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## The Other Cause of January 6

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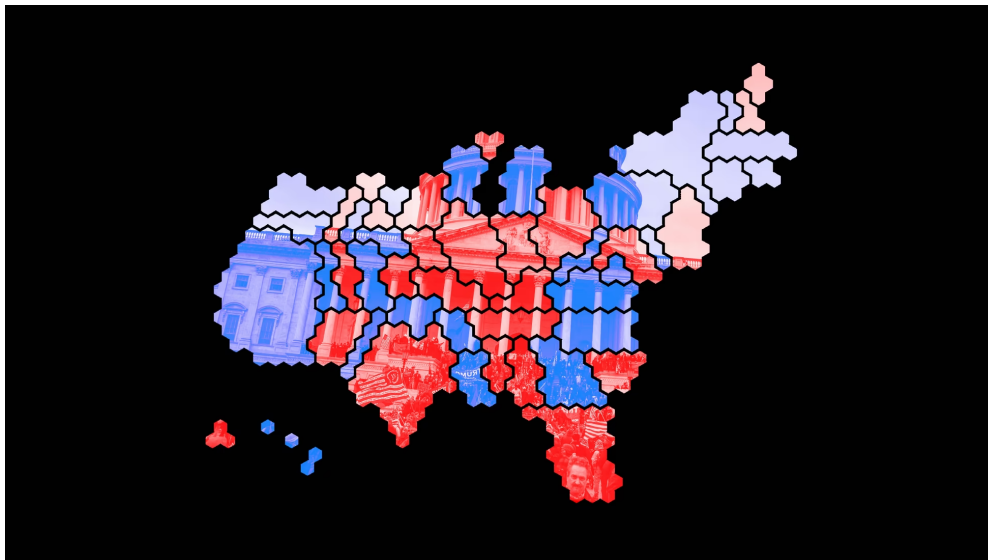
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## The Other Cause of January 6

Without the Electoral College, America would never have come so close to an overthrow of its government.



The Atlantic; Jon Cherry / Getty

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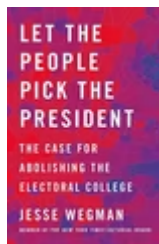
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About the author: [Kate Shaw](#) is a professor of law at the Benjamin N. Cardozo School of Law.

John Eastman. Rudy Giuliani. Donald Trump himself.

These people all bear some responsibility for the events of January 6, 2021. But there is another contributing factor—an institution, not a person—whose role is regularly overlooked, and that deserves a focus in the ongoing [January 6 committee hearings](#): the Electoral College. The Electoral College isn't *responsible* for President Trump's efforts to remain in office despite his clear loss. But it was integral to Trump's strategy, and it has everything to do with how close he came to success.

Many Americans understand that the country's [anachronistic system](#) of presidential selection, part constitutional and part statutory, can sometimes produce a winner who does not receive the most votes nationwide. In 2016, Hillary Clinton won the popular vote by approximately 3 million, but lost in the Electoral College 304–227. Sixteen years earlier, Al Gore won 500,000 more votes than George W. Bush nationwide, but Bush prevailed in the Electoral College 271–266 after the Supreme Court functionally awarded him Florida's electoral votes. And even without Trump's machinations, the 2020 election came dangerously close to producing yet again a president who did not win the national popular vote. Joe Biden won approximately 7 million more votes than Trump, and prevailed in the Electoral College 306–232, but just [44,000 additional Trump votes](#) in Arizona, Georgia, and Wisconsin could have resulted in a 269–269 tie in the Electoral College. If that had happened, the House, voting by state delegation, would almost certainly have anointed Trump president despite his second popular-vote loss.



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But there's a problem with the Electoral College that's distinct from the fact that it sometimes selects a winner who does not receive the most votes nationwide, and from the way it creates a political process that overvalues the concerns of voters in an arbitrary subset of states, increasing polarization, dysfunction, and division. (I elaborate on these dynamics in [a recent essay in the \*Michigan Law Review\*](#), as does Jesse Wegman in the book that's the subject of my essay, [Let the People Pick the President](#).) The problem is this: The Electoral College today is dangerously susceptible to manipulation. Indeed, as 2020 showed, the complex process through which a candidate

becomes president contains a number of postelection opportunities to contest or undermine the results of an election—and to do so for reasons purportedly having to do with law and legal process.

Consider the Trump campaign's many lawsuits designed to delay state certification beyond the "safe harbor" deadline created by the Electoral Count Act, after which a state's slate of electors is no longer deemed conclusive in the event of a dispute. Or Trump supporters' efforts to disrupt the statutorily required meetings at which each state's electors actually cast their votes, and the attempts of ersatz "Trump electors" to lay the groundwork for later challenges to official state slates. Trump also personally pressured state election officials to change election results by "finding" enough additional votes that he would be entitled to all of the state's electoral votes. Trump loyalists [in the Department of Justice](#), and Trump supporters such as [Ginni Thomas](#), sought to push state legislatures to take the radical step of throwing out state returns on the basis of spurious fraud claims and appointing Trump electors themselves. Trump and at least one of his attorneys sought to pressure Vice President Mike Pence to refuse to count electoral votes from a number of states in which Biden received more votes, [pointing to the vice president's central role](#) in "counting" electoral votes in the last stage of the Electoral College process created by the Twelfth Amendment. When that failed, what became the January 6 attack on the Capitol was an effort to disrupt that final event in the Electoral College timeline.

Put plainly, for a candidate determined to win at all costs, the Electoral College was central to a postelection strategy designed to convert loss into victory. Last night's opening hearings of the January 6 committee made clear that Trump and his advisers were well aware no good-faith legal basis existed to dispute the election's results. In a nationwide popular vote, a deficit of 7 million votes would have been impossible to challenge using ostensibly lawful means; the fact of the Electoral College meant that flipping a few close states, or coercing the vice president into throwing out those states' votes, would have been enough to change the election's outcome.

It also seems likely that the very existence of the Electoral College made the public more susceptible to Trump's efforts to subvert democracy—or at least lulled the public for a time into believing there was nothing wildly wrong with a process in which a defeated candidate exploited pressure points in an attempt to cling to power. Americans are, after all, acclimated to an undemocratic system of presidential selection; perhaps that primed the public to respond in muted ways to Trump's blatantly antidemocratic moves.

Commonplace political rhetoric about presidential elections suggests as much, framing elections more as complex logic games than crucial acts of self-governance. We discuss "paths to 270"; we contemplate the prospect of things like "running up the score in Broward County."

It is tempting to dismiss the events of January 6 as largely about Donald Trump rather than our system more broadly. And certainly, any electoral system can be targeted by an autocrat determined to hang on to power. But the Electoral College both provided numerous points of entry and brought the country dangerously close to an actual successful coup.

A genuine bipartisan legislative effort is now under way to reform some of the aspects of the Electoral Count Act that Trump sought to exploit in 2020, as well as to [address a number of other vulnerabilities of our electoral system](#). But at the moment, insufficient attention is being paid to the Electoral College itself. One of the goals of these hearings should be to communicate to the public just how dangerous an institution the Electoral College is—and perhaps to galvanize a serious effort to change it.