

How the Electoral College could deny Donald Trump the presidency.

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*The 2016 election is not yet over – on December 19th Electors from across the US will meet to cast their votes for president as part of the Electoral College. **Jeffrey Tulis** writes that the Electoral College – which began as a deliberative institution – could be used to deny Donald Trump the presidency. He argues that a bi-partisan coalition of Electors could choose a Republican other than Trump, thus splitting the Electoral College and handing the election to the House of Representatives.*



Americans do not elect their Presidents directly, through a popular vote. Rather, each citizen votes for a slate of Electors in the state in which they reside who are pledged to support the winning candidate in that state. In other words, the presidential candidates win all of the electoral votes of each state in which they prevail in the popular votes in that state. There are two exceptions: Maine and Nebraska each divide their electors between the winner of the state as a whole and winners of the Congressional districts within the state. The Electors throughout the United States form a body called the Electoral College, although it is not a single deliberative body but rather multiple bodies that meet within each state legislature on December 19 to choose the next President of the United States. Their votes are transmitted to the United States House of Representatives where they are counted and certified. In the event that no candidate has a majority of electoral votes (which is 270) the House, voting by state delegations chooses the president from among the three highest electoral vote-getters. House selection of the President has happened three times in American history– in 1801, 1825, and 1877.

When the American Founders devised this system they meant for the Electors to be an independent body that filtered the will of the people and exercised their discretion to choose candidates who were genuinely fit for office. They were particularly worried that a demagogue might ascend to the highest office and lead the Republic to the kind of ruin faced by so many in the historical record of failed democracies. Over the years, the Electoral College has, by norm, custom and specific state laws, evolved into a mere counting mechanism rather than a true deliberative institution. It is expected that Electors, chosen by their parties, will vote for their party's nominee. But the Constitution does not actually require them to do this, and 21 states have no formal restrictions on the Electors choice. 29 states do have laws requiring the Electors to support their party's nominee but the penalties for not doing so are minor. Over the course of modern American history, several Electors have voted for candidates other than the ones to which they were pledged. They have been labeled "faithless electors."



With the unprecedented election-day victory of Donald Trump, some efforts have emerged in the United States to revive the deliberative aspects of the Electoral College in order to prevent a demagogue from becoming President. One petition urges Electors to choose Hillary Clinton on the basis of her receiving at least 1.7 million votes more than Trump in the popular vote total — across all the states, nationally. This online petition received a million signatures within hours and 4.5 million signatures within several days.

At the University of Texas at Austin, my colleagues Sanford Levinson (in the Law School) and Jeremi Suri (in the History department) and I offered a different proposal for independent action by Electors. In an [Op Ed published](#) in the New York Daily News, we suggest that a bi-partisan coalition of Electors pledged to Hillary and 37 Electors pledged to Trump vote for some Republican other than Trump in order to push the election into the Republican-controlled House of Representatives.

The reaction to this proposal has been mixed, as one might imagine. Some are relieved and enthused that there is at least a slim possibility of preventing an autocrat from obtaining power. Others are quite angry and worried that such an effort would itself prompt a constitutional crisis by undermining the legitimacy of the election.

We offer the proposal in a genuine attempt to stave off what we argue is an existential threat to the American Republic. But even if the proposal goes nowhere, as is likely, it serves the purpose of a kind of test of true opinion of Americans who consider it. If one really believes, as so many Americans have claimed to believe, that Trump will be an autocrat (indeed, for many commentators he is an American version of a fascist), then can one seriously claim that the threat posed by this proposal to alter settled norms is greater than the threat posed by Trump? Or, does one really not believe that demagoguery is a serious problem, or that Trump has a tyrannical soul?

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