**Headline:** Why We Need to Plan Now to Stop Donald Trump From Staying in the White House as a Dictator If He Loses the Election

By Thom Hartmann

**Author Bio:** Thom Hartmann is a [talk-show host](https://www.thomhartmann.com/) and the author of [*The Hidden History of the War on Voting*](https://smile.amazon.com/Hidden-History-War-Voting-Stole/dp/1523087781/?tag=alternorg08-20) and more than [30 other books in print](https://www.amazon.com/Thom-Hartmann/e/B000AQ449C). His most recent project is a science podcast called [*The Science Revolution*](https://podcasts.apple.com/us/podcast/the-science-revolution-with-thom-hartmann/id1488059541). He is a writing fellow at the [Independent Media Institute](https://independentmediainstitute.org/).

**Source:** Independent Media Institute

**Credit Line:** *This article was produced by* [*Economy for All*](https://independentmediainstitute.org/economy-for-all/)*, a project of the Independent Media Institute.*

**Tags:** Trump, Presidential Elections, History, GOP/Right Wing, Media, Time-Sensitive

**[Article Body:]**

The Constitution provides a couple of mechanisms for Trump to lose the 2020 election—both the popular vote *and* the Electoral College—and still hold the office of president for a second term.

It’s keeping historians and constitutional scholars up at night and, based on offline conversations I’ve had with D.C. conservatives I know, is something the GOP and partisans within the Trump administration are already discussing.

Bill Maher and I have been repeatedly asking a question on the air that the rest of America’s media seemingly thinks is too far out to even consider: What if Trump’s lawyer Michael Cohen is right, and after losing the 2020 election Trump refuses to leave office?

On its surface, the question seems silly—nobody who has lost both the popular vote and an uncontested Electoral College vote has ever gone on to become president, right?

Unfortunately, it’s wrong. The GOP has done this before, an action that included multiple threats of violence and bloodshed on the floor of Congress, leading Democrats to cave in even though their candidate won the popular vote and had 22 more electoral votes than the Republican (who became president).

Additionally, the Constitution says that if a presidential election really turns into a mess with multiple claims of fraud or some other crisis, the president is selected by the U.S. House of Representatives.

While that sounds like good news, with Democrats controlling the House today, each state’s delegation only gets one vote—50 votes from 50 states determine the president. And a majority of the states are Republican-controlled, so this remedy would put Trump into office regardless of how badly he lost the popular vote, the electoral vote, or both.

So, how did we get here, and what are the scenarios the Republicans I know are considering?

First, some background.

**Swing States’ Legislatures Decide (and Trump Wins)**

Article II (the Executive Branch), Section 1, Clause 2 of the Constitution (and the 12th Amendment, which revises it) gives solely to the *legislature* of the states the power to control the electors who will decide the presidential election.

It does *not* say that the people of the states shall vote for their choice of president and then that vote shall be reflected in the states’ electoral votes. It’s entirely up to the legislature (without any input from the governor). “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…” is how it appears in Article II of the Constitution.

Every state’s legislature generally directs *all* their electors to vote for the candidate who won the majority in the state ([Maine and Nebraska are the exception](https://www.270towin.com/content/split-electoral-votes-maine-and-nebraska/), allowing for split decisions), a system we call “winner takes all,” but a state’s legislature (its combined house or assembly and senate, where each member has one vote) can, by simple majority vote, direct its electors to vote for any candidate they want, even over the objections of their governor.

In the 2000 election, for example, when the Florida Supreme Court had ordered a complete recount of the vote for president in that state, Republicans were concerned that a full, statewide recount would give Al Gore the presidency.

(And, indeed, that’s what would have happened, as a consortium of newspapers including the New York Times discovered a year later when they fully recounted the Florida vote and found that [Al Gore won Florida](https://www.nytimes.com/2001/11/12/us/examining-vote-overview-study-disputed-florida-ballots-finds-justices-did-not.html)—a fact largely buried by the papers because it was published just two months after 9/11 and no newspaper wanted to challenge the legitimacy of Bush’s presidency during one of the nation’s most severe times of national crisis since Pearl Harbor.)

Thus, had the U.S. Supreme Court not intervened to stop the Florida recount, the Republicans in the Florida legislature fully intended to hand the Florida electoral college vote—and, thus, the White House—to George W. Bush, even if a recount showed that Al Gore actually won the vote.

**The 2000 Dress Rehearsal**

As David Barstow and Somini Sengupta wrote for [the New York Times](https://www.nytimes.com/2000/11/28/us/contesting-vote-florida-legislature-jeb-bush-said-be-willing-sign-bill-ensuring.html) on November 28, 2000, “The president of Florida’s Senate said today that Gov. Jeb Bush had indicated his willingness to sign special legislation intended to award Florida’s 25 Electoral College votes to his brother Gov. George W. Bush of Texas even as the election results were being contested.”

Barstow and Sengupta added that “talk of a special legislative session continued unabated here today as local Republicans fretted about the possibility that the justices on the Florida Supreme Court, all appointed by Democrats, might uphold the challenge by Vice President Al Gore [for a statewide recount], ultimately awarding him the state’s electoral votes.”

Bluntly, they noted, “The driving force behind the calls for a special session is the Republican desire to use the Legislature to trump the state’s Supreme Court, should the need arise.” In other words, should the recount discover that Gore had actually won.

If the Florida legislature, then firmly in GOP hands, had voted to require all their electors to cast their votes for Bush (or appoint new ones who would), the recount would have been irrelevant; the Constitution gives that power exclusively to the state’s legislatures.

Which includes purple states with Democratic governors and a majority of Republicans in the combined House and Senate of the state, as with Michigan, Pennsylvania, and—most significantly because in 2020 it’ll probably play the role Florida did in 2000—Wisconsin.

Thus, through simple brute force, if Trump, Fox News and Limbaugh, et al, were to loudly claim that there was “voter fraud” in any or all of those states and succeed in casting doubts about the integrity of an election that would put a Democrat in the White House, the manufactured conflict could be resolved and the election given to Trump by one or more state legislatures as Florida threatened to do in 2000.

The GOP and right-wing radio and TV have been [preparing this ground for the better part of two decades](https://nymag.com/intelligencer/2017/07/trump-falsely-warns-of-multi-state-voter-fraud-conspiracy.html), constantly harping on non-existent voter fraud by undocumented Hispanics and African Americans who, as Trump alleged, go from polling place to polling place by bus to double- or even triple-vote.

While there’s absolutely no evidence for any of this—despite the Bush administration spending tens of millions of dollars, enlisting all 93 U.S. attorneys nationwide, and examining over [840 million votes and finding fully 35 examples of illegal votes nationwide](https://www.vox.com/policy-and-politics/2017/6/30/15900478/trump-voter-fraud-suppression-commission) (and none by “illegal Hispanics”)—this “voter fraud” fantasy is widely believed among the Republican electorate and could be used by a state’s legislature to flip a close vote.

**The U.S. House of Representatives Decides (and Trump Wins)**

Another way Trump could lose both the popular vote and the uncontested electoral vote is found in the election of 1876.

Democrat Samuel Tilden won the popular vote nationwide but, with 184 electoral votes, was one vote short of the necessary 185 electoral votes to become president.

Republican Rutherford B. Hayes not only lost the popular vote but had only 163 electoral votes.

Ohio’s Republican Congressman James Monroe (not related to the president of generations earlier of the same name) wrote the definitive summary of that election and how it played out in Congress, a narrative he published in [the Atlantic](https://www.theatlantic.com/magazine/archive/1893/10/the-hayes-tilden-electoral-commission/523971/) in October 1893.

Pointing out that “the votes of Florida, Louisiana, Oregon, and South Carolina, with an aggregate of 22 electors” would turn the election to either Hayes or Tilden, Monroe (who was there) wrote, “From the States just named there were two sets of returns, one favorable to General Hayes, the other to Mr. Tilden.”

The dispute had to do with three of those four states then being occupied by the Union Army (this was just 11 years after the Civil War ended, and Reconstruction was in full swing). At the same time, the Klan was riding high in all four states.

Formerly enslaved African Americans were trying to turn out large numbers of voters for the Republican candidate, but there was also widespread Klan activity suppressing that black vote. On the other side, Democrats in Congress charged that Union soldiers had intimidated Southern Democratic voters, suppressing their vote.

Monroe wrote that the Democrats charged, “that these returns [in those four states for Republican Hayes] were a product of fraud and dishonesty; that, in preparing them, the vote of whole precincts, parishes, and counties had been thrown out in order to secure Hayes electors… [and] they did not represent the people of those States, but were themselves the product of fraud and corruption, and were kept in place only by what was called the ‘moral influence’ of Federal bayonets.”

The nation nearly exploded, wrote Monroe: “The feeling of mutual hostility had been greatly intensified by party leaders, orators, and presses. In some of our cities it took all the terrors of the police court to keep Democrats and Republicans from breaking the peace.”

The 12th Amendment, ratified in 1804, had a simple solution to the problem of neither candidate winning a majority of electoral votes. “[I]f no person have such majority,” the 12th Amendment says, “then… the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote…”

Because all the Southern states had now been re-admitted to the Union, a majority of the House of Representatives that year were controlled by Democrats, as were a majority of the states. With each state’s delegation having only one vote, the Democratic-controlled House representing a Democratic majority of states would end up making Democrat Tilden the president, something the Republicans wouldn’t go along with.

Republicans added that because the 12th Amendment also says that “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the [electoral] votes shall then be counted…” that the president of the Senate should be the one to make the call as to which state’s contested votes were legitimate.

The Constitution provides that the vice president shall be the president of the Senate, but President Ulysses Grant’s veep, Henry Wilson, had died the previous year and Grant hadn’t replaced him; the president of the Senate in 1876 was Senator Thomas Ferry of Michigan, a Republican.

“[I]t would have been as unsatisfactory to Republicans to have the vote declared by the House,” wrote Monroe, “as it would have been to Democrats to have it declared by the President of the Senate.”

“The situation was serious,” Monroe wrote. “Some thoughtful men felt that perhaps the greatest peril that the Republic had encountered was not that of the Civil War” but that “within a hundred days, people would be cutting each other’s throats.”

Senator Banning of Ohio, “My colleague,” Monroe wrote, “declared in a speech, that, if the Republicans should attempt to carry out their theory of the election, and if a part of the army with eighty rounds of ammunition, and the navy, should be ordered to support them, the people would put them all down.”

In response, Virginia’s Congressman Goode stood up and loudly asked his colleagues if they were willing to essentially restart the Civil War.

“A shout of ‘Yes’ went up from the Republican side of the House,” wrote Monroe.

Cooler heads ultimately prevailed, and both sides worked out a compromise that gave the GOP the White House but only on the condition that the newly minted President Hayes would remove Union troops from the Southern states, ending Reconstruction.

The republic was saved, but only by selling out Southern black people for the next hundred years.

**Congress Empowers Electoral Challenges**

In the wake of the election of 1876, Congress passed the Electoral Count Act of 1887 to resolve things should such a situation recur. The [law (now codified as 3 U.S. Code § 15)](https://www.law.cornell.edu/uscode/text/3/15) specifies that after the president of the Senate opens and reads all the electoral votes as specified in Article II and in the 12th Amendment, then “the President of the Senate shall call for objections, if any.”

If a single member of each house of Congress (just one from the House *and* one from the Senate) [objects to the results](https://history.house.gov/Institution/Electoral-College/Electoral-College/), then both houses of Congress shall go back to their respective chambers and decide how to resolve the conflict. The objection “shall be signed by at least one Senator and one Member of the House of Representatives” is how the law reads.

I was recently in Seattle speaking at Town Hall with Representative Pramila Jayapal of Washington State. She told me the story of how, in the election of 2016, some Democrats were concerned that Republicans or possibly even Russians had manipulated the votes in Wisconsin, Ohio, Michigan and Pennsylvania.

She was willing to be the “objector” from the House but couldn’t find a single senator to sign onto her objection. She said she repeatedly asked Vice President Biden, who as president of the Senate, had the job of opening and certifying the electoral votes, to hold up the certification of Trump’s election win, and Biden repeatedly told her no.

The president of the Senate in 2020 will be Mike Pence, and if Trump loses the electoral vote but he and Fox are asserting fraud in some of the states, all it takes is one member each of the House and Senate to throw the issue into debate.

If this is resolved before the first week of January when the House and Senate are sworn in and, like in 1876, the House is Democratic-controlled and the Senate is still run by Republicans, the outcome will likely be a deadlock, which takes us back to the 12th Amendment’s remedy that the Democrats were afraid to use in 1876.

On the other hand, if the Democrats take the Senate and hold the House in 2020 and the dispute drags out into the next Congress, it’s possible (barring Supreme Court intervention) a united House and Senate could reject disputed votes and put the Democrat in the White House.

If, before the new session or if Democrats fail to take the Senate, the GOP or the Supreme Court could force that vote in the House (or Democrats, unwilling to let a new Civil War break out, were to cave in), because there are [more states whose legislatures are controlled by Republicans than Democrats](https://ballotpedia.org/Partisan_composition_of_state_legislatures), Trump would become president regardless of the popular or the electoral vote.

If you doubt that the Supreme Court might think that the individual state legislatures should each cast a single vote for president and keep Trump in office, consider what Rehnquist, Scalia and Thomas wrote in their separate concurrence to the [*Bush v. Gore*](https://www.law.cornell.edu/supct/pdf/00-949P.ZC) decision that gave Bush the White House, when a majority of the states’ legislatures were similarly controlled by Republicans.

Speaking of the possibility that the House may have to vote for the president, with each state having one single vote (which would have given 2000 to Bush, too), they wrote, “there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government. This is one of them.”

For emphasis, they added: “In *McPherson v. Blacker* (1892), we explained that Article II, Section 1, Clause 2, ‘convey[s] the broadest power of determination’ and ‘leaves it to the [state] legislature exclusively to define the method’ of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”

**Democrats Need to Plan**

I’ve had discussions around each of these scenarios over the past few years with conservatives and Republicans I got to know during the seven years I lived and worked in Washington, D.C. The GOP, I believe, is seriously gaming out all of these possibilities.

Meanwhile, Trump is preparing his base for this.

During the 2016 primary and general election, Trump repeatedly said that the vote was “rigged” for Democrats and Hillary Clinton. A few weeks after he won, on November 27, he [tweeted](https://www.npr.org/2018/04/05/599868312/fact-check-trump-repeats-voter-fraud-claim-about-california), “Serious voter fraud in Virginia, New Hampshire and California—so why isn’t the media reporting on this? Serious bias—big problem!”

In January of 2017, [USA Today](https://www.usatoday.com/story/news/politics/2017/01/26/fact-check-trumps-bogus-voter-fraud-claims-revisited/97080242/) reported that, “On Jan. 23, the new president told congressional leaders that between 3 million and 5 million illegal votes caused him to lose the popular vote to Hillary Clinton. Trump won the election with a convincing victory in the Electoral College, even as Clinton won the popular vote by nearly 2.9 million votes.”

In [April of 2018](https://www.npr.org/2018/04/05/599868312/fact-check-trump-repeats-voter-fraud-claim-about-california), he said to a group of supporters and reporters, “In many places, like California, the same person votes many times—you’ve probably heard about that. They always like to say ‘oh, that’s a conspiracy theory’—not a conspiracy theory, folks. Millions and millions of people.” He added that Democrats wanted “sanctuary cities” because “they think they’re going to vote Democrat.”

The week after the 2018 midterm election, Trump alleged massive voter fraud in Florida, [tweeting](https://www.nbcnews.com/politics/donald-trump/fact-check-trump-s-unsubstantiated-claims-voter-fraud-florida-n935461), “The Florida Election should be called in favor of [Republicans] Rick Scott and Ron DeSantis in that large numbers of new ballots showed up out of nowhere, and many ballots are missing or forged.”

On January 27, 2019, [he tweeted](https://www.factcheck.org/2019/01/more-voter-fraud-misinformation-from-trump/), “58,000 non-citizens voted in Texas, with 95,000 non-citizens registered to vote. These numbers are just the tip of the iceberg. All over the country, especially in California, voter fraud is rampant. Must be stopped.”

In August of 2019, [Trump told reporters](https://www.cnn.com/2019/08/16/politics/donald-trump-new-hampshire-vote-fraud/index.html), “New Hampshire should have been won [by Trump] last time, except we had a lot of people come in at the last moment, which was a rather strange situation. Thousands and thousands of people, coming in from locations unknown. But I knew where their location was.”

In [early 2020](https://nymag.com/intelligencer/2020/02/trump-brings-up-debunked-voter-fraud-claim-in-new-hampshire.html), Trump told a New Hampshire rally, “Remember last time? We won the primary tremendously. We should’ve won the [general] election, but they had buses being shipped up from Massachusetts, hundreds and hundreds. And it was very close, even though they did.”

This is just a scattering of his statements on the issue; it’s a frequent refrain in his rallies and press statements, and a line repeated constantly on Fox News.

This is no accident; these people are preparing the public for the claims they’ll use to contest the 2020 election as described earlier.

There are two possible long-term solutions to this problem, which is caused by the existence of the Electoral College.

The first is to simply repeal the Electoral College itself with a constitutional amendment, something that was last seriously tried in the 1970s when Senator Birch Bayh led the effort in Congress. It hit the two-thirds needed in the House but fell short in the Senate. Now that the last two Republican presidents have been elected exclusively with the electoral vote, the GOP has dug in its feet and is resisting any effort to eliminate it.

A second option is to go around the Electoral College. Because the Constitution gives the state legislatures the entire power to determine how their state’s electoral votes are allocated, the second way to solve the problem is for enough state legislatures to equal 270 votes (the threshold to win the electoral vote) to pass laws directing their electors to give all of their votes to whatever candidate wins the national popular vote.

There’s an [interstate compact](https://www.nationalpopularvote.com/) to do this (in the legislatures of California, Colorado, Connecticut, D.C., Delaware, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington), but that’s only 196 electoral votes. So long as red and purple states continue to have legislatures with a majority of Republicans, it faces an uphill fight.

But neither of these solutions will be in place this year.

Democrats need to get ready for the Republican plans to hold onto the White House when Trump loses by explaining *now* to the American people, repeatedly and loudly, how there’s no such thing as “voter fraud” but that the GOP’s main tool now to win elections is to pretend there is in order to justify voter suppression and election theft.

They also need to point out that the Republicans are, right out in the open and in front of us, trying to pull off a preemptive version of the 2000 Florida “[Brooks Brothers riot](https://www.washingtonpost.com/history/2018/11/15/its-insanity-how-brooks-brothers-riot-killed-recount-miami/),” when GOP staffers flew in from D.C. and pretended to be Floridians, loudly protesting outside vote-counting places and demanding that the recount ordered by the Florida Supreme Court be stopped and Bush be made president.

Get it into the media and repeat it over and over again: “The GOP plans to claim ‘Democratic voter fraud’ in this election to steal the election for themselves, and they’re already getting people primed for it!”

Then, when the GOP starts screaming that some states where Trump lost “are in doubt” because of “voter fraud,” it’ll be seen as the scam that it is.