

FAKE ELECTORS, REAL LEGAL CONSEQUENCES – AN UPDATE ON STATE INVESTIGATIONS OF THE BLATANT SCHEME TO NEGATE MILLIONS OF VOTES CAST IN THE 2020 ELECTION

When Americans vote for president of the United States they are not actually voting for their preferred candidate, but rather, as set out in the Constitution, they are voting for the electors in their state who will represent the political party of the candidate who won the most (popular) votes cast in that state. Those electors, typically party loyalists who are expected to cast their votes based on the popular vote, then cast their ballots in the Electoral College, as provided for in the Electoral Count Act. Electors convene in their states a month after the presidential election (the first Tuesday after the second Wednesday in December) to cast their own votes, after having been “ascertained” as the electors and after the state executive has confirmed the identity of the electors. Those votes are then sent to Congress for certification. On January 6, Congress meets in joint session, presided over by the Vice President, to certify the election. (See generally, [National Archives](#) explainer).

Exactly four years ago, Republicans in seven states where Trump lost the popular vote – Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania and Wisconsin – created their own slates of (fake/false) pro-Trump electors to compete with the official slate of Democratic electors and completed documentation falsely claiming that Donald Trump had won the popular vote in their respective states. By this time, most of the election cases filed by the Trump campaign had been thrown out and state officials had certified Biden’s victory in these seven states.

Four years later, a number of these fake electors are under investigation and facing state criminal charges.

The “Most Expansive” Effort to Overturn the Election Results

The fake elector scheme was a blatant effort to thwart the will of voters in an attempt to keep Trump in office. The New York Times [called](#) “[t]he brazen plan to create false slates of electors pledged [to Trump] in seven swing states won by [Biden] ... arguably the longest-running and most expansive of the multiple efforts by Mr. Trump and his allies to overturn the results of the 2020 election. It was also one of the most confusing, involving a sprawling cast of pro-Trump lawyers, state Republican officials and White House aides.” Had Trump and his enablers succeeded in creating alternative slates of electors, it would have “dramatically altered the results” of the election.

The fake elector enterprise is alleged to have been crafted by attorney Kenneth Chesebro and set out in an [internal memorandum](#) dated November 18, 2020, in which he described his fake elector scheme targeting Wisconsin. A December 6, 2020 [internal memorandum](#) from Chesebro called for the fake elector scheme (his “bold, controversial strategy”) to be rolled out in the other six states as well. The centrality of these memos was first highlighted in the January 6th [indictment](#) issued by the Special Counsel Jack Smith on August 1. Chesebro, the architect of the scheme along with fellow Trump attorney John Eastman, reportedly is cooperating with investigators in [Arizona](#), [Michigan](#) and [Nevada](#).

Chesebro was charged with seven felonies in the Georgia RICO case, pleaded guilty to a single felony charge of conspiracy and was sentenced to five years' probation.

According to the [January 6th indictment](#), Trump seized on the fake elector ploy after his efforts to pressure state officials to overturn the results had come to naught. This was a “corrupt plan to subvert the federal government function by stopping Biden electors’ votes from being counted and certified” and a basis for the felony charge that Trump attempted to defraud the United States. While false elector certificates submitted by New Mexico and Pennsylvania fake electors stated that they would only be effective were litigation filed by the Trump campaign to have succeeded in those states (copies of all of the fake elector certificates were published by [American Oversight](#)), the [January 6th indictment](#) cites an email from Chesebro that “the plan was not to use the fraudulent electors only in the circumstance that the Defendant's litigation was successful in one of the targeted states – instead, the plan was to falsely present the fraudulent slates as an alternative to the legitimate slates at Congress’s certification proceeding.”

The intention was that fake elector certificates would appear real enough that Vice President Pence would, as summarized by the [New York Times](#), follow one of potentially three paths on January 6 to keep Trump in power: he could have counted the fake electors rather than the real ones, he could have declared the election defective and thrown it to the House of Representatives, where under the Electoral Count Act Republican state delegations would have declared Trump the winner, or delay the count. The various steps of the plot were set out in a [memorandum](#) titled “January 6 scenarios,” prepared by John Eastman, which formed part of the evidence on the basis of which District Court Judge David Carter [found](#) in March 2022 that it was “more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021.”

The [January 6th indictment](#) did not charge any of the fake electors themselves. However, the fake electors are now under scrutiny of state prosecutors. State investigations of the fake elector scheme reportedly have been initiated in [Arizona](#) and [New Mexico](#), and prosecutors in Georgia, Michigan and Nevada have filed charges against fake electors in their states.

Georgia

In Georgia, three of the 16 fake electors from the state were charged as part of the broader election interference and racketeering case filed in August against Trump and 18 co-defendants. In court filings seeking removal of their cases to federal court (*see* [Still](#), [Latham](#) and [Shafer](#)), the three argue that they acted at the direction of Trump and campaign lawyers.

Michigan

In July, Michigan AG Dana Nessel [announced](#) that her office had filed criminal charges (eight counts, including multiple counts of forgery) against 16 fake electors in her state. Since then, one defendant has had the charges against him dropped in exchange for his

cooperation. A motion to dismiss the charges against two other defendants was thrown out in October.

This scheme incidentally was separate from the effort by Trump to pressure the two Republican members (out of a total of four members) of the Wayne County Board of Canvassers not to sign their certification of the election results. Wayne County is the most populous county in Michigan. This past week, a tape of a phone call between Trump and the two republican members, in which the RNC Chair reportedly also participated, was [uncovered](#) by the Detroit News. As widely reported at the time, the two Republican members initially refused to certify, but ultimately did so under pressure from local residents, then unsuccessfully tried to rescind their certification.

This was just one example of how close we came to a successful coup due to the multiple touch points in the US election process behind which are individual administrators who historically have discharged their duties in a nonpartisan fashion (incidentally with boards often composed of an even number of Democrats and Republicans) – votes would be counted, with the attendant tests along the way, and the results certified. Partisan actors under Trump’s direction sought to exploit a system that ultimately held the line, but barely.

Wisconsin

Earlier this month, in Wisconsin, as part of a [settlement](#) of a civil suit brought by two (real) Biden electors that was scheduled for trial next September, the ten fake pro-Trump electors in the state agreed to withdraw their fake documentation, acknowledged that Joe Biden won the 2020 presidential election, agreed not to serve as presidential electors in 2024 or in any other election where Trump is on the ballot and agreed to send a statement to the various government offices that received the Electoral College votes (President of the United States Senate, the Wisconsin Secretary of State, the Archivist of the United States, and the Chief Judge of the United States District Court for the Western District of Wisconsin) acknowledging that their actions were “part of an attempt to improperly overturn the 2020 presidential election results.” This was the first formal acknowledgement by any fake electors across the seven states of wrongdoing.

A civil suit was also brought against two lawyers, Jim Troupis and Chesebro, which is ongoing.

Nevada

Earlier this month, Nevada joined Michigan and Georgia to become the third state to bring [charges](#) against fake electors when a grand jury indicted the state’s six fake electors, each on two felony counts. The indictment was brought by Attorney General Aaron Ford. The six defendants include the Chair of the Nevada Republican Party; he and one other are running the Nevada Republican caucuses. Last May, Ford reportedly suggested no criminal charges were likely, but as [reported](#) by POLITICO, appeared to change his mind in September.

Concluding Thoughts

We have yet to rid ourselves of the ghosts of elections past. [ABC News](#) and the [Associated Press](#), among others, report that a fake electors have roles in the 2024 election in Nevada (as noted above), Arizona, Pennsylvania and Wisconsin. And then there is election denial.

Despite setbacks in the 2022 midterms, election deniers are expected to be back on the ballot in 2024, according to [States United Action](#), whose CEO describes election denial as having become “an industry” in our politics – a campaign platform as much as a fundraising strategy. Polling continues to find that around a third of American voters believe the 2020 election outcome was fraudulent and around 70% of Republicans believe Joe Biden is an illegitimate president (*see*, most recently, [reporting](#) by USA Today). American Oversight [tracks](#) efforts by red states to create an alternative to the nonpartisan Election Registration Information Center (ERIC) designed to minimize voter fraud, after these states, prompted by conspiracy theories and false claims regarding election fraud, left the initiative.

If one posits that Trump has an existential reason for becoming president – it keeps him out of jail, not to mention that it provides him with platform he so craves to exact revenge and retribution, and we assume for the moment that, the recent polling notwithstanding, Trump would not win the popular vote or reach 270 Electoral College votes, then we need to be fully cognizant of the different means by which he, with the help of his enablers, could seek once again to procure an illegitimate victory. Among the many sad aspects of this tragic tale is the failure of the Republican Party leadership and lawmakers to have explicitly distanced themselves from blatant criminal conduct designed to overturn an election and deprive millions of voters of their right to have their votes counted.

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Mark S. Bergman
[7Pillars Global Insights, LLC](#)
Mancora, Peru
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