

## Raising Questions

The presidential elections of 2016 and 2020 were two of the most disconcerting in American history. In 2016, the winning candidate lost the popular vote by three million votes and never obtained the support of the public. In 2020, the incumbent president lost by seven million votes. Instead of conceding defeat, he exploited the complex system of certifying the results to prolong the denouement of the election, attempting to subvert the US democratic process. Both elections raise serious doubts about democracy in America. At the core of these misgivings is the electoral college.

The 2016 presidential election was not unique. In this century, the loser of the popular vote also won the 2000 presidential election. And it was the electoral college, not the Supreme Court's decision in *Bush v. Gore*, that determined the outcome of that protracted election between George W. Bush and Al Gore. If we selected presidents as we choose almost every other elected official in the United States, Al Gore would have been the president – no matter which chads were counted in Florida.

That the runner-up in the popular vote has won the presidency twice in this young century raises the question of our mechanism for selecting presidents. Should not the candidate receiving the most votes win the election? Supporters of the electoral college saw no problem in the outcome of the Donald Trump–Hillary Clinton and Bush–Gore races. Those wishing to reform the electoral college, however, viewed those outcomes as violating political equality, a central tenet of democracy.

The country's surface acceptance of both election results masked deeper concerns about the new president's legitimacy. The first Gallup poll on George W. Bush's tenure revealed that he had a higher disapproval level than any previous president.<sup>1</sup> Similarly, the public's initial reception of Bush reflected the widest partisan differences for any newly elected president in polling history. In the twenty-eight Gallup and CBS/*New York Times* polls taken before September

11, 2001, Bush's approval ratings averaged 88 percent among self-identified Republicans but only 31 percent among Democrats. Independents averaged 50 percent. This fifty-seven-point difference between Democrats and Republicans indicated an extraordinary polarization in the wake of the resolution of the 2000 election.<sup>2</sup> Even after two and a half years and a sharp increase in his approval ratings following the 9/11 attacks, 38 percent of the public, including a majority of Democrats and half of Independents, did not consider Bush the legitimate winner of the 2000 presidential election.<sup>3</sup>

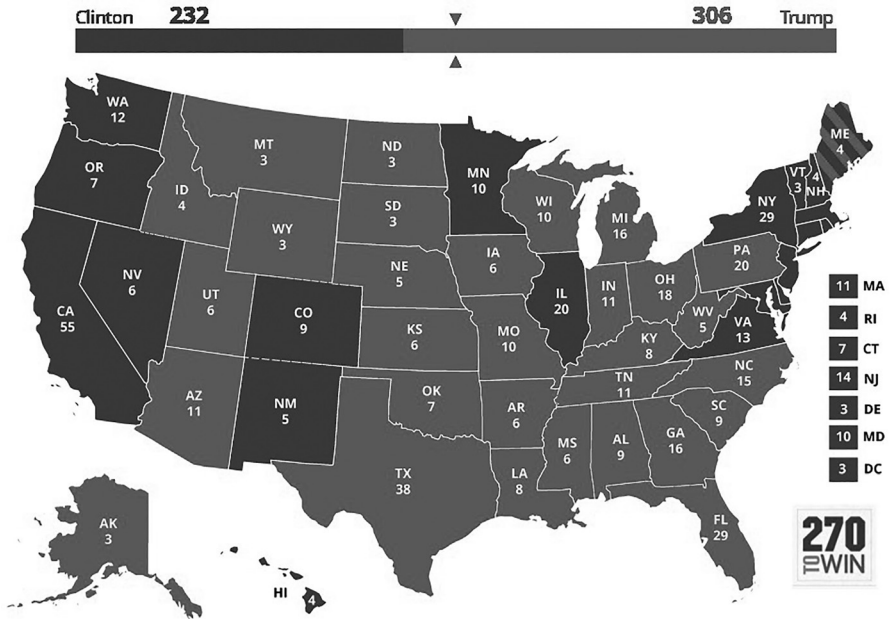
Donald Trump fared even worse in 2016. Immediately after his election, 43 percent of the public had a positive response, but 52 percent were upset or dissatisfied.<sup>4</sup> Forty-two percent of Americans described their reaction to his election as one of being "afraid."<sup>5</sup> The first Gallup report on his approval found his *disapproval* rating – 45 percent – was by far the highest of any new president.<sup>6</sup> On January 21, 2017, the day after Trump's inauguration, between three and five million people across the country marched in a Women's March to protest statements of the president many considered as anti-women or otherwise offensive to women, the largest one-day demonstration in American history.<sup>7</sup> Trump never recovered from his early low ratings, not even once reaching 50 percent approval in a Gallup poll.<sup>8</sup> In addition, the nature of his victory significantly decreased how people perceived the legitimacy of his presidency.<sup>9</sup>

As Thomas Patterson put it, to say that the system works is to judge its soundness "by the public's willingness to tolerate its distortions."<sup>10</sup> No president should have to govern amid questions of his legitimacy and with little initial support. Gerald Ford decided against a recount in the very close election in 1976, telling his staff, "I lost the popular vote. It would be very hard for me to govern if I won the presidency in the Electoral College through a recount." James Baker, Ford's campaign manager and later George W. Bush's lead advocate in the Florida recount, acknowledged, "He was right, of course."<sup>11</sup>

## THE 2016 ELECTION

Donald Trump's election to the presidency in 2016 was one of the greatest surprises in American political history, similar to Harry Truman's famous upset of Thomas Dewey in 1948. Because Hillary Clinton led in the public opinion polls throughout the campaign, few political pundits expected a Trump victory. Although he waged a much less elaborate and expensive campaign than his opponent, ran under the banner of a more divided party, lost all the formal presidential debates, was less popular than Clinton, and was rated by voters as more unqualified for office than her, Trump prevailed.<sup>12</sup>

The differences in the votes they received were even more striking – and worrying (Figure 1.1). Clinton won 2,984,757 more votes than Trump – 2.2 percent more of the popular vote.<sup>13</sup> Indeed, it appears that the electorate preferred



Candidate	% of Vote	Electoral Votes Cast
Trump	45.8	304
Clinton	48.0	227
Others	6.2	7

FIGURE 1.1 2016 Electoral college results

Donald Trump won the presidency despite losing the popular vote by a substantial margin because he received a majority of the electoral vote.

not only Hillary Clinton but also the two third-party candidates, Gary Johnson and Jill Stein, to Trump.<sup>14</sup> Nevertheless, Trump was inaugurated on January 20, 2017, as the forty-fifth president of the United States. How can we justify such an outcome?

Supporters of the electoral college argue that with each state guaranteed a specific number of electoral votes, and with all but two states choosing to cast their votes as a unit, the electoral college forces major-party candidates to pay attention to all regions of the country, ensuring the winner’s coalition will mirror the nation. Moreover, advocates claim, the electoral college ensures that presidential candidates will be attentive to state-based interests, especially those of states with small populations. In addition, they maintain, victory in the electoral college encourages national harmony and provides the president with a much-needed mandate to govern.

So, what did Donald Trump and Hillary Clinton actually do in the 2016 general election? Did they campaign across the nation, paying special attention to small states? Did Trump's victory reflect national harmony and earn him an electoral mandate?

We will see that none of the claims made by defenders of the electoral college proved to be correct. The presidential candidates avoided campaigning – in person or through advertising – in the small states and instead concentrated their efforts heavily in the large, competitive states. Neither Trump nor Clinton focused their campaigns in different states on those states' specific interests. Their stump speeches and advertisements addressed issues of national concern such as immigration, trade, health care, jobs, and the wars in Iraq, Syria, and Afghanistan. There is no evidence, either, that the candidates made private pledges to support interests in those states that they neglected during the campaign.

Defenders of the electoral college also argue that forcing presidential candidates to seek broad support helps maintain national harmony. We have seen that the candidates concentrated their campaigns on a few states. In addition, Donald Trump won a *smaller* percentage than Hillary Clinton of the votes of a wide range of the basic demographic components of American society. Thus, Trump's vote did not represent concurrent majorities across the major strata of American society. What actually happened was that the electoral college elected a candidate supported by white male Protestants – the dominant social group in the country – over the objections not only of a plurality of all voters but also of most of the politically relevant minority interests in the country.

The electoral college also did not induce a bipartisan coalition supporting the winner. Instead, Trump's support was the most polarized since the American National Election Studies began in 1952. Moreover, the first Gallup report on his approval found his initial rating – 45 percent – was lower than that of any previous president since polling began. Moreover, his approval was also the most polarized: 90 percent for Republicans but only 14 percent among Democrats.<sup>15</sup>

Another claim made for the electoral college is that it creates a mandate for governing, strengthening the president's position in our decentralized political system. We will see that Trump did not receive an electoral mandate. Subsequent events showed how little support the president had. Neither congressional Republicans nor Democrats deferred to him, and the public opposed many of his major initiatives. The president could not muster majority backing for his policies regarding health care, taxes, immigration, or climate change.<sup>16</sup>

When the time came for electors to cast their ballots, another issue arose. Seven electors – five Democrats and two Republicans – failed to support their party's candidates. The number of faithless electors was not large enough to affect the outcome of the election, but their actions dramatically illustrated the disconnection between the wishes of the people and the results in the electoral college, as well as the potential for even greater mischief in the future.

In sum, in 2016, the electoral college did not work at all as its defenders said it would. Instead of encouraging candidates to take their cases to the entire country and pay special attention to small states, it distorted the electoral process and gave the candidates strong incentives to ignore most of the country, especially the smallest states. It did not ensure national harmony by providing the winner with a broad coalition and a mandate to govern. Moreover, the electoral college did not preclude extreme partisan polarization. In addition, faithless electors did not vote for their party's nominees, violating voters' trust. At this point, it does not appear that the presumed benefits of the electoral college can serve as justification for the violation of political equality in electing the candidate who finished second in the balloting. The remaining chapters will investigate this matter in detail.

#### THE 2020 ELECTION

Hillary Clinton graciously conceded defeat in 2016, bringing the election to a close. Donald Trump did not follow her example in 2020. Instead, he refused to acknowledge Joe Biden's victory and engaged in an endless round of false charges about electoral fraud and maneuvered to overturn duly certified electoral votes for his opponent. In the process, the president induced many of the populace to believe their votes were not counted fairly and to adopt more negative attitudes toward elections and democracy.<sup>17</sup>

At 2:30 a.m. on November 4, 2020, as the presidential vote count solidified Joe Biden's victory in the electoral college, Trump declared to the nation and the world: "This is a fraud on the American public. This is an embarrassment to our country. We were getting ready to win this election. Frankly, we did win this election." With this hyperbolic rhetoric, the president launched an unprecedented attack on the American electoral system, with the goal of overturning the election results. In the process, he:

- (1) attempted to delegitimize the electoral process before the election occurred;
- (2) ignored the conclusions of his appointees and spread false information about the 2020 election;
- (3) supported the filing of scores of lawsuits claiming electoral irregularities;
- (4) bullied state and local officials to make changes in vote counts;
- (5) attempted to coerce the Department of Justice to support his claims of election fraud;
- (6) sought to have state legislators overturn the election results by selecting electors directly;
- (7) instructed Republicans in seven states to create false electoral slates and transmit those slates to Congress and the National Archives;
- (8) pressured Vice President Mike Pence to reject electoral votes cast for Biden and replace them with uncertified votes for Trump;

- (9) summoned protestors to Washington, DC, and directed them to march on the Capitol and demand that the vice president and Congress reject duly certified electoral votes cast for Biden; and
- (10) ignored pleas for assistance from his advisers and failed to take action to stop the violence.

### Pre-election Efforts to Delegitimize the Electoral Process

The president paved the way for his post-elections claims of fraud “by blanket-ing voters with a blizzard of lies and statements delegitimizing mail-in voting and consistently questioning the security of ballots.”<sup>18</sup>

#### *False Claims of Fraud*

In the immediate aftermath of the election and continuing to this day, the president and his allies claimed the election was characterized by widespread voter fraud, including votes being cast by ineligible voters, ballots for Joe Biden being counted multiple times, voter counters altering the dates on absentee ballots, phony and improperly filled-out ballots being counted, and proper ballots being rejected. Most remarkably, Trump and his supporters claimed that Dominion voting machines switched votes and rigged the election.<sup>19</sup> No such fraud was ever verified, and recounts in Georgia, Wisconsin, and Arizona validated Biden’s victory in those states. Trump did not care. He wanted to reverse the election results. In his view, “You say something enough times, and it becomes true.”<sup>20</sup>

Many of the president’s top advisers told him there was no fraud.<sup>21</sup> Matt Morgan, the general counsel for the Trump campaign, later told Congress that any fraud that may have occurred “was not sufficient to be outcome-determinant.” Eric Herschmann, a White House attorney for Trump, added, “I never saw any evidence whatsoever to sustain those allegations.”<sup>22</sup> The Department of Homeland Security also concluded that “The November 3rd 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.”<sup>23</sup>

A group of prominent conservatives undertook an examination of every claim of fraud and miscount put forward by former President Trump and his advocates. They concluded that

there is absolutely no evidence of fraud in the 2020 Presidential Election on the magnitude necessary to shift the result in any state, let alone the nation as a whole. In fact, there was no fraud that changed the outcome in even a single precinct. It is wrong, and bad for our country, for people to propagate baseless claims that President Biden’s election was not legitimate.<sup>24</sup>

Similarly, a Republican-commissioned review of votes in Maricopa County (Phoenix), Arizona, a Republican-led Michigan state Senate committee report, a Republican-ordered Wisconsin State Assembly investigation and a recount of votes in Milwaukee and Dane (Madison) counties, and two Republican-supervised

recounts in Georgia found an absence of fraud and Biden victories in their states. An Associated Press review of every potential case of voter fraud in six battleground states also found that Biden had won legitimately.<sup>25</sup>

On December 1, 2020, Attorney General William Barr announced that there was no evidence of electoral fraud that could have changed the election results.<sup>26</sup> Barr repeated his conclusion about fraud before the House Select Committee to Investigate the January 6 Attack on the United States Capitol. Among his choice words about various claims by the Trump legal team were “bullshit,” “completely bullshit,” “absolute rubbish,” “idiotic,” “bogus,” “stupid,” “crazy,” “crazy stuff,” “complete nonsense,” and “a great, great disservice to the country.” What is more, Barr added, if Trump actually believed the allegations he was spewing about the election, then he had become dangerously “detached from reality” as he pushed the Justice Department to investigate increasingly far-fetched fraud claims. Trump, Barr observed, never gave any “indication of interest in what the actual facts were.”<sup>27</sup>

The president and some of his supporters were also open to and helped publicize bizarre and baseless conspiracy theories that Chinese software companies, Swiss bankers, an Italian security firm, Venezuelan officials, and the liberal financier George Soros had separately or together hacked into Dominion voting machines in a secret plot to steal votes from Trump. The Trump campaign never provided proof of these allegations. When Dominion sued Trump lawyer Sidney Powell for defaming the firm, her official court response was that her claims were so outrageous that “no reasonable person would conclude that the statements were truly statements of fact.”<sup>28</sup>

### *Litigation*

In total, the Trump campaign and allies of President Trump filed sixty-two separate lawsuits between November 4, 2020, and January 6, 2021, calling into question or seeking to overturn the election results. Some of the lawsuits alleged voter fraud, but most of the campaign’s legal actions made no such claims. They had no evidence of fraud to present to the courts. Instead, the litigation focused on procedural issues related to changes made to the voting process during the coronavirus pandemic. Many of these suits raised questions about matters such as the deadlines by which postal or mail-in voters had to submit materials confirming their identities or about the legitimacy of ballot drop boxes. Often, they hinged on complex arguments about the scope of state lawmakers’ power to establish election rules.

Judges in nine states and Washington, DC, evaluated President Trump’s claims that the election was stolen. Thirty of the cases were dismissed by a judge *after* a hearing on the merits.<sup>29</sup> Twenty-two of the judges who heard the cases were appointed by Republican presidents, ten by Trump himself.<sup>30</sup> The Trump campaign lost sixty-one of these cases.<sup>31</sup> “In every State in which claims were brought, one or more judges specifically explained as part of their dismissal orders that they had evaluated the plaintiffs’ allegations or supposed

proof of widespread election fraud or other irregularities, and found the claims to be entirely unconvincing.”<sup>32</sup>

### *Attempted Coercion of State and Local Officials*

Not content to rely on the courts, the president and his aides and top supporters attempted to coerce state and local officials to make changes in vote counts.<sup>33</sup> Most blatantly, the president called Georgia Secretary of State, Brad Raffensperger, on January 2, 2021. In an hour-long conversation, Trump threatened Raffensperger, implying that the secretary would be subject to criminal penalties, and then asked him to deliver him a second term by “finding” just enough votes to ensure victory. The president declared, “I just want to find 11,780 votes.”<sup>34</sup>

Raffensperger felt threatened but resisted the president’s pressure.<sup>35</sup> So did many other officials, ranging from governors and state legislators to frontline election workers. In doing their jobs and protecting the public interests, they were subjected to

public demonization and subsequent spamming, doxing, harassment, intimidation, and violent threats. Some of the threats were sexualized or racist in nature and targeted family members. President Trump never discouraged or condemned these tactics, and in fact he was an active participant in directing his supporters, through tweets and speeches, to apply pressure to public servants who would not comply.<sup>36</sup>

### *Misuse of the Department of Justice*

The president was furious with William Barr for announcing there was no significant fraud in the election, and the attorney general announced on December 14, 2020 that he was resigning, effective December 23. What followed was an effort by Trump to pressure the Justice Department into backing his falsehoods that the election had been rigged and stolen from him.<sup>37</sup> He named Jeffrey Rosen as acting attorney general to replace Barr and Richard Donoghue as acting deputy attorney general. The next day in the Oval Office, the president pressed Rosen to appoint a special counsel to investigate electoral fraud. He also wanted the department to support lawsuits that sought to overturn the election. Then, and for the remainder of the administration, Rosen rebuffed such requests, reiterating Barr’s conclusion that there was no widespread fraud. Pat Cipollone, the White House Counsel, and attorney Eric Herschmann, Senior Advisor to the president, were highly supportive of the Department of Justice’s stance.<sup>38</sup> Conversely, White House Chief of Staff Mark Meadows repeatedly pressed the department to dispute the election results.<sup>39</sup>

The president flouted an established anticorruption norm that the Department of Justice acts independently of the White House on criminal investigations or law enforcement actions.<sup>40</sup> On December 27, Trump even suggested the department could “just say that the election was corrupt and leave the rest to me and the Republican Congressmen.”<sup>41</sup>



Finally, a frustrated president tried to replace Rosen with a loyalist, Jeffrey Clark, who lacked the appropriate credentials to serve as attorney general. Clark asked Rosen to send a letter falsely informing Georgia state officials that a federal investigation could invalidate the state's results. Rosen refused. Clark then secretly spoke with Trump, in defiance of orders. On January 3, he informed Rosen that the president intended to appoint him to replace Rosen. The acting attorney general met with Trump that evening. In an extensive discussion, Rosen explained Clark's lack of qualifications to serve as attorney general. Equally important, he pointed out that such an appointment would result in the entire leadership of the department resigning *en masse*, leading to perhaps hundreds of other resignations in Washington and around the country. Wishing to avoid a public relations disaster, Trump took no action.<sup>42</sup>

### *Seeking to Have Republican State Legislatures Appoint Electors Directly*

Making false claims of fraud and seeking to overturn election results through lawsuits could occur under any system of electing the president. However, the electoral college, as we will see, provides not only increased incentives to commit fraud but also to overturn state election results, because a small change in vote totals can yield a large change in electoral votes. Moreover, many other attempts to subvert the presidential election outcome in 2020 were only conceivable because of the electoral college. I will detail these efforts in the following chapter. Here, I illustrate the potential of the electoral college for promoting instability and undermining democratic values.

The flurry of lawsuits filed by the Trump campaign appear to have been aimed, at least in part, at slowing down states' certification of electoral voters and possibly providing a pretext to declare a "failed" election under the 1887 Electoral Count Act, which would allow state legislatures to step in and appoint electors.<sup>43</sup>

After scores of cases were rejected by the courts – often with scathing words from judges, including Republican jurists – the state of Texas filed an unusual request directly to the US Supreme Court that challenged election procedures in four key swing states: Georgia, Michigan, Pennsylvania, and Wisconsin. The Texas lawsuit asked the Court to block those states from casting their electoral votes for Biden and to shift the selection of electors to the states' Republican legislatures. That would have effectively handed Trump the election and required the justices to throw out millions of votes. The Supreme Court – in the hands of a conservative majority bolstered by three Trump appointees – rebuffed the effort in a brief unsigned order, finding that Texas lacked standing to pursue the case.<sup>44</sup>

A complementary strategy of the Trump campaign was to convince Republican state legislators in states that Biden won to intervene to reject the election results and directly select Republican electors – even after a state's electoral votes were certified.<sup>45</sup> On January 2, 2021, attorneys John Eastman and Rudolph Giuliani joined Trump on a conference call with approximately

300 state legislators. The president told them that they had the best chance to change the certified results of the presidential election in certain states. “You’re the ones that are going to make the decision,” he said.<sup>46</sup> Three days after the call, dozens of lawmakers from Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin wrote to Vice President Mike Pence, asking him to delay certification of Biden’s victory for ten days to allow “our respective bodies to meet, investigate, and as a body vote on certification or decertification of the election.” Pence made no effort to respond. Members of the Pennsylvania state legislature wrote a letter to Senator Mitch McConnell, then the Senate majority leader, and Representative Kevin McCarthy, the Republican leader in the House, asking them to delay certification.<sup>47</sup>

Trump acknowledged that in deciding whom to endorse in state legislative races in 2022, he was looking for candidates who wanted state legislatures to have a say in naming presidential electors – a position that could let politicians short-circuit the democratic process and override the popular vote. The former president continued to try to convince state legislatures that they could “decertify” the results of the 2020 election, a process that has no basis in either the US Constitution or state constitutions.<sup>48</sup>

### *Encouraging Republicans to Create False Slates of Electors*

On the day the electoral college voted, December 14, 2020, Republican electors convened in the capitals of five states in which Joe Biden had won the popular vote: Arizona, Georgia, Michigan, Nevada, and Wisconsin. They declared themselves “duly elected and qualified” and sent signed certificates to Washington affirming Donald Trump as the actual victor in the election. Republican electors in two additional states, Pennsylvania and New Mexico, sent certificates with the qualifier that they were to be considered only if the election results in their states were changed. These efforts were orchestrated by the Trump campaign.

No state legislature or governor agreed to certify those slates as authentic. The Trump campaign’s senior staff attorneys had concerns about this scheme and refused to support it. The Office of White House Counsel also opposed the plan, and the acting attorney general and the deputy attorney general blocked the sending of a letter indicating that there were “competing slates” of electors. Nevertheless, Trump and his supporters cited the actions of these electors to argue that Biden’s victory in the five states was in doubt, and they claimed that when Congress met to count the electoral college votes, Vice President Mike Pence could reject the votes for Biden and perhaps choose to recognize Trump’s electors instead.<sup>49</sup>

### *Pressuring the Vice President to Reject Electoral Votes for Biden*

The ultimate step in certifying the election of a president is Congress’s counting of the electoral votes. As a last-gasp effort to overturn the election result, President Trump and some of his supporters argued that Vice President Mike

Pence, as president of the Senate, had the authority to discard some electoral votes for Biden, denying him a majority and throwing the election into the House of Representatives. Alternatively, they argued that Pence could send “disputed” electoral votes back to the states for reconsideration. Some in the president’s camp even wanted Pence to count alternative slates of fake electoral votes cast for Trump. These actions were clearly illegal, and senior White House and campaign officials opposed them, as did conservative former US Court of Appeals judge Michael Luttig, former Vice President Dan Quayle, and former Speaker of the House Paul Ryan. Nevertheless, a desperate Donald Trump made a strong-armed attempt to subvert the electoral college process and bludgeon Pence into obedience.<sup>50</sup>

Trump met with Pence on the evening of January 5, 2021, the day before the formal certification process in Congress. He urged the vice president, in his capacity as the presiding officer at the certification session, to reject Biden’s electors. Pence responded that he did not have the power to do so. “What if these people say you do?” Trump asked, gesturing outside, where a large crowd of his supporters had gathered. Their cheering and bullhorns could be heard through the Oval Office windows. “I wouldn’t want any one person to have that authority,” Pence replied. “But wouldn’t it almost be cool to have that power?” asked the president. “No,” Pence said. “I’m just there to open the envelopes.” “You don’t understand, Mike, you *can* do this. I don’t want to be your friend anymore if you don’t do this.” Trump’s voice became louder, and he grew threatening. “You’ve betrayed us. I made you. You were nothing,” he said. “Your career is over if you do this.” In a 10 a.m. call to Pence on January 6, Trump tried again. “Mike, you can do this. I’m counting on you to do it. If you don’t do it, I picked the wrong man four years ago.”<sup>51</sup>

Despite the president’s pressure, Pence held firm. We can be thankful for his courage and commitment to constitutional principles. Nevertheless, the possibility that the vice president, sitting as presiding officer of a joint session of Congress to count electoral votes, could decide on his own to ignore electors certified by the states – effectively reelecting himself in the process – poses a serious threat to democracy in America.

### ***Using Protestors to Pressure the Vice President and Congress to Reject Electoral Votes for Joe Biden***

On December 19, 2020, President Trump took to Twitter and issued a call to his supporters to join him in Washington for a last-ditch rally to protest the results of the vote. A date was set for January 6, 2021 – the day Congress would oversee the final certification of the electoral vote count. “Be there,” the president wrote, “will be wild!”

Ultimately, hundreds of thousands of Trump supporters descended on Washington that day, and thousands of them heard the president deliver an incendiary speech at the Ellipse near the White House. After Rudolph Giuliani urged the crowd to “have trial by combat,” the president spoke. He again

claimed that the election had been stolen, encouraged the crowd to “fight like hell” to save the country, and declared that “you’ll never take back our country with weakness.” He urged the crowd to walk to the Capitol and promised, “I’ll be there with you.”<sup>52</sup>

Trump returned to the White House, however. Although he knew the crowd was armed, he was not concerned.<sup>53</sup> Thousands heeded his call to march from the Ellipse to the Capitol. Believing Trump’s lie of a stolen election, rioters, chanting “Hang Mike Pence,” stormed the Capitol with Pence inside, erected a gallows, and forced lawmakers to evacuate in a scene of violence and mayhem. In the words of the Select Committee to Investigate the January 6th Attack on the United States Capitol,

President Trump had summoned a mob, including armed extremists and conspiracy theorists, to Washington, DC on the day the joint session of Congress was to meet. He then told that same mob to march on the U.S. Capitol and “fight.” They clearly got the message.<sup>54</sup>

Republican Senate leader Mitch McConnell accurately described the attack as a “violent insurrection for the purpose of trying to prevent the peaceful transfer of power, after a legitimately certified election, from one administration to the next.”<sup>55</sup> The electoral college was the catalyst for this peril to democracy in America.

### *Failure to Act to Stem the Violence*

As he watched the riot unfold on television, Republican members of Congress, former administration officials, Fox News personalities, and even the president’s own son implored him to stop the violence. Yet it took more than three hours for Trump to tell the mob to disperse. He even poured fuel on the fire with a tweet containing a link to his Ellipse speech one minute before the mob violently pushed through the Capitol police and moved toward the House chamber.<sup>56</sup> Finally, in a video posted on Twitter, he told his supporters that there had been “an election that was stolen from us,” but that it was time for them to go home peacefully. Even then, he could not resist adding, “We love you,” he said. “You’re very special.”<sup>57</sup>

Fifteen months later, on June 9, 2022, the president cast the attack on the Capitol as a legitimate manifestation of public grievance against a stolen election. “January 6th was not simply a protest, it represented the greatest movement in the history of our Country,” he wrote on his new social media site.

### **Consequences for the Polity**

Donald Trump’s defeat was undisputed among election officials and certified by Democratic and Republican state election officials, with slates of electors signed by Democratic and Republican governors. Nevertheless, the grievance-filled, insecure president, unable to face the fact of his defeat, collaborated with a

cabal of loyalists in and out of government to overturn the election results. The electoral college was at the heart of these efforts.

Donald Trump's unsubstantiated vote-fraud claims infected the Republican Party. More than 60 percent of House Republicans, including the top two party leaders, joined a legal brief supporting the unsuccessful Texas lawsuit asking the Supreme Court to overturn the election results. Even in the wake of the violent attack on the US Capitol on January 6, 2021, many House Republicans, especially those representing constituencies in which the president was popular, continued to amplify Trump's baseless claims by voting to exclude the electors from Arizona and Pennsylvania.<sup>58</sup> The *New York Times* found that at least 357 sitting Republican legislators in closely contested battleground states have used the power of their office to discredit or try to overturn the results of the 2020 presidential election. The tally accounts for 44 percent of the Republican legislators in the nine states where the presidential race was most narrowly decided. In each of those states, the election was conducted without any evidence of widespread fraud.<sup>59</sup>

Trump's refusal to admit defeat also weakened his successor. First, Trump and his aides delayed initiating a transition to a new presidency, making it more difficult for Biden's administration to get up to speed by Inauguration Day. Worse, the claims of voter fraud delegitimized Biden's presidency in the eyes of most Republicans in the public. In July 2022, a year and a half after Biden took office, only 34 percent of Republicans (compared to 98 percent of Democrats) thought his election was legitimate.<sup>60</sup> A poll in December 2022 found that only 28 percent of Republicans thought Biden had won his election fairly. Another 17 percent said they did not know.<sup>61</sup> Even in May 2023, only 36 percent of Republicans concluded that he had won legitimately.<sup>62</sup>

No doubt in response to this type of opinion, more than 120 Republican nominees for major offices in 2022 backed Trump's false claims of fraud in the 2020 election. His election denialism had become the price of victory in many primary elections.<sup>63</sup> Among members of the 118th Congress (2023–2024), more than two dozen Republicans had explicitly claimed the 2020 election was stolen or rigged, and about 150 others had cast doubt in other ways.<sup>64</sup>

Equally threatening to democracy in America, in December 2021 only 33 percent of Republicans thought the January 6 riot was an attempt to overturn the election and keep Donald Trump in power.<sup>65</sup> In June 2022, half of Republicans in the public reported that they believed either that the January 6 riot was justified or that they were not sure if it was.<sup>66</sup> Sixty-one percent of Republicans saw the riot as a legitimate protest.<sup>67</sup>

Public officials, from governors to local election workers, paid a price for simply doing their jobs. They were sometimes subject to scathing criticism and public pressure in attempts to bully them into supporting the Trump campaign's outrageous accusations. It is understandable if those officials, particularly those unaccustomed to the limelight, decided that public service requires too much sacrifice.

A critical consequence of Trump's reelection effort is its impact on governing. He exploited the potential for winning the presidency while receiving fewer votes than his opponent by relying largely on his core supporters.<sup>68</sup> The president never enjoyed the approval of a majority of the public. Thus, he concluded that he would never persuade most of the public to support either him or his policies. His solution was to fire up his base. "This president seems to be operating on 'how do I make my smaller supporters more intensified' as opposed to 'how do I get more supporters?'" explained Matthew Dowd, a former top political advisor to George W. Bush. "Instead of trying to overcome division, he is trying to harden the division."<sup>69</sup> Indeed, Trump governed by stoking division and typically paid no rhetorical deference to the notion of the presidency as a national unifier. General James Mattis, his former secretary of defense, wrote, "Donald Trump is the first president in my lifetime who does not try to unite the American people – does not even pretend to try. Instead he tries to divide us."<sup>70</sup>

This strategy was successful in winning the presidency in 2016, but it was not well suited for governing. According to Republican pollster Whit Ayres, "Donald Trump got elected with minority support from the American electorate, and most of his efforts ... focused on energizing and solidifying the 40 percent of Americans who were with him, primarily by attacking the 60 percent who were not. That is great for his supporters, but it makes it very difficult to accomplish anything in a democracy."<sup>71</sup>

#### A NEED TO REEVALUATE

Given the electoral college's sometimes antidemocratic results and consequences and its failure to fulfill its advocates' claims for it, one might think that there would be substantial informed debate about the unique manner by which Americans select their presidents. But there is no such debate.

Two aspects of discourse on the electoral college are especially striking. First, the supporters of the electoral college rarely join the issue. Reformers argue that the electoral college violates political equality as epitomized in the principle of one person, one vote – one of the most fundamental tenets of democracy. Given the country's commitment to democracy and the importance of equality in American life, one might anticipate that supporters of the electoral college would respond to attacks on it with principled arguments. But they rarely do. Instead, typically they simply dismiss such concerns and focus on what they see as the system's advantages.

A second striking aspect is the nature of the discussion. Supporters argue – often passionately, sometimes hysterically – that the electoral college has a wide range of advantages for the American polity. These benefits are said to include protecting the interests of small states and strategically placed minorities, preserving federalism, encouraging the two-party system, and protecting against voter fraud. These assertions certainly deal with important issues and require careful examination.

It is disconcerting, then, to find that supporters of the electoral college are extraordinarily insouciant about their claims on its behalf. They virtually never marshal data systematically or rigorously evaluate supposed benefits. Nor do they cite relevant literature. Instead, they make assertions. There are ways to evaluate claims. For example, do candidates really pay attention to small states? We can find out. Is the electoral college really a fundamental pillar of federalism? Let us examine the federal system and see. Is the winner-take-all system in the electoral college the critical institutional underpinning of the two-party system? Researchers have been studying party systems for years. We have the knowledge to answer this question.

Talking past each other is not a useful means of evaluating constitutional provisions for selecting the president. The purpose of this book is to join the issue, to focus directly and systematically on the core questions surrounding the electoral college and assess whether it warrants a role in American democracy.

We cannot evaluate the electoral college until we understand how it works. Chapter 2 does this by asking and then answering a set of key questions about the way we elect the president and vice president. These answers flesh out many of the problems illustrated in the discussion of the elections of 2016 and 2020 in this chapter.

Chapter 3 makes the normative argument that political equality lies at the core of democracy and that we must evaluate any means of electing officials against this standard. I then engage in empirical analysis to show that the electoral college violates political equality and I explain how it does so. Chapter 4 focuses on the contingent election process, showing how it also represents an egregious violation of democratic principles.

Not even its most ardent defenders deny that the electoral college contravenes political equality. Does the electoral college provide benefits for the polity that justifies its violation of democratic principles? Answering this fundamental question is the focus of Chapters 5–8. In Chapter 5, I investigate whether the framer's intentions provide a political theory that can justify violating majority rule in the twenty-first century. They cannot. Most of the motivations behind the creation of the electoral college are irrelevant today, and the electoral college does not work at all as the framers anticipated.

The defense of the electoral college system's violation of political equality, then, must rest on arguments about how its current operation provides other fundamental benefits. One of the core justifications for the electoral college is that it is necessary to protect important interests, especially state-based interests. I investigate these claims rigorously in Chapter 6 and find them based on faulty premises. States do not embody coherent, unified interests and communities, and they have little need for protection. Even if they did, the electoral college does not provide it. Indeed, the electoral college *discourages* candidates' attention to most states, including almost all small states, and to the interests of people of color.



Advocates of the electoral college offer few other positive benefits on its behalf. Instead, they claim that alternative methods of presidential selection, especially direct election, would damage the polity. One disparate set of arguments centers on maintaining the harmony and cohesion of the Republic. Defenders of the electoral college charge that direct election of the president would encourage electoral fraud and vote recounts, sow national disharmony, and deny the president a mandate for governing. Most supporters of the electoral college also maintain that it is an essential bulwark of federalism.

I examine these contentions in Chapter 7 and find that the electoral college does not contain the results of fraud and accidental circumstances within states. Instead, it magnifies their consequences for the outcome nationally. Direct election, by contrast, would create disincentives for fraud and recounts. Similarly, the notion that the electoral college produces concurrent majorities around the country and forces winning candidates to moderate their stances to appeal successfully to all segments of society and all geographic locations is illusory, and under direct election of the president there is little chance of one state, big-state, or large-city dominance of an election. Equally problematic is the view that victory in the electoral college ensures presidents mandates and effective coalitions for governing. Moreover, the electoral college does not represent constitutional consistency, as it differs fundamentally from constitutional provisions that require supermajorities to take positive action. Equally important, the electoral college is not an underpinning of federalism.

Defenders of the electoral college also charge that direct election of the president would fragment and polarize the party system and lead to corrupt deals among political leaders. At the core of the argument is the assumption that direct election would require a runoff between the two candidates receiving the most votes.

In Chapter 8, I show that there is no need for a runoff under direct election of the president. In the absence of a runoff, both plurality election and ranked choice voting are more likely to produce the Condorcet winner than the electoral college. In addition, the electoral college is not essential for a two-party system and actually encourages third parties to run as presidential candidates, increases the impact of third parties in distorting election results, and discourages party competition in many states. There is no evidence that direct election of the president would polarize political parties. Similarly, there would be little incentive for secret deals under direct election and severe constraints on the bargains third parties could make.

Defenders of the electoral college base their arguments on faulty premises. In Chapter 9, I review the primary options for electing the president, concluding that direct election is the best choice. Direct election of the president cannot diminish benefits of the electoral college that do not exist and offers substantial benefits for American politics. Under direct election, candidates would be more likely to campaign widely, voters would be better informed and more likely to



turn out to vote, parties would be more competitive, and winning presidents would enjoy more legitimacy with the populace.

I end by assessing the prospects for changing the way we elect presidents. Because there is widespread confusion regarding presidential selection, the first step toward a rigorous evaluation of the electoral college is understanding how it works.

#### SUGGESTED READINGS

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