelphia & Milwaukee, massive voter fraud, he's got a big unsolvable problem!"<sup>21</sup>

<sup>&</sup>lt;sup>17</sup> Karen Yourish & Larry Buchanan, *Since Election Day, a Lot of Tweeting and Not Much Else for Trump*, N.Y. Times, Nov. 24, 2020, <a href="https://www.nytimes.com/interactive/2020/11/24/us/politics/trump-twitter-tweets-election-results.html">https://www.nytimes.com/interactive/2020/11/24/us/politics/trump-twitter-tweets-election-results.html</a> [https://perma.cc/LZN4-RUV2] ("In total, the president attacked the legitimacy of the election more than 400 times since Election Day, though his claims of fraud have been widely debunked"). For more details, see HASEN, *supra* note 13, at 3-11. <sup>18</sup> Ned Foley, *How to Best End "Electoral McCarthyism*," ELECTION L. BLOG, Sept. 13, 2021, <a href="https://electionlawblog.org/?p=124540">https://electionlawblog.org/?p=124540</a> [https://perma.cc/75QN-C4PZ] ("Based on the research I did for *Ballot Battles*, I'm not aware of a historical example (prior to 2020) in which a serious dispute over counting votes was accompanied by the kind of blatant falsification of reality that is the mark of McCarthyism-style demagoguery. Not even the Hayes-Tilden dispute, in my judgment, was of that nature.").

<sup>&</sup>lt;sup>19</sup> For a more detailed chronology, see HASEN, *supra* note 13, at 1-19.

<sup>&</sup>lt;sup>20</sup> Martin Pengelly, *Trump Aide Asked DoJ to Investigate Bizarre 'Italygate' Claim Votes Were Changed by Satellite*, GUARDIAN, June 6, 2021, <a href="https://www.theguardian.com/us-news/2021/jun/06/donald-trump-mark-meadows-doj-italygate">https://www.theguardian.com/us-news/2021/jun/06/donald-trump-mark-meadows-doj-italygate</a> [https://perma.cc/5CHD-M48E].

<sup>&</sup>lt;sup>21</sup> The tweet from Trump, which originally appeared on Twitter on November 27, 2020, is no longer available on Twitter (which deplatformed Trump). The archived version is available at:

This drumbeating led to public protests over vote counting and threats of violence against election officials. It also helped to bring pressure from below on elected officials to consider taking steps to turn a Trump loss into a victory. Election offices where counting and recounting took place were subject to sometimes violent protests, and election officials received death threats and other threatening messages, threats which continue to this day as Trump continues to falsely claim fraud.<sup>22</sup>

For example, Claire Woodall-Vogg, the executive director of the Milwaukee election commission, received voicemails calling for her hanging in August 2021, nine months after the end of the election.<sup>23</sup> One angry caller railed: "You mother fucker. You rigged my fucking election, you fucking piece of shit. We're going to try you and we're going to fucking convict your piece-of-shit ass. And we're going to hang you. You fucking piece—you get the fuck out of my country, you pile of shit."<sup>24</sup> A report by the Brennan Center for Justice and Bipartisan Policy Center found one in three election officials reported feeling unsafe because of their job.<sup>25</sup> As a result, we are beginning to witness a mass exodus of election officials.<sup>26</sup>

 $\frac{https://web.archive.org/web/20201211212108/https://twitter.com/realDonaldTrump/status/1332352538855747584.$ 

<sup>&</sup>lt;sup>22</sup> Linda So & Jason Szep, *Special Report: Terrorized U.S. Election Workers Get Little Help from Law Enforcement*, Reuters, Sept. 8, 2021, <a href="https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08/">https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08/</a>; John Kruzel, *Threats of Violence Spark Fear of Election Worker Exodus*, THE HILL, Aug. 2, 2021, <a href="https://perma.cc/V8VE-6EZ2]">https://perma.co/V8VE-6EZ2</a>; Nick Corasaniti, Jim Rutenberg, & Kathleen Gray, *Threats and Tensions Rise as Trump and Allies Attack Elections Process*, N.Y. TIMES, Nov. 18, 2020 (updated Feb. 1, 2021), <a href="https://www.nytimes.com/2020/11/18/us/politics/trump-election.html">https://www.nytimes.com/2020/11/18/us/politics/trump-election.html</a>

<sup>&</sup>lt;sup>23</sup> Rob Kunzia, Bob Ortega, & Casey Tolan, *In the Wake of Trump's Attacks on Democracy, Election Officials Fear for the Future of American Elections*, CNN, Sept. 13, 2021, <a href="https://www.cnn.com/2021/09/12/politics/trump-2020-future-presidential-elections-invs/index.html">https://www.cnn.com/2021/09/12/politics/trump-2020-future-presidential-elections-invs/index.html</a> [https://perma.cc/G348-8D8D].

<sup>&</sup>lt;sup>24</sup> *Id.* The audio of the call may be accessed directly at: <a href="https://pmd.cdn.turner.com/cnn/2021/images/08/27/threatening-call-wi.mp3">https://pmd.cdn.turner.com/cnn/2021/images/08/27/threatening-call-wi.mp3</a> [https://perma.cc/QT7Z-F8Z2].

<sup>&</sup>lt;sup>25</sup> Press Release, "One in Three Election Officials Report Feeling Unsafe Because of Their Job," Brennan Center for Justice at NYU Law and Bipartisan Policy Center, June 16, 2021, <a href="https://www.brennancenter.org/our-work/analysis-opinion/one-three-election-officials-report-feeling-unsafe-because-their-job">https://www.brennancenter.org/our-work/analysis-opinion/one-three-election-officials-report-feeling-unsafe-because-their-job</a> [https://perma.cc/8BNH-5WGV]. The report itself, ELECTION OFFICIALS UNDER ATTACK: HOW TO PROTECT ADMINISTRATORS AND SAFEGUARD DEMOCRACY, is available at: <a href="https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials-v7.pdf">https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials-v7.pdf</a> [https://perma.cc/9244-BPVZ].

<sup>&</sup>lt;sup>26</sup> Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES, July 2, 2021, <a href="https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html">https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html</a> [https://perma.cc/RG2P-B7S9]; Fredreka Schouten, *Personal Threats*,

Trump and his allies also filed at least 62 lawsuits aimed at either contesting the results of elections in states Biden had won or seeking to delay the official certification of votes for Biden in those states. Among the most high-profile of these cases was an original action that the state of Texas filed directly in the United States Supreme Court against at least four other states seeking to reverse the outcome of the election. The claims were based upon false evidence of voter fraud and unsupported legal theories, and the Supreme Court rejected them without a hearing. Trump and his allies eventually lost 61 cases, winning only one on an inconsequential point.<sup>27</sup>

Trump's behind-the-scenes activities were the most nefarious. He made over 30 contacts with governors, state election officials, state elected officials, and others to either stall or reverse official certification of presidential election results in the states and to facilitate state legislative action on presidential election results.<sup>28</sup> In one of the most notorious incidents captured on an audio recording,

Election Lies, and Punishing New Laws Rattle Election Officials, Raising Fears of Mass Exodus, CNN, July 17, 2021, <a href="https://www.cnn.com/2021/07/21/politics/election-officials-exodus/index.html">https://www.cnn.com/2021/07/21/politics/election-officials-exodus/index.html</a> [https://perma.cc/7F7T-22Y7].

[https://perma.cc/YBD3-H2FC] ("In a remarkable show of near-unanimity across the nation's judiciary, at least 86 judges—ranging from jurists serving at the lowest levels of state court systems to members of the United States Supreme Court—rejected at least one post-election lawsuit filed by Trump or his supporters, a Washington Post review of court filings found"); Adam Liptak, Supreme Court Rejects Texas Suit Seeking to Subvert Election, N.Y. TIMES, Dec. 11, 2020 (updated Jan. 15, 2021), <a href="https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html">https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html</a>

[https://perma.cc/AW9V-NEPC]; see also HASEN, supra note 13, at 159-62 (describing losing lawsuits).

<sup>28</sup> Anita Kumar & Gary Orr, *Inside Trump's Pressure Campaign to Overturn the Election*, Politico, Dec. 21, 2020, <a href="https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486">https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486</a> [https://perma.cc/H5MB-RU4V] ("In total, the president talked to at least 31 Republicans, encompassing mostly local and state officials from four critical battleground states he lost — Michigan, Arizona, Georgia and Pennsylvania. The contacts included at least 12 personal phone calls to 11 individuals, and at least four White House meetings with 20 Republican state lawmakers, party leaders and attorneys general, all people he hoped to win over to his side. Trump also spoke by phone

<sup>&</sup>lt;sup>27</sup> William Cummings, Joey Garrison, & Jim Sergent, By the Numbers: President Donald Failed **Efforts** to Overturn the Election, USA https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failedefforts-overturn-election-numbers/4130307001/ [https://perma.cc/79U5-44T4] ("Out of the 62 lawsuits filed challenging the presidential election, 61 have failed, according to Elias. [¶] Some cases were dismissed for lack of standing and others based on the merits of the voter fraud allegations. The decisions have come from both Democratic-appointed and Republican-appointed judges - including federal judges appointed by Trump."); Rosalind S. Helderman & Elise Viebeck, "The Last Wall": How Dozens of Judges across the Political Spectrum Rejected Trump's Efforts to Overturn the Election, WASH. POST, https://www.washingtonpost.com/politics/judges-trump-electionlawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8 story.html

Trump pressured Georgia Secretary of State Brad Raffensperger to "find" at least 11,780 votes to reverse the results in Georgia for Joe Biden. Raffensperger refused.<sup>29</sup>

In addition to reaching out to state officials, Trump was working with a deputy attorney general in the Justice Department, Jeffrey Clark, to get DOJ to weigh in on election disputes by falsely claiming fraud cost Trump the election. Clark prepared letters that would have had DOJ falsely claim that there were serious irregularities in the conduct of the election in states where Biden won, and he pushed for DOJ to file federal litigation in the Supreme Court mirroring the defeated Texas lawsuit. Attorney General Jeffrey Rosen rejected Clark's attempts, and Trump considered firing Rosen and replacing him with Clark, an attempt that apparently failed only because several high-profile DOJ officials threatened to resign in protest.<sup>30</sup>

Putting together all of these actions, the end game was to get state legislatures to rely on purported evidence of fraud to declare alternative slates of presidential electors to be submitted to Congress for counting despite a lack of authority under state or federal law to do so; to argue that the federal Electoral Count Act, which governed the counting of Electoral College votes, permitted Congress to consider these alternative slates of electors because the fraud constituted a "failed" election under the Act; to get Vice President Mike Pence to delay the counting of Electoral College votes by January 6 until enough states could declare alternative slates of electors to call the presidential election into question; and ultimately to prevent Biden from obtaining a majority of Electoral College votes, triggering a procedure

about his efforts with numerous House Republicans and at least three current or incoming Senate Republicans."); Maria Polletta, *Trump Lashes Out at Gov. Doug Ducey Following Certification of Arizona Election Results*, ARIZ. CENT., Nov. 30, 2020 (updated Dec. 1, 2020), <a href="https://www.azcentral.com/story/news/politics/elections/2020/11/30/president-trump-slams-arizona-gov-ducey-after-election-certification/6472784002/">https://www.azcentral.com/story/news/politics/elections/2020/11/30/president-trump-slams-arizona-gov-ducey-after-election-certification/6472784002/</a>

[https://perma.cc/39NC-LMGE]; Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election Results*, POLITICO, Nov. 21, 2020, <a href="https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031">https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031</a> [https://perma.cc/UNT9-K3RV].

<sup>29</sup> Amy Gardner, "I Just Want to Find 11,780 Votes": In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor, WASH. POST, Jan. 3, 2021, <a href="https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\_story.html">https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\_story.html</a> [https://perma.cc/ZF8M-9JS6].

<sup>30</sup> Katie Benner, Former Acting Attorney General Testifies About Trump's Effort to Subvert Election, N.Y. TIMES, Aug. 7, 2021, <a href="https://www.nytimes.com/2021/08/07/us/politics/jeffrey-rosen-trump-election.html">https://www.nytimes.com/2021/08/07/us/politics/jeffrey-rosen-trump-election.html</a> [https://perma.cc/993B-AF7X]; Katherine Faulders & Alexander Mallin, DOJ Officials Rejected Colleague's Request to Intervene in Georgia's Election Certification: Emails, ABC NEWS, Aug. 7, 2021, <a href="https://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198">https://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198</a> [https://perma.cc/EAE4-AC4D].

for choosing the President via votes by each state's House of Representatives' delegation that would have favored Trump.<sup>31</sup>

Pence refused to participate in the delay,<sup>32</sup> and the counting on January 6, 2021 confirmed Biden's victory, even as it was interrupted by a violent invasion of the United States Capitol in the middle of the vote counting.<sup>33</sup> Even after the insurrection, 138 Republican members of the House and 7 Republican Senators voted to object to the counting of Pennsylvania's electoral college votes based upon spurious grounds.<sup>34</sup>

Bravery of Republican and other election officials and elected officials prevented Trump's gambit from succeeding. It was not just Pence, Raffensperger, and Rosen who stood up to Trump, but also Republican governors, Republican-appointed election officials, and others, many of whom faced pressure and condemnation from both Trump and the base of the Republican Party. Raffensperger faces a Republican primary challenge as he runs for reelection as Secretary of State against Jody Hice, a current member of Congress who has parroted Trump's claims of a stolen 2020 election. 36

Trump egged on his supporters to attend "wild" protests in Washington, D.C., and thousands of his supporters obliged. And at his January 6 rally, he directed his

<sup>&</sup>lt;sup>31</sup> U.S. CONST. AMEND. XII; 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct"); Deanna Paul, *Trump Campaign Wants States to Override Electoral Vote for Biden. Is That Possible?*, WALL ST. J., Nov. 21, 2021, <a href="https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695">https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695</a> [https://perma.cc/SD9D-FU36].

<sup>&</sup>lt;sup>32</sup> Maggie Haberman & Annie Karni, *Pence Said to Have Told Trump He Lacks Power to Change Election Result*, N.Y. TIMES, Jan. 5, 2021 (updated Jan. 15, 2021), <a href="https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html">https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html</a> [https://perma.cc/QZY9-PJY5].

<sup>&</sup>lt;sup>33</sup> Lisa Mascaro, Eric Tucker, Mary Clark Jalonick, & Andrew Taylor, *Biden Win Confirmed after Pro-Trump Mob Storms US Capitol*, AP, Jan. 7, 2021, https://apnews.com/article/joe-biden-confirmed-0409d7d753461377ff2c5bb91ac4050c.

<sup>&</sup>lt;sup>34</sup> Harry Stevens, Daniela Santamariña, Kate Rabinowitz, Kevin Uhrmacher & John Muyskens, *How Members of Congress Voted on the Counting of the Electoral College Vote*, WASH. POST, Jan. 7, 2021, <a href="https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/">https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/</a> [https://perma.cc/AN8W-Q93K].

<sup>&</sup>lt;sup>35</sup> Helderman & Viebeck, *supra* note 27; Richard L. Hasen, *More and More Republican Officials are Standing Up to Trump and His Effort to Overturn the Election*, SLATE, Dec. 11, 2021, <a href="https://slate.com/news-and-politics/2020/12/republican-officials-who-have-gone-against-trump-barr-ducey-kemp.html">https://slate.com/news-and-politics/2020/12/republican-officials-who-have-gone-against-trump-barr-ducey-kemp.html</a> [https://perma.cc/D73V-BRJ2].

<sup>&</sup>lt;sup>36</sup> Ian Millhiser, *Jody Hice Tried to Overturn the 2020 Election. Now He Wants to Be in Charge of Georgia's Elections*, Vox, Mar. 22, 2021, <a href="https://www.vox.com/2021/3/22/22345029/jody-hice-2020-election-donald-trump-georgia-secretary-of-state-brad-raffensperger">https://www.vox.com/2021/3/22/22345029/jody-hice-2020-election-donald-trump-georgia-secretary-of-state-brad-raffensperger</a>.

supporters to the Capitol after he and other speakers once again claimed a rigged and stolen election and demanded that Vice President Pence and others do something about it.<sup>37</sup>

The January 6, 2021 riot left over 140 law enforcement officers injured, 4 Trump supporters dead, and four Capitol police officers who died by suicide by August 2021.<sup>38</sup> The officers' injuries were serious, including a lost eye, broken ribs and spinal disks, and concussions; insurrectionists tased one officer so many times that he had a heart attack.<sup>39</sup>

It was first successful violent attack on the Capitol since the British attacked during the War of 1812.<sup>40</sup> Had things gone even slightly differently, the Vice President and congressional leadership could have been captured or killed; the events could have provoked a military response and the counting of election results never completed.<sup>41</sup> Thanks to the bravery of law enforcement officials and members of Congress, the counting resumed after the violence, and Biden was found to be the winner early on the morning of January 7.<sup>42</sup>

<sup>&</sup>lt;sup>37</sup> For a detailed chronology, see Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump, Jan. 28, 2021, at 12–13,

https://judiciary.house.gov/uploadedfiles/house\_trial\_brief\_final.pdf?utm\_campaign=570 6-519 [https://perma.cc/6SWZ-TEST].

<sup>&</sup>lt;sup>38</sup> Jan Wolfe, Four Officers Who Responded to U.S. Capitol Attack Have Died by Suicide, REUTERS, Aug. 2, 2021, <a href="https://www.reuters.com/world/us/officer-who-responded-us-capitol-attack-is-third-die-by-suicide-2021-08-02">https://www.reuters.com/world/us/officer-who-responded-us-capitol-attack-is-third-die-by-suicide-2021-08-02</a>; Peter Hermann, Two Officers Who Helped Fight the Capitol Mob Died by Suicide. Many More Are Hurting, WASH. POST, Feb. 21, 2021, <a href="https://www.washingtonpost.com/local/public-safety/police-officer-suicides-capitol-riot/2021/02/11/94804ee2-665c-1eb-886d-5264d4ceb46d\_story.html">https://www.washingtonpost.com/local/public-safety/police-officer-suicides-capitol-riot/2021/02/11/94804ee2-665c-1eb-886d-5264d4ceb46d\_story.html</a> [https://perma.cc/5E22-XZPA].

<sup>&</sup>lt;sup>39</sup> Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan.* 6, N.Y. TIMES, Feb. 13, 2021 (updated Mar. 19, 2021), <a href="https://www.nytimes.com/2021/02/13/us/politics/capitol-riots-impeachment-trial.html">https://www.nytimes.com/2021/02/13/us/politics/capitol-riots-impeachment-trial.html</a> [https://perma.cc/VBE5-UYSY].

<sup>&</sup>lt;sup>40</sup> Jackie Salo, *US Capitol Building Invaded for the First Time Since War of 1812*, N.Y. POST, Jan. 6, 2021, <a href="https://nypost.com/2021/01/06/us-capitol-building-invaded-for-first-time-since-war-of-1812/">https://nypost.com/2021/01/06/us-capitol-building-invaded-for-first-time-since-war-of-1812/</a> [https://perma.cc/93YK-5ZZH].

<sup>&</sup>lt;sup>41</sup> Ashley Parker, Carol D. Leonnig, Paul Kane, & Emma Brown, *How the Rioters Who Stormed the Capitol; Came Dangerously Close to Pence*, WASH. POST, Jan. 15, 2021, <a href="https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207">https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207</a> story.html

<sup>[</sup>https://perma.cc/QZ8X-6D5F]; Adam Goldman, John Ismay, & Hailey Fuchs, Man Who Broke into Pelosi's Office and Others Are Charged in Capitol Riot, N.Y. TIMES, Jan. 8, 2021 (updated Jan. 10, 2021), <a href="https://www.nytimes.com/2021/01/08/us/politics/capitol-riot-charges.html">https://www.nytimes.com/2021/01/08/us/politics/capitol-riot-charges.html</a> [https://perma.cc/XT3K-RMLC]; New Timeline Shows Just How Close Rioters Got to Pence and His Family, CNN, Jan. 15, 2021, <a href="https://www.cnn.com/videos/politics/2021/01/15/mike-pence-close-call-capitol-riot-foreman-vpx.cnn">https://www.cnn.com/videos/politics/2021/01/15/mike-pence-close-call-capitol-riot-foreman-vpx.cnn</a> [https://perma.cc/7R2D-KHCP].

<sup>&</sup>lt;sup>42</sup> Mascaro, Tucker, Jalonick, & Taylor, *supra* note 33.

Trump reluctantly left office at his constitutionally prescribed time on January 20, 2021, but he refused to participate in the custom of attending his successor's inauguration and affirming the peaceful transition of power that has been the hallmark of U.S. elections. <sup>43</sup> Trump instead continues to insist falsely that the 2020 election was stolen, even as many of his comments on the subject reached fewer readers thanks to the decision of Facebook and Twitter to remove his accounts from their websites. <sup>44</sup>

Deplatforming Trump did little to dampen the enthusiasm among some conservatives and Republicans to relitigate November 2020 and insist on a Trump victory. Arizona's Republican-led Senate ordered an "audit" of the state's presidential election results months after Biden took office. The firm employed a firm, "Cyber Ninjas," that had no experience conducting election audits and that was headed by someone who parroted Trump's false claims of a stolen elections. Pressure fell on Republicans in other states to emulate the "audit," and similar bogus investigations began in Wisconsin and Pennsylvania. 46

Those Republican election officials and elected officials who stood up to Trump have faced censure, removal from office, and other consequences. Republican party organizations have condemned Secretaries of State and governors who vouched for the fairness of the 2020 election;<sup>47</sup> a Republican on

<sup>&</sup>lt;sup>43</sup>Ayesha Roscoe, For 1st Time in 150 Years, Outgoing President Doesn't Attend Inauguration, NPR, Jan. 20, 2021, <a href="https://www.npr.org/2021/01/20/958905703/for-1st-time-in-150-years-outgoing-president-doesnt-attend-inauguration">https://perma.cc/C37L-time-in-150-years-outgoing-president-doesnt-attend-inauguration</a> [https://perma.cc/C37L-W5RU]; see also Michael D. Shear, Maggie Haberman, Nick Corasaniti, & Jim Rutenberg, Trump Administration Approves Start of Formal Transition to Biden, N.Y. TIMES, Nov. 23, 2020 (updated Nov. 24, 2020), <a href="https://www.nytimes.com/2020/11/23/us/politics/trump-transition-biden.html">https://www.nytimes.com/2020/11/23/us/politics/trump-transition-biden.html">https://perma.cc/64N7-QA97</a>].

<sup>&</sup>lt;sup>44</sup> On the deplatforming of Trump by Facebook and Twitter, see HASEN, *supra* note 13, at 2, 15-16, 123, 145-57.

<sup>&</sup>lt;sup>45</sup> Michael Wines, *Half a Year After Trump's Defeat, Arizona Republicans Are Recounting the Vote*, N.Y. TIMES, Apr. 25, 2021 (updated July 9, 2021), <a href="https://www.nytimes.com/2021/04/25/us/Election-audit-Arizona-Republicans.html">https://www.nytimes.com/2021/04/25/us/Election-audit-Arizona-Republicans.html</a> [https://perma.cc/6SFV-DDC2].

<sup>&</sup>lt;sup>46</sup> Nick Corasantini, Republicans Seek Pennsylvania Voters' Personal Information as They Try to Review the 2020 Results, N.Y. Times, Sept. 15, 2021, <a href="https://www.nytimes.com/2021/09/15/us/politics/pennsylvania-election-audit-republicans.html">https://www.nytimes.com/2021/09/15/us/politics/pennsylvania-election-audit-republicans.html</a> [https://perma.cc/K7L9-MWDP]; Scott Bauer, Wisconsin Election Clerks Say GOP Investigator's Inquiry Landed in Junk Folders, AP, Sept. 14, 2021, <a href="https://www.twincities.com/2021/09/14/wisconsin-election-clerks-say-gop-investigators-inquiry-landed-in-junk-folders/">https://www.twincities.com/2021/09/14/wisconsin-election-clerks-say-gop-investigators-inquiry-landed-in-junk-folders/</a> [https://perma.cc/GMP7-62UW].

<sup>&</sup>lt;sup>47</sup> Michelle L. Price, Nevada GOP Censures Election Official Who Defended Results, AP, Apr. 11, 2021, <a href="https://apnews.com/article/donald-trump-barbara-cegavske-nevada-elections-bccf4ffe9a52dd6ebbe6e93ad0285e5a">https://apnews.com/article/donald-trump-barbara-cegavske-nevada-elections-bccf4ffe9a52dd6ebbe6e93ad0285e5a</a>; Lisa Lerer, Republicans in Two Rural Georgia Counties Censure Gov. Brian Kemp and Others, N.Y. TIMES, Apr. 13, 2021

Michigan's state board of canvassers, who served in a ceremonial role in certifying the state's presidential election results, was removed from his position by Republicans unhappy that he did his ministerial duty. 48 Republican members of the House who voted for his impeachment for events related to the January 6 insurrection have faced threats as well. Representative Anthony Gonzalez decided not to run for reelection, citing the threats and calling Trump "a cancer for the country."

The state of Georgia passed a law removing Secretary of State Raffensperger from his position on the state election board, replacing him with someone chosen by the state legislature.<sup>50</sup> That same legislation gave the board authority to take over county election boards, including in heavily Democratic counties such as Fulton County.<sup>51</sup>

 $(updated\ Aug.\ 30,\ 2021),\ \underline{https://www.nytimes.com/2021/04/14/us/politics/georgia-kemp-raffensperger-trump-republicans.html}\ [https://perma.cc/RD8A-R4VU].$ 

<sup>51</sup> See id.:

Another power play by Republican state lawmakers. Tensions have long simmered between state and county election officials in Georgia, particularly in Fulton County, the largest Democratic hub in the state, where officials say they have been targeted and deprived of support by Republicans at the state level. Election officials in Fulton County, for their part, have had their historical share of mistakes and mismanagement.

Now the State Election Board, newly influenced by the partisan Legislature, will have the power to suspend county election officials. That part of the new law alarmed some Democratic legislators, who noted that it could particularly affect counties like Fulton, which contains 15 percent of those in the state who voted Democratic in the November election.

<sup>&</sup>lt;sup>48</sup> Dave Boucher, Whitmer Appoints New Member to Elections Board After GOP Wanted Replacement, DETROIT FREE PRESS, Jan. 19, 2021, <a href="https://www.freep.com/story/news/politics/elections/2021/01/19/tony-daunt-whitmer-gop-michigan-board-state-canvassers/4210262001/">https://www.freep.com/story/news/politics/elections/2021/01/19/tony-daunt-whitmer-gop-michigan-board-state-canvassers/4210262001/</a> [https://perma.cc/U3R4-6WG9].

<sup>&</sup>lt;sup>49</sup> Jonathan Martin, *Ohio House Republican, Calling Trump 'a Cancer,' Bows Out of 2022*, N.Y. TIMES, Sept. 16, 2021 (updated Sept. 17, 2021), <a href="https://www.nytimes.com/2021/09/16/us/politics/anthony-gonzalez-ohio-trump.html">https://www.nytimes.com/2021/09/16/us/politics/anthony-gonzalez-ohio-trump.html</a> [https://perma.cc/2Q4V-Q6VZ] ("The congressman, who has two young children, emphasized that he was leaving in large part because of family considerations and the difficulties that come with living between two cities. But he made clear that the strain had only grown worse since his impeachment vote, after which he was deluged with threats and feared for the safety of his wife and children.").

<sup>&</sup>lt;sup>50</sup> Nick Corasantini & Reid J. Epstein, *What Does Georgia's Voting Law Really Do?*, N.Y. TIMES, Apr. 2, 2021 (updated Aug. 18, 2021), <a href="https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html">https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html</a> [https://perma.cc/4WWL-DXB5].

The Georgia law was one of 148 bills across 38 states that give or would give partisan state legislators greater control of the election process over state and local election officials, according to a recent report by the States United Democracy Center, Protect Democracy, and Law Forward. <sup>52</sup> In Iowa, local election officials could face criminal penalties for sending an absentee ballot application to a voter unless first requested by the voter; <sup>53</sup> in Texas, poll workers could face fines for interfering with the activities of "poll watchers" who now can engage in intimidation and interference at polling places. <sup>54</sup> While many of these laws have provisions that might be seen as aimed at voter suppression, at least some of them appear geared at providing a path for overturning election results. <sup>55</sup> Perhaps the most troubling bills introduced so far, but not passed, are those in the state of Arizona, which would have given the state legislature authority to ignore the vote of Arizonans and appoint its own slate of presidential electors upon flimsy allegations of election irregularities or for any reason at all. <sup>56</sup>

The changed laws and continued threats and harassment of election officials has caused an unprecedented exodus of election officials, who already faced harsh conditions and budget shortfalls.<sup>57</sup> The loss of these officials creates two simultaneous risks to election integrity. First, lack of professionalization increases the risk of election administrator error, which in the current hyperpolarized atmosphere in the United States can further undermine confidence in the election

The law does state that the bar for suspension is high: either a minimum of three clear violations of State Election Board rules, or "demonstrated nonfeasance, malfeasance, or gross negligence in the administration of the elections" in two consecutive elections.

<sup>&</sup>lt;sup>52</sup> States United Democracy Center, Protect Democracy, and Law Forward, "A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration," Apr. 21, 2021, at 1, <a href="https://s3.documentcloud.org/documents/20688594/democracy-crisis-report-april-21.pdf">https://s3.documentcloud.org/documents/20688594/democracy-crisis-report-april-21.pdf</a> [https://perma.cc/3HBS-XAS2] [hereafter, *Democracy Crisis in the Making*].

<sup>&</sup>lt;sup>53</sup> *Id.* at 26 (citing S.B. 413, 89th Gen. Assemb., Reg. Sess. (Iowa 2021)).

<sup>&</sup>lt;sup>54</sup> Sean Morales-Doyle, *We're Suing Texas Over Its New Voter Suppression Law*, Brennan Center for Justice, Sept. 3, 2021 (updated Sept. 7, 2021), <a href="https://www.brennancenter.org/our-work/analysis-opinion/were-suing-texas-over-its-new-voter-suppression-law">https://www.brennancenter.org/our-work/analysis-opinion/were-suing-texas-over-its-new-voter-suppression-law</a> [https://perma.cc/9TBM-83GE] (new Texas law "threatens poll workers with criminal prosecution if they try to stop partisan poll watchers from harassing or intimidating voters"). On the general danger of election surveillance intimidating voters and poll workers, see Rebecca Green, *Election Surveillance*, WAKE FOREST L. REV. (forthcoming 2022).

<sup>&</sup>lt;sup>55</sup> Green, *supra* note 54; Lawrence Norden, *Protecting American Democracy is No Crime; New Laws Could Make Election Officials Legal Targets*, FOREIGN AFFAIRS, Apr. 7, 2021, <a href="https://www.foreignaffairs.com/articles/united-states/2021-04-07/protecting-american-democracy-no-crime">https://www.foreignaffairs.com/articles/united-states/2021-04-07/protecting-american-democracy-no-crime</a> [https://perma.cc/5RCD-D7UK].

<sup>&</sup>lt;sup>56</sup> See Democracy Crisis in the Making, supra note 52, at 9-10 (describing and criticizing proposed Arizona laws).

<sup>&</sup>lt;sup>57</sup> See supra notes 22-23 and accompanying text.

process. Second, vacancies in election positions in the current atmosphere may facilitate the population of election officials with those who believe the 2020 election was stolen and who may be more willing to break the rules out of a mistaken desire to level the playing field. Thousands of Trump loyalists, at the urging Trump ally Steve Bannon, have been filling positions as Republicans on local election boards, raising the serious danger of vote miscounting in future elections.<sup>58</sup>

The risk of election officials undermining the security of election systems was on full display in August 2021, when the Mesa County, Colorado election administrator Tina Peters, did an interview at a conference my "My Pillow" owner Mike Lindell that perpetuated false statements that the 2020 election was stolen. Although Peters denied releasing the source code used on Dominion voting machines, she admitted copying it, and the Lindell conference made the code publicly available, raising serious questions about whether those machines would now be more vulnerable to hacking. <sup>59</sup>

And among the Republican base, beliefs have hardened that the 2020 election was stolen. Trump's stolen election claim has become a core article of faith, part of what it means in the contemporary United States to *be* a Republican: in a September 2021 CNN poll, 59 percent of Republicans and Republican-leaning independents said believ[ing] that Donald Trump won the 2020 election" was "very" or "somewhat" important to what it means to be a Republican today. Overall, 36 percent of Americans in September 2021 did not believe that Biden was the legitimate president. "Among Republicans, 78% say that Biden did not win and 54% believe there is solid evidence of that, despite the fact that no such evidence exists. That view is also deeply connected to support for Trump." The report further found that "Among Republicans who say Trump should be the leader

as Amadonf Do

<sup>&</sup>lt;sup>58</sup> Isaac Arnsdorf, Doug Bock Clark, Alexandra Berzon & Anjeanette Damon, *Heeding Steve Bannon's Call, Election Deniers Organize to Seize Control of the GOP — and Reshape America's Elections*, PROPUBLICA, Sept. 2, 2021,

https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections [https://perma.cc/JJ5J-Z3FF] ("ProPublica contacted GOP leaders in 65 key counties, and 41 reported an unusual increase in signups since Bannon's campaign began. At least 8,500 new Republican precinct officers (or equivalent lowest-level officials) joined those county parties. We also looked at equivalent Democratic posts and found no similar surge.").

<sup>&</sup>lt;sup>59</sup> Nick Corasantini, *G.O.P. Election Reviews Create a New Kind of Security Threat*, N.Y. TIMES, Sept. 1, 2021, <a href="https://www.nytimes.com/2021/09/01/us/politics/gop-us-election-security.html">https://www.nytimes.com/2021/09/01/us/politics/gop-us-election-security.html</a> [https://perma.cc/L3T3-BCTX].

<sup>&</sup>lt;sup>60</sup> SSRS Poll for CNN, Embargoed for Release Sept. 12, 2021, at 10, <a href="http://cdn.cnn.com/cnn/2021/images/09/12/rel5c.-.partisanship.pdf">http://cdn.cnn.com/cnn/2021/images/09/12/rel5c.-.partisanship.pdf</a> [https://perma.cc/D5EZ-53SH].

<sup>&</sup>lt;sup>61</sup> Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Most Americans Feel Democracy is Under Attack in the US*, CNN, Sept. 15, 2021, <a href="https://www.cnn.com/2021/09/15/politics/cnn-poll-most-americans-democracy-under-attack/index.html">https://www.cnn.com/2021/09/15/politics/cnn-poll-most-americans-democracy-under-attack/index.html</a> [https://perma.cc/MTE5-YX6M].

of the party, 88% believe Biden lost — including 64% who say there is solid evidence that he did not win — while among those Republicans who do not want Trump to lead the Party, 57% say Biden won legitimately."62

Most amazing about the continued Republican belief that the election was stolen from Trump is the utter lack of reliable evidence supporting the claim; a pandemic-laden election raised the risk of serious errors in election administration that could have been parlayed into false charges of malfeasance. But this was perhaps the best administered presidential election in American history.

Given the new Republican orthodoxy of a stolen 2020 election, it is no wonder that false claims of voter fraud costing Republicans' election victories have spread beyond Trump. Greg Sargent notes that other Republican politicians, including Adam Laxalt, running for the U.S. Senate seat in Nevada, and Larry Elder, who ran unsuccessfully in the recall election against California's Democratic governor Gavin Newsom, preemptively and without evidence have raised claims of stolen elections preemptively, in Elder's case before polls had even closed. (After the election in which the recall vote failed ay an almost 2-1 margin, Elder quietly abandoned those claims on his website. (4) As Sargent wrote, "So is this really how it's going to be? Are more and more Republican candidates across our great land going to treat it as a requirement that they cast any and all election losses as dubious or illegitimate by definition?"

#### II. THREE PATHS TO ELECTION SUBVERSION IN THE U.S.

It is a long way from thinking that an American President was illegitimately elected to the possibility of election subversion. After all, millions of Democrats and others did not accept the legitimacy of George W. Bush's presidency after the disputed 2000 election ended up in the United States Supreme Court, with the Court's conservatives siding with Bush and ending Al Gore's attempt to recount some ballots following Bush's razor-thin lead in Florida. <sup>66</sup> But few thought lack

<sup>&</sup>lt;sup>62</sup> *Id*.

<sup>&</sup>lt;sup>63</sup> Greg Sargent, *Opinion: A Dangerous Trend Among GOP Candidates Shows the Trump Threat is Here to Stay*, WASH. POST, Sept. 10, 2021, <a href="https://www.washingtonpost.com/opinions/2021/09/10/dangerous-trend-among-gop-candidates-shows-trump-threat-is-here-stay/">https://www.washingtonpost.com/opinions/2021/09/10/dangerous-trend-among-gop-candidates-shows-trump-threat-is-here-stay/</a> [https://perma.cc/63JE-FS8D].

<sup>&</sup>lt;sup>64</sup> Lara Korte, *Larry Elder's Voter Fraud Messaging Depressed Republican Turnout, GOP Consultant Charges*, SAC. BEE, Sept. 16, 2021, <a href="https://www.sacbee.com/news/politics-government/capitol-alert/article254265763.html">https://www.sacbee.com/news/politics-government/capitol-alert/article254265763.html</a> ("When asked why the language claiming voter fraud was removed from Elder's website, as The Sacramento Bee and others noted on Tuesday, [Elder advisor Jeff] Corless said to his knowledge, nothing had been changed. That is incorrect; The Bee has screenshots of content referring to the 'twisted' results of the recall, which no longer appears on the site.").

<sup>&</sup>lt;sup>65</sup> Sargent, *supra* note 63.

<sup>&</sup>lt;sup>66</sup> Joseph Carroll, Seven Out of 10 Americans Accept Bush as Legitimate President; Seventeen Percent Continue to Say Bush "Stole" Election, Gallup, July 17, 2001,

of Democrats' acceptance of Bush's victory would lead to the demise of American democracy.

There is much more reason for concern this time, in part because Trump has galvanized a popular movement around his stolen election claim, while Gore was willing to accept the Supreme Court's determination regarding his request for a recount and conceded defeat when the Court ruled against him. <sup>67</sup> The terrorist attacks on the United States on September 11, 2001 also blunted political forces against Bush. <sup>68</sup>

Trump's actions also must be considered in the context of his entire presidency, which featured consistent attacks on institutions of civil society and government that help preserve order and promote legitimacy, including not just the opposition Democratic party but also the judiciary, the free press, and the FBI. <sup>69</sup> Scholars such as Larry Diamond, Steven Levitsky, and Daniel Ziblatt who study how democratic countries backslide and move toward authoritarianism, like Viktor Orbán's Hungary, see serious warning signs for the United States. <sup>70</sup> Manipulating election outcomes is a key component in many states' slides into authoritarianism.

https://news.gallup.com/poll/4687/seven-americans-accept-bush-legitimate-

president.aspx [https://perma.cc/MER9-HG3P] ("In polls conducted since December, a little more than one-third of all Democrats have said that Bush stole the election, while roughly half have said that Bush won the presidency on a technicality, and just 15% said he won fair and square. By comparison, more than eight in 10 Republicans feel Bush won the election fair and square, and only 11% of them feel Bush won on a technicality. Independents fall in the middle, with 47% saying Bush won fair and square, while more than a third say he won on a technicality.").

<sup>&</sup>lt;sup>67</sup> HOWARD GILLMAN, THE VOTES THAT COUNTED 127-28 (2001).

<sup>&</sup>lt;sup>68</sup> "George W. Bush, who had become president nine months earlier after a fiercely contested election, saw his job approval rise 35 percentage points in the space of three weeks. In late September 2001, 86% of adults – including nearly all Republicans (96%) and a sizable majority of Democrats (78%) – approved of the way Bush was handling his job as president." Hannah Hartig & Carroll Doherty, *Two Decades Later, the Enduring Legacy of 9/11*, Pew Research Center, Sept. 2, 2021, <a href="https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/">https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/</a> [https://perma.cc/JB68-PR7N].

<sup>&</sup>lt;sup>69</sup> Michael J. Klarman, Foreword: The Degradation of American Democracy—and the Court, 134 HARV. L. REV. 1, 20-45 (2020).

<sup>&</sup>lt;sup>70</sup> The already classic works drawing lessons for other countries for the risk of authoritarianism in the United States are STEVEN LEVITSKY & DANIEL ZIBLATTT, HOW DEMOCRACIES DIE (2018) and LARRY DIAMOND, ILL WINDS (2019). Klarman, *supra* note 69, at 11-19, nicely summarizes this literature, obviating the need for a restating here. *See also* Jacob M. Grumbach, *Laboratories of Democratic Backsliding* 24-26 (draft under review dated April 5, 2021, *available at*: <a href="https://bit.ly/3EqxRup">https://bit.ly/3EqxRup</a>) ("In this article, we use the State Democracy Index to test a set of prominent theories of the causes of democratic expansion and backsliding in the U.S. Drawing on American and comparative democracy literatures, we develop predictions about the drivers of democratic expansion and backsliding. We estimate the effects of political competition, polarization, and racial demographic change on states' democratic performance. The results suggest that none of

Indeed, in July 2021, Levitsky and Ziblatt penned an essay for *The Atlantic* entitled, "*The Biggest Threat to Democracy is the GOP Stealing the Next Election*." They write:

Elections require forbearance. For elections to be democratic, all adult citizens must be equally able to cast a ballot and have that vote count. Using the letter of the law to violate the spirit of this principle is strikingly easy. Election officials can legally throw out large numbers of ballots on the basis of the most minor technicalities (e.g., the oval on the ballot is not entirely penciled in, or the mail-in ballot form contains a typo or spelling mistake). Large-scale ballot disqualification accords with the letter of the law, but it is inherently antidemocratic, for it denies suffrage to many voters. Crucially, if hardball criteria are applied unevenly, such that many ballots are disqualified in one party's stronghold but not in other areas, they can turn an election.<sup>72</sup>

Of greatest concern is that the activities of Trump and his allies from the November 2020 election through January 7, 2021 served as dress rehearsal for how to subvert election results in 2024 or in other future elections. This Part describes three ways in which election subversion may emerge in the United States as demonstrated by the post-2020 election period.

1. Usurpation of Voter Choice for President. By far the most likely way in which election subversion would infect United States elections in the near term is through a respectable bloodless coup dependent upon technical legal arguments overcoming valid election results.<sup>73</sup> Trump and his allies began to make such arguments in 2020, and this path is much simpler than the bogus claims of voter fraud that failed to work for Trump in 2020. Indeed, in a March 2021 interview with Washington Post journalists Carol Leonnig and Phil Rucker, Trump sounded the same themes about the 2020 election:

these factors is central to dynamics in state democratic performance. Republican control of state government, however, consistently and profoundly reduces state democratic performance during this time period. [¶] The large effects of Republican control, contrasted with the minimal effects of within-state dynamics, speak to the nationalization of American politics in recent decades.").

<sup>&</sup>lt;sup>71</sup> Steven Levitsky & Daniel Ziblatt, *The Biggest Threat to Democracy is the GOP Stealing the Next Election*, THE ATLANTIC, July 9, 2021, <a href="https://www.theatlantic.com/ideas/archive/2021/07/democracy-could-die-2024/619390/">https://www.theatlantic.com/ideas/archive/2021/07/democracy-could-die-2024/619390/</a> [https://perma.cc/GA53-6GW2].

<sup>72</sup> *Id.* 

<sup>&</sup>lt;sup>73</sup> I first advanced an argument along these lines in Richard L. Hasen, *Trump is Planning a Much More Respectable Coup Next Time*, SLATE, Aug. 5, 2021, <a href="https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html">https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html</a> [https://perma.cc/KRC5-PEUQ].

[T]he legislatures of the states did not approve all of the things that were done for those elections. And under the Constitution of the United States, they have to do that. And the Supreme Court, they didn't find fact—don't forget, they didn't say they disagreed—they said we are not going to hear the case. I'm very disappointed in the Supreme Court. Had Mike Pence had the courage to send it back to the legislatures, you would have had a different outcome, in my opinion.... Before you even start about the individual corruptions ... when you are handed these votes, and you know that the legislature of any one of those states did not approve those vast changes—hours, days, when to vote—it was all done, local politicians and local judges—right there you should have sent them back to the legislatures. And I can show you letters from legislatures. They wanted them back... Had they gotten them, it would have been a much different story.<sup>74</sup>

The technical legal argument depends upon arcana of the Constitution's and federal statutory law rules for choosing presidential electors and counting their votes. It begins with Article II of the Constitution, which gives each state "legislature" the power to set the manner for choosing presidential electors. <sup>75</sup> A parallel provision in Article I, section 4 gives each state "legislature" the power to set the rules for congressional elections, subject to congressional override. <sup>76</sup>

Although each state and Washington, D.C. allow voters to vote directly for President, with the winner of the state's election entitled to that state's electoral college votes,<sup>77</sup> the Supreme Court affirmed in its 2000 *Bush v. Gore* case ending the 2020 election controversy that a state legislature could reclaim its power directly to appoint presidential electors in future elections.<sup>78</sup> In 2020, voters cast

<sup>&</sup>lt;sup>74</sup> *Id.* (transcribing audio of March 2021 interview posted at: <a href="https://www.washingtonpost.com/politics/2021/07/21/trump-interview-i-alone-can-fix-it/">https://www.washingtonpost.com/politics/2021/07/21/trump-interview-i-alone-can-fix-it/</a>).

<sup>&</sup>lt;sup>75</sup> U.S. CONST, ART. II.

<sup>&</sup>lt;sup>76</sup> *Id.*, Art. I, § 4.

<sup>&</sup>lt;sup>77</sup> All states aside from Maine and Nebraska award the state's electoral college votes to the plurality winner of the presidential election in the state. Those states assign a portion of each state's electoral college votes to the winner by congressional district. Meilan Solly, *Why Do Maine and Nebraska Split Their Electoral Votes?*, SMITHSONIAN MAG., Nov. 5, 2020, <a href="https://www.smithsonianmag.com/smart-news/why-do-maine-and-nebraska-split-their-electoral-votes-180976219/">https://www.smithsonianmag.com/smart-news/why-do-maine-and-nebraska-split-their-electoral-votes-180976219/</a> [https://perma.cc/3HVE-NL9B]. With the Biden victory in one of Nebraska's congressional districts in 2020, the state is considering moving to a winner-take-all system for the state. Jon Kipper, *NE Bills Would Combine Electoral Votes and Require Voter ID; NE-O2 Would Not Be Counted Separately*, KMTV, Jan. 8, 2021 (updated Jan. 9, 2021), <a href="https://www.3newsnow.com/news/local-news/ne-bills-would-combine-electoral-votes-and-require-voter-id-ne-02-would-not-be-counted-separately">https://www.3newsnow.com/news/local-news/ne-bills-would-combine-electoral-votes-and-require-voter-id-ne-02-would-not-be-counted-separately</a>.

<a href="mailto:78">78</a> Bush v Gore, 531 U.S. 98, 104 (2000) ("The State, of course, after granting the franchise).

in the special context of Article II, can take back the power to appoint electors."). Once the election process has begun, however, the state legislature has selected "the manner" for its conduct and it could not taken back from the people for *that* election.

their ballots for President, each state followed its state law procedures to certify Biden or Trump as the winner of the state's electoral college votes, state officials sent those ballots to be opened and counted in Congress, and despite some Republican objections to accepting the electoral college votes from Arizona and Pennsylvania, a majority in both the House and Senate accepted the electoral college votes cast for each candidate, confirming that Biden had won by a vote of 306 to 232.<sup>79</sup>

While it would be perfectly constitutional for a state like Arizona to give back to the legislature the power to appoint the state's presidential electors directly, it is a political nonstarter: it would be profoundly antidemocratic to take away voters' ability to vote for the most important office in the United States, and legislators who sought to do so would likely face the voters' wrath.

But a provision of an 1887 federal law called the Electoral Count Act provides that a state legislature may send in a slate of presidential electors when the state has "failed" to make a choice of President on election day. The section of the Act contemplates something like a natural disaster that prevents voters from casting their ballots.<sup>80</sup>

Trump's lawyers and allies argued that in states where Biden won, the election had "failed" because other actors besides state legislators were involved in making rules for implementing the 2020 elections, thereby giving state legislatures the ability to appoint a rival slate of electors that could be sent to Congress. 81 More generally, Republicans tried to use the federal courts slow or limit counting of ballots in cases where Democratic-controlled state supreme courts and executive branches eased voting restrictions in light of the COVID pandemic.

<sup>&</sup>lt;sup>79</sup> Mascaro, Tucker, Jalonick, & Taylor, *supra* note 33.

<sup>80 3</sup> U.S.C. § 2; Justin Levitt, Failed Elections and the Legislative Selection of Presidential Electors, 96 N.Y.U. L.REV. (forthcoming 2021) (draft available at: <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3714294">https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3714294</a>), draft at 16 n. 54 ("the Due Process Clause would be implicated in any decision to replace a popular election process authorized by statute with a purported legislative appointment that was not so authorized, particularly after the election had begun. See, e.g., Roe v. Alabama, 43 F.3d 574, 580-81 (11th Cir. 1995) (reviewing alleged post-election changes for "fundamental unfairness"); Richard H. Pildes, Judging "New Law" in Election Disputes, 29 FLA. ST. U. L REV. 691 (2001). And some commentators have suggested that a legislature's appointment of its own electoral slate after Election Day would violate the federal statute establishing a uniform day for the appointment of electors, on the first Tuesday after the first Monday in November; 3 U.S.C. § 1; National Task Force on Election Crises, A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election

https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f625c790cef066e94 0ea42d/1600281722253/State Legislature Paper.pdf.").

<sup>81</sup> Steve Coll, *The Outdated Law That Republicans Could Use to Upend the Electoral College Vote Next Time*, NEW YORKER, Dec. 18, 2020, <a href="https://www.newyorker.com/news/daily-comment/the-outdated-law-that-republicans-could-use-to-upend-the-electoral-college-vote-next-time">https://www.newyorker.com/news/daily-comment/the-outdated-law-that-republicans-could-use-to-upend-the-electoral-college-vote-next-time</a> [https://perma.cc/5ZXR-PXEY].

In Pennsylvania, for example, the state Supreme Court, applying a Pennsylvania constitutional provision guaranteeing "free and equal" elections, agreed with voting rights plaintiffs that COVID-related problems with voting justified extending the deadline for the receipt of mail-in ballots to three days after election day from the election day deadline set by the state legislature. Republican lawyers argued this violated the powers of the state legislature. And in North Carolina, Trump-allied lawyers argued that state election administrators usurped the North Carolina General Assembly's power in setting rules for conducting the election during COVID. Trump allies dropped the argument once it was clear that Trump had won the state. 83

The argument that Article II and Article I, section 4 give state legislatures virtually unlimited powers over the rules for running presidential and congressional elections—even if it means violating the state's own Constitution—has come to be known as the "independent state legislature" doctrine. This Essay is not the place for a full exploration of the doctrine, but there are serious reasons to doubt the muscular reading put forward by Trump and his allies in 2020. 84 Nonetheless, four conservative Justices on the Supreme Court at one point or another during 2020 expressed support for the doctrine, 85 and the other two Court conservatives could embrace some form of the doctrine as well.

<sup>82</sup> Pa. Dem. Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

<sup>&</sup>lt;sup>83</sup> Moore v. Circosta, 141 S. Ct. 46 (2020); Rick Hasen, *Before the Election, Republicans Complained to the Supreme Court About Ballot Deadlines in Pennsylvania and North Carolina Under the Same Theory, But Now They Are Perfectly Fine with Counting Late Ballots in NC Where They Are Leading*, ELECTION L. BLOG, Nov. 11, 2020, <a href="https://electionlawblog.org/?p=118482">https://electionlawblog.org/?p=118482</a> [https://electionlawblog.org/?p=118482]

<sup>84</sup> For a detailed historical account debunking much of this muscular reading, see Hayward H. Smith, Revisiting the History of the Independent State Legislature Doctrine (draft dated Sept. 13, 2021 and available at: <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3923205">https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3923205</a>. See also Levitt, supra note 80; Michael T. Morley, The Independent State Legislature Doctrine, Federal Elections, and 15 State Constitutions, 55 GA. L. REV. 1 (2020); Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, FLA. ST. U. L.REV. 731 (2001).

<sup>&</sup>lt;sup>85</sup> Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020); Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732, 732-33 (2021) (Thomas, J., dissenting); id. at 738 (Alito, J., dissenting); Moore v. Circosta, 141 S. Ct. 46 (2020) (Gorsuch, J., dissenting from denial of application of injunctive relief); Dem. Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28, 34 n.1 (Kavanagh, J., concurring in denial of application to vacate stay); *see also* Smith (draft in progress at 5 n.13).

<sup>&</sup>lt;sup>86</sup> Justice Amy Coney Barrett, new to the Court during the end of the 2020 election season, has not weighed in on the issue. Chief Justice Roberts was not willing to invoke the independent state legislature doctrine in the context of the 2020 election, but he was the lead dissenter when a similar issue came up involving the power of Arizona voters to use the initiative process to create a redistricting commission taking the power to draw congressional districts outside the power of state legislatures. Ariz. State Leg. v. Ariz. Ind. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting).

Indeed, under this doctrine, Justice Samuel Alito required Pennsylvania officials during the 2020 election to set aside mail-in ballots that arrived in the three days after election day for possible exclusion from the count.<sup>87</sup> Mercifully for the country, there were only about 10,000 such ballots, and Biden had won the state by about 80,000 votes, rendering the legal dispute moot as to the presidential election.<sup>88</sup>

Judicial acceptance of the strong reading of the independent state legislature doctrine would create a potential earthquake in American election law by upending everything from voter initiatives setting the rules for congressional primaries to normal election administration decisions of state and local election administrators—not to mention, rendering state constitutional protections for voting rights a nullity in congressional and presidential elections. <sup>89</sup>

But even if the courts did not bless the independent state legislature doctrine, and even if there was no good reason to believe that state courts or state election officials meaningfully deviated from the intent of the legislature in running a presidential election, state legislatures could still choose to convene and send in an alternative slate of electors based upon this supposed technicality. State legislatures could alternatively or in addition point to "fraud" or "irregularities" that they would declare constitute a "failed" election in the state, purportedly allowing for choosing an alternative slate of electors.

If enough states for control of the Electoral College with majority-Republican legislatures whose voters chose the Democratic presential candidate sent in alternative slates of electors (or even blocked the sending in of the electors for the winning Democratic candidate), and if Republicans controlled both Houses of Congress, Congress could accept such bogus results and declare a Republican presidential loser the winner. Or, if the houses of Congress are divided, the stalemate could lead to several scenarios, including the speaker of the House becoming temporary President or a situation where no candidate gets the majority and voting by House delegations, likely leads to the election of Trump or another Republican choice for President. 90

<sup>&</sup>lt;sup>87</sup> Republican Party of Pa. v. Boockvar, 2020 WL 6536912 (U.S. Nov. 6, 2020).

<sup>&</sup>lt;sup>88</sup> Jonathan Lai, *Only 10,000 Pa. Mail Ballots Arrived After Election Day—Far Too Few to Change the Result If Thrown Out*, PHIL. INQUIRER, Nov. 11, 2020, <a href="https://www.inquirer.com/politics/election/pennsylvania-mail-ballots-counted-deadline-supreme-court-20201111.html">https://www.inquirer.com/politics/election/pennsylvania-mail-ballots-counted-deadline-supreme-court-20201111.html</a> [https://perma.cc/97MZ-BBGH].

<sup>&</sup>lt;sup>89</sup> Aziz Huq, *Opinion: The Roberts Court is Dying. Here's What Comes Next*, POLITICO, Sept. 15, 2021, <a href="https://www.politico.com/news/magazine/2021/09/15/the-roberts-court-is-dying-heres-what-comes-next-511784">https://www.politico.com/news/magazine/2021/09/15/the-roberts-court-is-dying-heres-what-comes-next-511784</a> [https://perma.cc/S8GT-9CXF] ("Expect, therefore, the 'independent legislature' doctrine and other creative readings of the Constitution to flourish on the shadow docket as election season rolls around. It is these cases — where the court most risks becoming a naked implement of partisan entrenchment — that will truly test Roberts' leadership").

<sup>&</sup>lt;sup>90</sup> Of course, Democrats could try to do this as well, but so far party leaders have not embraced any of the arguments that would lead to such subversion.

The benefit of technical arguments under the independent state legislature doctrine to subvert election results is that they have an aura of respectability and expertise. Lawyers in fine suits making legalistic arguments are much more appealing than desperate lawyers making unsubstantiated claims of ballot box stuffing and other chicanery. The doctrine would be a strong vehicle for a bloodless coup.

2. Election Official Manipulation of Election Results. The second means by which election results can be subverted is through direct manipulation of the conduct of elections or vote counting by corrupt election officials. The hyperdecentralized election system of the United States creates room for vulnerabilities. Take the 2020 election results: thanks to the Electoral College system, a shift of about 45,000 votes across three states (a relatively small number of votes when vote totals exceed 150 million votes) would have turned Trump into the election winner and Biden into the loser. The risk is that a few unscrupulous actors could make minor changes in vote totals that could prove decisive in a very close presidential election.

Elections are already administered in many places by partisan actors who are elected or appointed as Democrats or Republicans, but there is no evidence of such officials directly manipulating vote totals in federal elections in modern American history. 92 The risk is that this unwillingness to engage in illegal conduct changing vote totals would change if election officials were replaced by those who have publicly embraced Trump's false claims of a stolen election in 2020. Embracing such claims demonstrates a lack of credibility and seriousness of election administration. There is no room for debate about the overall integrity of the 2020 election vote count, and someone who claims there is or who says they are "just asking questions" about the vote counts cannot be trusted to administer a fair election.

Election officials lacking such scruples and seeking to manipulate election outcomes also might attempt to interfere with the fair administration of the election by creating conditions for long lines in parts of a jurisdiction to dampen turnout or by engaging in aggressive voter purges that remove eligible voters. Such efforts to suppress the vote are not new, but they might be taken to more extreme and potentially illegal levels by those who are not committed to the rule of law and the integrity of the voting system.

One particularly tricky issue concerns state election administrator oversight and takeovers of local election boards and administration. Sometimes such actions

<sup>&</sup>lt;sup>91</sup> Paul Waldman, *Opinion: We Came Much Closer to an Election Catastrophe Than Many Realize*, WASH. POST, Nov. 18, 2020, <a href="https://www.washingtonpost.com/opinions/2020/11/18/how-2020-election-was-closer-than-2016/">https://www.washingtonpost.com/opinions/2020/11/18/how-2020-election-was-closer-than-2016/</a> [https://perma.cc/Z7B4-XCMM?type=image]. A national popular vote would make such manipulation much harder, as Biden beat Trump by millions of votes, which would have required much more messing with vote totals by unscrupulous election officials.

<sup>&</sup>lt;sup>92</sup> See supra note 2.

are completely justified. For example, the state of Michigan made a terrific decision to help oversee elections in Detroit in 2020 by putting in place a very experienced former state election official. Detroit had a history of poor election administration, and needed help from the state, help which diffused some false claims of election chicanery in 2020. 93

But the more recent trend has been Republican legislatures changing laws to allow takeovers of local election boards run in Democratic cities, as in Georgia, 94 or removing the ability of local election administrators to offer easier voter registration and voting opportunities, as in Texas. 95 It is hard to understand some of this new state authority over local election administration as anything but an attempt to put in place those who would manipulate election outcomes or at the very least seek to suppress the vote in heavily Democratic areas. 96

3. Violence or Intimidation Interfering with Election Processes. Even if state legislatures are unwilling to bend or break election rules to overturn voters' choice for President in a state, and even if conspiracy-minded new election administrators refuse to break the law in running fair elections, American elections may still be subverted by violence or intimidation interfering with election processes. The fear was encapsulated in the recent comments of Congressman Madison Cawthorn, an ally of Trump, who recently told a crowd that "if our election systems continued to be rigged and continue to be stolen, then it's going to lead to one place – and it's bloodshed." <sup>97</sup>

The violence surrounding the 2020 election has not been seen in this country since the civil rights movement of the 1960s. 98 The danger of election-related

<sup>&</sup>lt;sup>93</sup> Alex Ebert, *Meet the Technocrat Who Keeps Killing Trump Voter Fraud Claims*, BLOOMBERG GOV., Aug. 5, 2021, <a href="https://about.bgov.com/news/meet-the-technocrat-who-keeps-killing-trump-voter-fraud-claims/">https://about.bgov.com/news/meet-the-technocrat-who-keeps-killing-trump-voter-fraud-claims/</a> [https://perma.cc/EA88-MRBN].

<sup>&</sup>lt;sup>94</sup> Stephen Fowler, *State Appoints Bipartisan Panel to Review Fulton Election Board's Actions*, GEORGIA PUB. BROADCASTING, Aug. 18, 2021 (updated Aug. 19, 2021), <a href="https://www.gpb.org/news/2021/08/18/state-appoints-bipartisan-panel-review-fulton-election-boards-actions">https://www.gpb.org/news/2021/08/18/state-appoints-bipartisan-panel-review-fulton-election-boards-actions</a> [https://perma.cc/HT2S-LQCC].

<sup>&</sup>lt;sup>95</sup> Morales-Doyle, *supra* note 54 ("The bill also makes it a crime for election officials — like our plaintiff Harris County Elections Administrator Isabel Longoria — to encourage eligible voters to apply to vote by mail.").

<sup>&</sup>lt;sup>96</sup> Democracy Crisis in the Making, supra note 52, provides more detailed analysis of the way that state legislatures are seeking to take election administration powers away from local election officials for partisan reasons.

<sup>&</sup>lt;sup>97</sup> Felicia Somnez, *Rep. Madison Cawthorn Falsely Suggests Elections are 'Rigged', Says There Will Be 'Bloodshed' If System Continues on Its Path*, WASH. POST, Aug. 30, 2021, <a href="https://www.washingtonpost.com/politics/rep-madison-cawthorn-says-there-will-be-bloodshed-if-us-elections-continue-to-be-rigged/2021/08/30/297a9fa2-09c8-11ec-aea1-42a8138f132a\_story.html">https://perma.cc/5JJC-AJG8</a>].

<sup>&</sup>lt;sup>98</sup> See https://perma.cc/AHZ6-SQYC Rachel Kleinfeld, *The U.S. Shows All the Signs of a Country Spiraling Toward Political Violence*, WASH. POST, Sept. 11, 2020, <a href="https://www.washingtonpost.com/outlook/america-political-violence-risk/2020/09/11/be924628-f388-11ea-999c-67ff7bf6a9d2">https://www.washingtonpost.com/outlook/america-political-violence-risk/2020/09/11/be924628-f388-11ea-999c-67ff7bf6a9d2</a> story.html

violence is so palpable that a recent Supreme Court amicus brief filed by well-respected former Fourth Circuit judge Michael Luttig in a Second Amendment gun rights case raised the connection between easy availability of firearms and future election-related violence: "Adopting petitioners' 'whenever and wherever' right to carry [firearms] would be to throw gasoline on the fires of our Nation's future political conflicts. Although the January 6, 2021, attack on the Capitol itself was unprecedented, political violence in our streets unfortunately is not. Indeed, elected officials and others have continued to make statements long *after* January 6, 2021 that threaten more political violence."

Election-related violence and intimidation could be targeted at keeping voters from the polls or deterring them from voting, interfere with the job of election administrators or official bodies in running elections or counting or certifying votes, or prevent lawfully elected officials from taking office.

Legal changes could help facilitate violence and intimidation. For example, the Texas law empowering poll watchers over poll workers seems destined to end badly, potentially interfering with voters and pollworkers, perhaps leading to violence. <sup>100</sup> If anything, we need more laws protecting election workers. Neal Kelley, the normally unflappable longtime Republican election administrator of Orange County, California, was exasperated by misguided or nefarious efforts to interfere with the sound administration of the 2021 California gubernatorial recall election: Kelley told the *Los Angeles Times*: "I still try to be diplomatic. But I'm at the point where I say, "Enough," said Orange County Registrar Neal Kelley, whose duties Thursday included dealing with an agitated volunteer election watcher upset that election staffers were approving voter signatures he believed should be rejected. This needs to be called out. ... It's just gotten absurd." <sup>101</sup>

#### IIII. MINIMIZING THE RISK OF AMERICAN ELECTION SUBVERSION

[https://perma.cc/AHZ6-SQYC]. Note that Kleinfeld wrote before the January 6, 2021 insurrection.

<sup>&</sup>lt;sup>99</sup> New York St. Rifle & Pistol Ass'n v. Bruen, No. 20-483, Amicus Brief of J. Michael Luttig, Peter Keisler, Carter Phillips and Stuart Gerson et al. as *Amici Curiae* in Support of Respondents, <a href="https://www.supremecourt.gov/DocketPDF/20/20-843/192273/20210913145956623\_20-843\_Amici%20Brief.pdf">https://www.supremecourt.gov/DocketPDF/20/20-843/192273/20210913145956623\_20-843\_Amici%20Brief.pdf</a> (citation omitted; original emphasis); see also Michael C. Dorf, Disaggregating Political Violence, <a href="https://www.brennancenter.org/sites/default/files/2021-06/Dorf">https://www.brennancenter.org/sites/default/files/2021-06/Dorf</a> final.pdf

<sup>[</sup>https://perma.cc/2XKW-JDKW] (Brennan Center report dated June 2021 tying political violence of January 6, 2021 with debate over Second Amendment firearm rights).

<sup>&</sup>lt;sup>100</sup> See *supra* note 54; Green, *supra* note 54.

<sup>&</sup>lt;sup>101</sup> Paige St. John, *Election Watchers Snap Photos of Workers, Challenge Voter Signatures as Recall Nears*, L.A. TIMES, Sept. 10, 2021, <a href="https://www.latimes.com/california/story/2021-09-10/election-chiefs-wary-of-california-recall-vote-fraud-claims">https://perma.cc/NAZ4-8JN3</a>].

Minimizing the risk of American election subversion requires both legal change and political action, especially to enforce norms respecting the rule of law. Legal change alone is not enough because rules for conducting fair elections are not binding without a deeper commitment to the rule of law. What saved American democracy from election subversion in 2020 was not just law but also the refusal of most election and elected officials to disobey or ignore legal constraints as urged by Trump. Law still constrains many, and strong law protecting election integrity can help provide roadblocks to a snowballing escalation of antidemocratic conduct.

The legal changes described below should be favored by everyone who supports free and fair elections regardless of political affiliation. Indeed, in a recent CNN poll, 57 percent of Republicans (compared to only 49 percent of Democrats) thought it was "very" or at least "somewhat" likely that "in the next few years, some elected officials will successfully overturn the results of an election in the United States because their party did not win." The rules and norm changes proposed here minimize the risks of subversion whether they come from Republicans or Democrats. <sup>103</sup>

## A. Legal Change

1. Improved transparency, chain-of-custody, and auditing capacity. All jurisdictions should run elections that produce paper ballots. 104 Paper is a verified,

<sup>&</sup>lt;sup>102</sup> Levitsky & Ziblatt, supra note 71.

<sup>103</sup> SSRS Poll for CNN, Embargoed for Release Sept. 15, 2021, at <a href="http://cdn.cnn.com/cnn/2021/images/09/15/rel5e.-.elections.pdf">http://cdn.cnn.com/cnn/2021/images/09/15/rel5e.-.elections.pdf</a> [https://perma.cc/4UBA-PYAT] (question 41, table 066).

<sup>104</sup> There is a raging current controversy over the integrity of ballot-marking devices, or BMDs, used for voting. Like direct recording-electronic (DRE) machines, BMDs allow voters to make choices on a computer touchscreen. But whereas a DRE machine stores votes in an electronic format, BMDs produce a printed paper ballot which can then be counted. Typically, these BMDs produce a QR or bar code that a ballot reading machine reads to record votes, but the ballots also include the voters' choices in a human readable format. Computer science critics of BMD machines believe that not enough voters will check to make sure that the printed ballot accurately reflects their choices, meaning that the code used to record voter choices can be manipulated without voters recognizing it. Supporters of the use of BMD machines, who point to its value in providing multiple languages and assistance to disabled voters, believe that risk-limiting audits that hand count a portion of BMD-produced ballots, discussed below, can ensure that BMD devices accurately record voter choices. For the statement of the main argument against the machines, see Andrew Appel, Richard DeMillo, & Phillip B. Stark, Ballot-Marking Devices Cannot Assure the Will of the Voters, 19 ELECTION L.J. 432 (2020). The Brennan Center's approach has been more nuanced. Andrea Córdova McCadney, Elizabeth Howard, & Lawrence Norden, Voting Machine Security: Where We Stand Six Months Before the New Hampshire Primary, Brennan Center for Justice, Aug. 13, 2019, https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-securitywhere-we-stand-six-months-new-hampshire-primary [https://perma.cc/T6EP-D2KC]

tangible record that may be examined by courts or others to ensure that there has been an accurate count. Paper ballots not only assure that counts can be verified but also that help to bolster public confidence. In 2020 when Trump attacked the integrity of the vote in Georgia, the state conducted a full hand recount of all the ballots for President, which confirmed the results that Biden won the state. <sup>105</sup> Fully electronic voting systems that produce no paper record should be illegal for use in American elections because—even setting aside any risk that the machines may be hacked—they can spawn dangerous conspiracy theories that cannot be backed up with adequate physical evidence.

Paper ballots are only the first step toward transparency and confirmation of election results. States should require the adoption of risk-limiting audits, <sup>106</sup> a procedure to ensure that the vote totals announced by election officials, and often tallied using electronic processes, are accurate. Such audits can help ferret out not

("These devices collect the voter's choices and either produce a ballot that is then scanned by the voter in a separate scanner (BMDs) or create a "paper trail" that is preserved for potential review later. Experts have warned that some of these paper trails or ballots can be difficult to review. Before purchasing such systems, election officials should consider how easy it will be for voters to review and understand the machine marked ballots. In jurisdictions where either system is used, election officials should put in place procedures that make it more likely voters will review and catch errors on the paper record, as well as consider additional security measures recommended by experts.").

Concerns over the security of BMDs were heightened after the leak of software for Dominion voting machines done in connection with Mike Lindell's activities, *supra* note 59, surrounding the integrity of the 2020 elections. See John Myers, *Security of Some Ballot-Marking Devices Could Be Vulnerable in California Recall, Experts Say*, L.A. TIMES, Sept. 3, 2021, <a href="https://www.latimes.com/california/story/2021-09-03/some-ballot-marking-devices-could-be-vulnerable-in-california-recall-say-researchers">https://www.latimes.com/california/story/2021-09-03/some-ballot-marking-devices-could-be-vulnerable-in-california-recall-say-researchers</a>.

It is beyond my technical expertise to weigh in on whether risk-limiting audits adequately deal with the risks of BMD machines. I can say only that a BMD machine that produces a paper ballot is far better from the point of view of election subversion than DRE machines, which produce no possible physical evidence from which to conduct a recount or audit.

<sup>105</sup> Richard Fausset, *Hand Tally of Georgia Ballots Reaffirms Biden's Win*, N.Y. TIMES, Nov. 19, 2020 (updated Nov. 20, 2020), <a href="https://www.nytimes.com/2020/11/19/us/georgia-recount-biden-trump.html">https://www.nytimes.com/2020/11/19/us/georgia-recount-biden-trump.html</a> [https://perma.cc/D46A-NNE3].

<sup>106</sup> For an introduction, see AD HOC COMMITTEE FOR 2020 ELECTION FAIRNESS AND LEGITIMACY, FAIR ELECTIONS DURING A CRISIS 17-19 (Apr. 2020), https://www.law.uci.edu/faculty/full-time/hasen/2020ElectionReport.pdf

[https://perma.cc/GBC3-GV2T]; Risk-Limiting Audits Working Group, Risk-Limiting Post-Election Audits: Why and How (Oct. 2012), <a href="https://www.stat.berkeley.edu/~stark/Preprints/RLAwhitepaper12.pdf">https://www.stat.berkeley.edu/~stark/Preprints/RLAwhitepaper12.pdf</a>

[https://perma.cc/5LV2-JF6P]; Post-Election Audits, Brennan Ctr. For Justice <a href="https://www.brennancenter.org/issues/defendour-elections/election-security/post-">https://www.brennancenter.org/issues/defendour-elections/election-security/post-</a>

<u>election-audits</u> [https://perma.cc/56CY-NUZK]; "Risk-Limiting Audits, National Conference of State Legislatures, <a href="https://www.ncsl.org/research/elections-and-campaigns/risk-limiting-audits.aspx">https://www.ncsl.org/research/elections-and-campaigns/risk-limiting-audits.aspx</a> (last visited, Sept. 18, 2021).

only deliberate manipulation of election results but also software glitches and human errors.

Paper ballots and results confirmed by audits are only trustworthy if there are adequate chain-of-custody and transparency requirements for the handling of ballots. <sup>107</sup> Procedures must be in place so that the work of election officials may be monitored by bipartisan and nonpartisan observers to assure fairness in the entire process. The rules must allow observers to observe and not to interfere with or delay legitimate election administration procedures. <sup>108</sup>

2. Rules limiting the discretion of those who certify the votes, including Congress. Transparency and related rules minimize the risk of subversion by those who collect and tally the votes. A different set of actors is involved in certifying the vote totals. Depending on the state, this certifier may be a state or county election board, or some other official. When it comes to the presidential election, certification happens first on the state level and then Congress counts the certified votes.

Certification is essentially a ministerial act; there is no discretion in the normal decision whether to accept or reject votes as counted by election officials. States should change laws to eliminate any discretion in the certification process; <sup>109</sup> if there is a bona fide dispute about fraud or about who actually won an election, states should have procedures for judicial or other administrative review by those empowered to examine facts and evidence and make a determination about election outcomes.

Congress also must amend or replace the 1887 Electoral Count Act to make it harder to raise frivolous objections to Electoral College vote counts. Right now, it takes only one Representative and one Senator to raise an objection and trigger a two-hour debate and vote on a particular state. Congress should set the threshold higher and otherwise rewrite the rules to bar frivolous challenges. Congress should also rewrite the ECA to exclude all but natural disasters and terrorist attacks from the definition of a "failed" election that could allow the state legislature to send in an alternative slate of electors. <sup>110</sup>

our-elections-be-vulnerable-again/617542/ [https://perma.cc/BP6H-3FUK].

<sup>&</sup>lt;sup>107</sup> FAIR ELECTIONS DURING A CRISIS, *supra* note 106, at 17 ("maintaining control over the chain of custody of ballots is critical not only to ensure that the initial count is accurate, but to ensure that any disputes that arise are resolved based on the votes cast"); *id* (risk-limiting audits "require paper ballots or records, and a degree of chain-of-custody over ballots that few states and local jurisdictions currently require").

<sup>&</sup>lt;sup>108</sup> Green, *supra* note 54.

<sup>109</sup> Richard L. Hasen, *We Can't Let Our Elections Be This Vulnerable Again*, THE ATLANTIC, Jan. 4, 2021, <a href="https://www.theatlantic.com/ideas/archive/2021/01/we-cant-let-">https://www.theatlantic.com/ideas/archive/2021/01/we-cant-let-</a>

<sup>110</sup> For some general principles for Electoral Count Act reform, see NATIONAL TASK FORCE ON ELECTION CRISES, CONGRESS MUST UPDATE THE ELECTORAL COUNT ACT TO GUARD AGAINST CRISES DURING FUTURE PRESIDENTIAL ELECTIONS (n.d.), https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/6128044f8b752c575 32df0ab/1630012496256/Congress+Must+Update+the+Electoral+Count+Act.pdf

- 3. Rules limiting the over-politicization of election administration, especially by state legislatures. As noted, 111 state legislative takeovers of certification procedures or local election administration present special concern. On the one hand, state supervision of local election processes is essential when election administrators lack basic competence. 112 On the other hand, many of the recent laws and proposed bills coming from Republican legislatures appear intended to interfere with local election administration for political, not competence, reasons. There is no good reason to criminalize the sending of absentee ballot applications to voters, or in offering voters secure opportunities to vote early, such as through early voting centers. Laws that allow state takeovers of local elections should include safeguards that ensure that the takeovers are not politically motivated, and that the actual administration of elections will be done on a fair bipartisan or nonpartisan basis. Any laws allowing for state takeovers of elections that does not ensure fairness should be rejected.
- 4. Rules increasing the criminal penalties on those who tamper with federal elections or commit violence or intimidation of voters, elected officials, or elected candidates. Elected officials, election officials, or private individuals who tamper with federal election vote totals or election processes should face increased penalties for chicanery. These activities are already illegal, 113 but enhanced penalties and a realistic threat of prosecution could deter election subversion activities on the margin. Increased penalties for election-related violence should

[https://perma.cc/8MK6-UPLM]; Greg Sargent, *Opinion: How to Prevent the Next Jan. 6, As Revealed in an Important New Analysis*, WASH. POST, Aug. 30, 2021, <a href="https://www.washingtonpost.com/opinions/2021/08/30/how-prevent-next-jan-6-revealed-an-important-new-analysis/">https://www.washingtonpost.com/opinions/2021/08/30/how-prevent-next-jan-6-revealed-an-important-new-analysis/</a>.

<sup>112</sup> See HASEN, supra note 6, at 1-4 (describing local election administration problems in Wisconsin); HASEN, supra note 7, at 47-74 (describing problematic local election administrators as the "weakest link" in the election administration process).

<sup>113</sup> For example, 52 U.S.C. § 20511(2) imposes up to a five-year penalty for any person in a federal election who

knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by—

- (A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or
- (B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held[.]

Penalties should be much higher than five years for such conduct, particularly when it threatens a presidential election.

<sup>&</sup>lt;sup>111</sup> See supra notes 93-95.

be coupled with additional resources provided to law enforcement and the Department of Justice to secure save voting, voting counting, and transitions of power.

5. Rules countering disinformation about elections, particularly disinformation about when, where, and how people vote. As explained in Part I, future election subversion in the United States is much more likely because of the viral spread of disinformation by Donald Trump and others that the 2020 election was stolen. Such a widespread belief sets the stage for countermeasures that themselves can undermine election integrity and lead to election subversion.

Several key legal measures may counter disinformation in elections, such as laws making it a crime to spread false information about when, where, and how people vote. Such laws must be carefully crafted to avoid infringing on First Amendment rights of free speech and association. I explore this delicate task and explain why law alone is not enough to counter the risk of disinformation undermining election integrity in a book-length treatment elsewhere. 114

## B. Political Action Enforcing Norms Respecting the Rule of Law

Law can only go so far in protecting American democracy against election subversion, and new laws must be enacted and not just proposed if they are going to counter the risk. Political organization is necessary to pass those laws and to reenforce norms respecting the rule of law and fair election processes.

Political organization can help advance the proposed legal changes advocated above. For example, aside from a paper ballot requirement, no anti-election subversion provisions appeared in the original version of the "For the People Act," the main Democratic Party-backed election reform measure being considered in the current Congress. 116

The most recent version of the Democrats' proposal, now dubbed the "Freedom to Vote Act," does contain important anti-subversion provisions, thanks in part to public airing of the dangers of stolen elections. Among those provisions are: a requirement to use paper ballots; chain of custody requirements for handling ballots; a guarantee of federal judicial review of vote counting by including a statutory right to have one's vote counted; a prohibition on removing state and local election officials from office without good cause; protection of

<sup>&</sup>lt;sup>114</sup> HASEN, *supra* note 13.

<sup>&</sup>lt;sup>115</sup> H.R. 1, 117th Cong., 1st Sess. (2021); S. 1, 11th Cong, 1st Sess. (2021). Section 1502 of HR. 1. and S.1 contain the paper ballot requirement.

<sup>116</sup> Nate Cohn, *Georgia's New Law, and the Risk of Election Subversion*, N.Y. TIMES, Apr. 6, 2021 (updated Aug. 18, 2021), <a href="https://www.nytimes.com/2021/04/06/upshot/georgia-election-law-risk.html">https://www.nytimes.com/2021/04/06/upshot/georgia-election-law-risk.html</a> [https://perma.cc/D5QK-WWSD]; Richard L. Hasen, *Republicans Aren't Done Messing with Elections*, N.Y. TIMES, Apr. 23, 2021, <a href="https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html">https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html</a> [https://perma.cc/L3TV-BOZS].

<sup>&</sup>lt;sup>117</sup> S. 2747, 117th Cong., 1st Sess. (2021). A copy of the bill as introduced is available at: <a href="https://perma.cc/DWK3-AMNU">https://perma.cc/DWK3-AMNU</a>.

election workers from intimidation; and a reaffirmation that manipulating election tabulation or results is a federal crime. It is not enough but it is a good start. The big question now is whether Democrats in an equally divided Senate will find a way around the filibuster to pass such urgent reform now that there appears to be no prospect of bipartisan legislation addressing any aspect of voting, even the risk of election subversion. 119

Political organizing against bad proposed legislation is just as crucial. As states have considered new restrictive voting legislation, political pushback from corporations, civic groups, nongovernmental organizations, and others can be helpful. The original version of Texas's new voting legislation, for example, would have lowered the legal standards for overturning election results in court based on claims of irregularities. <sup>120</sup> After complaints, Texas Republican legislative leaders dropped that provision from the bill. <sup>121</sup> Although Arizona is the site of the sham "audit" that is fueling more conspiracy theories about the integrity of the 2020 election, <sup>122</sup> proposed bills that would have made it easier for that state legislature to overturn the voters' choice of presidential electors did not make it out of committee or get significant support in the state legislature. <sup>123</sup>

Political opposition must be mounted against those who embrace the false claim that the 2020 election was stolen from Trump and who run for office or seek appointment to run elections. Spreading these false claims shows rejection of a commitment to the rule of law, and those share the false claims deserve to have their positions on the 2020 election relentlessly challenged during their campaigns. If any of these persons attains office, then oversight from more fair-minded, responsible people will be urgently required. Getting such oversight so may require new legislation, lawsuits, or even peaceful protests.

<sup>118</sup> A summary from the group Protect Democracy points to the specific provisions of the Freedom to Vote Act providing these protections. Protect Democracy, "How the Freedom to Vote Act Stops Election Subversion" (n.d.), <a href="https://s3.documentcloud.org/documents/21062171/election-subversion-freedom-to-vote-two-pager.pdf">https://s3.documentcloud.org/documents/21062171/election-subversion-freedom-to-vote-two-pager.pdf</a> [https://perma.cc/3RL2-GAGW].

<sup>119</sup> Claudia Grisales & Juana Summers, Senate Democrats Offer A New Voting Bill, But a GOP Filibuster Likely Blocks the Way, NPR, Sept. 14, 2021, https://www.npr.org/2021/09/14/1036812609/senate-democrats-offer-a-new-voting-bill-but-a-gop-filibuster-likely-blocks-the- [https://perma.cc/T3F8-AVAZ].

Daniel Dale, Fact Check: Here are 20 Things Texas Republicans' Elections Bill Would Do, CNN, June 3, 2021, <a href="https://www.cnn.com/2021/06/02/politics/fact-check-texas-elections-bill-voting-sb7-republicans-abbott/index.html">https://www.cnn.com/2021/06/02/politics/fact-check-texas-elections-bill-voting-sb7-republicans-abbott/index.html</a> [https://perma.cc/7FGD-4UCA].

Alexa Ura, Republican Bill Tightening Texas Election Laws is Headed to Gov. Greg

Abbott's Desk, Texas Tribune, Aug. 31, 2021, https://www.texastribune.org/2021/08/31/texas-voting-restrictions-bill/

<sup>[</sup>https://perma.cc/NES6-Y3L5] ("Left off were controversial provisions from the spring that would've restricted Sunday voting hours and made it easier for judges to overturn elections.").

<sup>&</sup>lt;sup>122</sup> Wines, *supra* note 45.

<sup>&</sup>lt;sup>123</sup> See supra note 56.

Indeed, the ultimate safeguard of American democracy during this period of democratic instability may be millions of people taking to the streets for peaceful protests to demand fair vote counting and adherence to the rule of law. In 2020, it was enough to avoid election subversion that some heroes stepped up to assure that elections ran smoothly, votes fairly counted, and a peaceful transition of power took place. Next time, a few heroes in the right places may be inadequate. I fear that only concerted, peaceful collective action against an attempt to subvert election results stands between American democracy and nascent authoritarianism.