

# NEW YORK

## **There Are Still Ways to Prevent a Trump Presidency – But That’s Not Going to Happen**

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A month after Election Day, many Americans are still having trouble wrapping their heads around the idea that Donald Trump will actually be president, and some have simply refused to accept it. Liberals and other avid Never Trumpers have put their hopes in the recounts occurring in several states, the Electoral College, and obscure sections of the Constitution that could almost instantly remove Trump from office. Passing such theories around social media is a tempting alternative to burying yourself in a *West Wing* binge, but the reality is that Trump will almost certainly be inaugurated on January 20, 2017. Here’s a look at some of the efforts to keep Trump out of the White House, and why it’s unlikely the 2016 election has more surprises in store.

### *Recounts*

The Process: Efforts to recounts ballots cast on November 8 are currently underway in five states. Green Party presidential candidate Jill Stein is seeking recounts in Pennsylvania, Michigan, and Wisconsin, three states where Trump narrowly beat Clinton.

In Pennsylvania, where Trump had a 44,000 vote lead over Clinton, Green Party lawyers have filed a federal lawsuit requesting a forensic examination of voting machines used across the state, as well as a recount of all paper ballots. A hearing is set for Friday.

A recount has been underway in Wisconsin since Thursday, despite a federal lawsuit filed by a Trump voter and two super-PACs seeking to stop the process. Trump won by about 22,000 votes in the state, and so far there’s been little change in the results.

On Monday a U.S. district judge ordered Michigan to begin its recount immediately. The courts have issued conflicting rulings as the state’s Republican attorney general, the Trump campaign, and super-PACs have attempting to stop the process. Trump won Michigan by roughly 10,700 votes.

In response to Stein’s effort, independent presidential candidate Roque De La Fuente requested a recount in Nevada, which Clinton won by 27,202 votes. A partial recount is currently underway.

Three Florida voters filed a lawsuit on Monday requesting a hand recount all paper ballots cast in the state. They claim Clinton actually won the state, and Trump’s 112,000 vote lead in the official tally was the result of hacking, malfunctioning voting machines, and other issues.

Why It Won't Work: Stein was able to raise more than \$7 million dollars for the recount effort in a matter of days because many Clinton supporters saw it as their last chance to overturn the election results. But it's extremely unlikely that any of the states will flip, and no one pushing for the initial batch of recounts ever said that making Clinton president was the goal.

On the Tuesday before Thanksgiving, *New York's* Gabriel Sherman reported that a group of computer scientists and election lawyers were urging Clinton to pursue recounts in Wisconsin, Michigan, and Pennsylvania. While the experts found no proof of hacking, they noted that America's voting machines have serious cybersecurity flaws, and amid surprising election results and reports of Russian meddling, there was cause for concern.

The next day one of the experts, J. Alex Halderman, the director of the University of Michigan Center for Computer Security and Society, explained in a post on Medium that computer scientists have found voting machines can be hacked, and if they're completely electronic that may be impossible to prove. Machines that involve a paper record – whether a paper ballot is fed into the machine, or the machine produces a paper receipt of a vote cast electronically – are far more secure, but many states don't bother to check the electronic results against the paper record to make sure the machines are functioning properly. Thus, the call for recounts. Halderman wrote:

Were this year's deviations from pre-election polls the results of a cyberattack? Probably not. I believe the most likely explanation is that the polls were systematically wrong, rather than that the election was hacked. But I don't believe that either one of these seemingly unlikely explanations is overwhelmingly more likely than the other. The only way to know whether a cyberattack changed the result is to closely examine the available physical evidence—paper ballots and voting equipment in critical states like Wisconsin, Michigan, and Pennsylvania. Unfortunately, nobody is ever going to examine that evidence unless candidates in those states act now, in the next several days, to petition for recounts.

There are various theories about Stein's true motives, but her website said the recount push was “not intended to help Hillary Clinton,” adding, “These recounts are part of an election integrity movement to attempt to shine a light on just how untrustworthy the U.S. election system is.”

Some say more regular post-election vote auditing will increase confidence in election results, and Stein's effort will help disprove claims of widespread voter fraud. Others say the drawn out recount effort is actually raising false concerns about election rigging. But none of the experts involved are arguing that Clinton actually won the battleground states.

As Joshua A. Douglas, University of Kentucky law professor and a Clinton supporter, explained, recounts have only changed election results on a few rare occasions. “All of these recounts had one significant fact in common: the margin of victory was in the hundreds, not thousands,” he said. “And the shifts in vote totals after the recounts were very small.”

In a post explaining that Clinton campaign lawyers would quietly participate in Stein's effort to ensure fairness, attorney Marc Elias acknowledged that Trump's lead of more than 100,000 votes in the three battleground states is insurmountable. “We do so fully aware that the number of votes separating Donald Trump and Hillary Clinton in the closest of these states — Michigan — well exceeds the largest margin ever overcome in a recount,” he said.

Realistically, the best case scenario for Clinton supporters who donated to Stein's effort is that the recount encourages states to adopt better voting technology and auditing procedures. Theoretically, Trump could have gained 100,000 votes in battleground states thanks to an incredibly elaborate hack, but there is as much evidence to back that up as there is behind this tweet:

### *The Electoral College*

The Process: Technically the American people didn't elect Trump on November 8, they voted for a slate of electors who will cast their ballots for president in their respective state capitals on December 19. Alexander Hamilton said the Electoral College exists to ensure that "the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications," such as a candidate who exploited "talents for low intrigue, and the little arts of popularity." In the wake of the election, many have argued that Trump is exactly the kind of person they had in mind.

Over the year there have been a handful of "faithless electors" who refused to vote for the candidate selected by the voters in their state, and just before this year's election two electors who supported Bernie Sanders in the primaries said they may not vote for Clinton. Previously, there was never any risk of rogue electors changing the election results, but a group of eight Democratic electors from Colorado and Washington are hoping to change that.

The group, who have dubbed themselves the "Hamilton Electors," are trying to convince 37 Republican electors to vote against Trump. He has 306 electors to Clinton's 232, so that would put him under the 270 vote majority required to secure the presidency, sending the election to the U.S. House of Representatives. Rather than trying to convince Republican electors to support Clinton, the Hamilton Electors are pushing a moderate Republican as a "compromise candidate."

So far, one Republican elector is on board. On Monday Christopher Suprun of Texas announced in a New York *Times* op-ed that he will not vote for Trump. He wrote:

The election of the next president is not yet a done deal. Electors of conscience can still do the right thing for the good of the country. Presidential electors have the legal right and a constitutional duty to vote their conscience. I believe electors should unify behind a Republican alternative, an honorable and qualified man or woman such as Gov. John Kasich of Ohio. I pray my fellow electors will do their job and join with me in discovering who that person should be.

Why It Won't Work: It does seem that this is just the scenario the Founding Fathers had in mind when they created the Electoral College, but the reality is that the electors would have to jump through a number of hoops to deny Trump 270 electoral votes, and Congress would almost certainly make Trump president anyway.

Assuming the Hamilton Electors could find 36 additional Republicans who consider Trump a threat to the country, they'd then have to get past laws that require those electors to vote for the candidate who won the popular vote in their state. According to Vox those laws exist in about 30 states, and the penalties tend to be mild – in some cases it's a fine of \$500 to \$1,000. However, there are few states where a faithless elector is considered to have resigned, and can be replaced by a faithful elector.

Two Hamilton Electors from Colorado are heading to court on Tuesday to challenge a law binding their vote, which they argue goes against the Founding Father's intentions for the Electoral College. Such requirements have never been tested, and they hope their win will undermine similar laws across the country.

Assuming the Hamilton Electors can legally change their vote, they need a willing alternative to Trump, and that's proving difficult. They had settled on Ohio Governor John Kasich, but on Tuesday he asked members of the Electoral College not to vote for him.

Colorado elector Michael Baca suggested he'd vote for him anyway, noting "George Washington was a reluctant leader but he was the right person at the right time."

So let's say the Hamilton Electors manage to convince a few dozen Republicans to vote for their reluctant hero. Then the House of Representatives gets to choose the new president from the three candidates who received the most electoral votes, in this case Clinton, Trump, and Kasich.

Baca told *The Atlantic* last month that voting for a Republican who "actually knows what they're doing" would be in the best interest of lawmakers because they'd be most likely to enact a Republican Congress's agenda. However, congressional Republicans seem to think Trump will help them enact their agenda, and he's the candidate more than 62 million Americans voted for. Representatives could vote for the far more stable Republican alternative, but the decision would likely plunge the country into chaos. As Peter Beinart wrote in *The Atlantic*:

Were the electors to meet on December 19 and decide that Donald Trump is unfit to be president, all hell would break loose. Trump's supporters, and even some who opposed him, would say the election had been stolen. Their worst fears about America's "rigged" system of government would be confirmed. The president who the electors chose—even if it were Hillary Clinton, who beat Trump by over a million votes—would lack legitimacy in the eyes of much of the public. It's unclear whether such a president could effectively govern. Violence might break out. Moreover, once the precedent was set, future electors would become more likely to act independently again. The process of choosing them would grow fraught. America's entire system of presidential elections would grow unstable.

So it would make more sense to avoid sending the vote to the House. As Michael F. Cannon, a resident scholar at the Cato Institute, argues in the *Washington Post*, anti-Trump electors may have a better shot if they make a "dramatic gesture of true bipartisanship." If all 232 Democratic electors promise to vote for a moderate Republican – he suggests Romney – it wouldn't be so hard to pick up 38 Republican electors, giving the 2012 GOP nominee all the votes he needs to become president.

But *even then*, Congress may be able to stop the Electoral College. They have one last opportunity to reject any electoral vote that is not "regularly given," and it's not entirely clear what that means. As *Time* explains:

On January 6, 2017, the newly elected Congress will meet to ensure that the electoral vote was "regularly given." In the past, this meeting has almost always been ceremonial. Each state announces its electoral votes, everyone claps, and that's it. But technically, if one House member and one senator objects, then the new members must retreat to their own chambers and vote on what to do about the objection. If the House and Senate agree, their decision is final. That

happened once, in 1968, when both chambers agreed to respect a faithless elector from North Carolina's decision to switch his vote to George Wallace, even though he was pledged to Richard Nixon. (His vote didn't have an effect on the outcome of the election.)

If the House or the Senate cannot agree on what to do about an objection, then the dispute goes to the "executive of the state," meaning the state's Secretary of State, according to federal election law. He or she would make the final call.

That could save America from the theoretical danger of a Trump presidency, but it would be replaced by the danger of forcing state and federal officials into an insane legal battle over who should assume the presidency.

### *The 25th Amendment*

The Process: Following the assassination of John F. Kennedy, members of Congress realized that they needed to spell out the procedure for presidential succession more clearly. In 1967 they adopted the 25th Amendment, which states in Section 4:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

The president can fight this by sending a letter to the House and Senate saying he's capable of carrying out his duties, but the vice president and a majority of the cabinet can insist that he's still not fit. Then Congress would meet to decide the matter. If two-thirds of the House and Senate say they president is unable to do his job, the vice president remains acting president.

The 25th Amendment was last used by George W. Bush to make Dick Cheney acting president while he underwent a colonoscopy, but it doesn't say the president has to be *medically* unable to perform his duties.

Why It Won't Work: Months before the election it was suggested that people should start preparing for a potential Trump presidency by reading up on the 25 Amendment. Several outlets published similar pieces after November 8, and Keith Olbermann posted a video saying it could allow for "instant impeachment" of Trump.

Last week Nate Silver suggested in a Five Thirty Eight that's it's worth considering how loyal each new cabinet member is to the president-elect.

To continue down my line of unconventional thinking: The 25th Amendment requires the vice president and a majority of the Cabinet to declare a president unfit for office. How likely is that to actually come up? Probably not too likely (that section of the 25th Amendment has never been invoked before). But I do think a useful heuristic is to think in terms of whether Cabinet members might be more loyal to Trump or more loyal to Pence in a crisis.

But while Pence and the incoming cabinet do have the ability to remove Trump from office at any point, politically, it's extremely unlikely.

For the most part Republican officials have chosen to turn a blind eye to the long list of Trump scandals. Pence doesn't seem like the Frank Underwood type, but even if he were, invoking the 25th Amendment shortly after inauguration would be seen as an outrageous coup attempt. As with the efforts to change the Electoral College vote, members of Congress know the backlash over booting a legally elected president out of office would be harsh, and potentially harmful to U.S. democracy.

Of course, that could change if President Trump does something that even Republicans see as completely reprehensible, but at this point it's hard to imagine what that might be. (Or why they'd use the 25th Amendment rather than impeachment, a procedure that would be less shocking to voters.)

And as Olbermann put it, the 25th Amendment provides the means to remove Trump from office, but only if Pence and Trump's cabinet someday develop "the ethics, the patriotism, and the stones to use it." That's not a very hopeful thought for Trump opponents, but that's their best shot at getting him out of office.