



PENNSYLVANIA

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How the General Assembly Can Try to Steal the Election, Why It Would Be Wrong to Do So, and How to Stop It

There has been loose talk among right-wing activists calling on the General Assembly to intervene in the choice of presidential electors and thus overriding the vote of the people. Here is what the PA General Assembly might try to do and why under the law and Constitutions of Pennsylvania and the United States, they should not be allowed to do it.

Leaving aside efforts to interfere with the counting of mail-in ballots that come in after 8 pm on Election Day—another subject of continuing concerns—there are two things the General Assembly could attempt to do to replace or undermine a slate of Biden pledged electors legitimately elected by a majority of Pennsylvanians. Their justification for doing so would be the, no-doubt, false claim that the election was conducted fraudulently for one reason or another. (Why they would claim that and why that claim will, no doubt, be false is outside the scope of this paper.)

1. Attempt to take control of the process of selecting electors and replace the Biden electors with a Trump slate of electors chosen by them.
2. If they fail take the first step, because they are blocked by the state or federal courts, act informally to send a second set of electoral votes to Washington, giving Congress the opportunity to choose which set of electors is to be counted (which is basically what happened in 1876) or to decide to exclude Pennsylvania's electors entirely, which might throw the election into the House of Representatives where, depending on the results of the election, might lead to the House choosing Trump. (The House votes by state, so Democrats would have to have a majority in a minimum of 25 state delegations to block this.)

The legislature would justify replacing the electors chosen by the majority of voters in Pennsylvania on November 3 by invoking Article 2, section 1, of the US Constitution which states that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”

Early in the life of the Republic, some legislatures did choose the presidential electors under this provision of the constitution. By 1828, only Delaware and South Carolina still did so with South Carolina holding out until the Civil War. (There is some lack of clarity, to which I will return, about how they did this.)

Under this provision, the PA General Assembly could claim the right to set aside the electors chosen by the voters. Even if blocked by state or federal courts from replacing the electors chosen by the

voter, they could informally choose another set of electors and send the votes of those “electors” to Washington.

Here are a number of reasons that both of these actions are dubious from a statutory and constitutional perspective.

State Issues

If the General Assembly tries to choose electors, it will be subject to lawsuit in state court on the grounds that its action violates both Pennsylvania law and the PA Constitution.

Statute. The decision to give voters the right to Pennsylvania electors is established by the state laws that create the entire machinery of our elections. The General Assembly cannot revoke this law except by passing a new one, which the governor could and would veto.

Constitution. As we saw in the dispute about revoking the governor’s emergency declaration earlier this year, the Pennsylvania General Assembly does not have any clear authority under the PA Constitution to take joint action except through concurrent resolutions which must have the approval of the governor or be passed over his veto by a two-thirds majority in both the House and Senate. There are limited exceptions for (1) an amendment to the Pennsylvania Constitution or (2) internal legislative matters. The other side might argue, however, that choosing electors is similar to the US constitutional amendment process, in that just as the General Assembly can propose amendments or ratify without the approval of the governor based on the authority of the US Constitution, it similarly is granted such power to decide how electors are chosen by the US Constitution.¹ As we shall see in a moment, what authority the US Constitution gives the Pennsylvania General Assembly in this area is subject to controversy.

Federal Issues

Who has the authority to decide who chooses the process by which electors are chosen or to choose electors? There is a major ambiguity in the provision of the US Constitution cited above: Does “Legislature” mean the branch of government that has the major share of legislative power, that is the General Assembly in Pennsylvania, or does it mean the legislative process created by the PA Constitution which gives the power to enact laws to the General Assembly and the governor?

Previous precedent is not totally clear, but there is little reason to doubt that if the state has enacted a statute that gives the people the power to choose electors this cannot be undone except by the enactment of another statute. There is also a good case that even if the state has made no such decision, the right to choose electors does not fall to the General Assembly alone, at least in Pennsylvania.

A recent Supreme Court decision, *Arizona State Legislature v. Arizona Independent Redistricting Commission* (with opinion by Ruth Bader Ginsburg) on the issue of who has the authority to draw Congressional district lines upheld an Arizona redistricting commission created by a referendum. The Court reasoned that the term “Legislature” in the elections clause in Article I, section 4 of the US Constitution—“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”—refers to whichever institutions of government are given the legislative power under the state constitution. Under Arizona’s constitution, people have a right to enact legislation through a referendum. Similarly, the

¹ I do not yet know if the Pennsylvania Constitution explicitly authorizes the PA General Assembly to propose or approve amendments to the US Constitution. I do not think so but will check further.

process of drawing congressional district lines is carried out through the enactment of a law in most states, including Pennsylvania, which enables the governor to veto the lines.²

Applying the same reasoning to the process by which electors are chosen would lead us to conclude that this must be done in Pennsylvania by statute or concurrent resolution and since the governor has the right to veto concurrent resolutions as well as legislation, he or she would have the right to veto any choice of electors by the General Assembly.

It is not entirely clear me how electors were chosen by the states before they all decided to give that power to the voter. It is likely that in the early years of the republic, in at least some states, legislative bodies chose electors without the approval of governors. But I don't know if the states that did this had state constitutions that authorized the legislative body to pass joint or concurrent resolutions without the approval of the governor or if not, whether they acted under the authority of the US Constitution alone.

The timing of the choice of electors. Since all of the states have since the Civil War given the power to choose electors to the voters, the US Congress has, under the power granted it by the Elections Clause, enacted a statute that sets the date of the election. This year that date is November 3. Thus any action taken by the General Assembly to change how Pennsylvania's electors are chosen, or to choose electors themselves, after that date would be contrary to US law.

The importance of any Pennsylvania Supreme Court decision to the federal courts. Traditionally, there has been a strong presumption that US Courts defer to the state courts about issues that fall under the purview of the state constitution. The only exceptions are when state action clearly violates the rights of individuals or clearly established political processes mandated by the US Constitution.

Thus, any decision by the Pennsylvania Supreme Court that blocked the PA General Assembly from choosing presidential electors on the grounds that doing so violated the Pennsylvania Constitution or Pennsylvania statute, would under normal circumstances strengthen the argument in the federal courts against the PA General Assembly trying to choose Pennsylvania's electors.

However, four members of the US Supreme Court were recently willing to stay the PA Supreme Court's ruling that extended the deadline for the receipt of mail-in ballots. This suggests that, especially with the addition of another Republican-appointed justice, this presumption might be overturned in this case. That Justice Kavanaugh was willing to cite *Bush v. Gore* in defense of his claim that the Supreme Court has the authority to protect powers presumably assigned by the Constitution to the legislative branch of government against limitations on that power created by state courts following the state constitution is especially concerning.

There are, however, precedents for states choosing by statute—not by the decision of the legislature itself—to turn powers assigned by the Constitution to the Legislature to another body. For example, although the Constitution before the 17th Amendment gave the “Legislature” the power to choose US senators, about half the states had already passed laws that created primaries or other elective processes to choose senators and bound legislators to follow the will of the people. I'm not aware of any challenges in federal court to this process on the grounds that the Executive Branch of the states were involved in this assignment of a power explicitly granted by the Constitution to the people (and one which, unlike the power to choose electors does not explicitly give the Legislature the option to choose a method for choosing electors).

² This was a controversial decision, with Justice Roberts writing a scathing opinion holding that “legislature” in the Elections Clause means the body given the bulk of the legislative power. Justices Alito, Thomas, and Scalia joined that opinion.

Similarly, in choosing to allow presidential electors to be chosen by the voters, the General Assembly acted by statute to set up the election machinery of an election. Having acted through its authority to enact law, the Legislature has in effect, submitted its sole authority under the US Constitution as to how electors should be chosen to the process for making law created under the PA Constitution, and that process has a role for both the governor and the Pennsylvania Supreme Court which, under our theory of checks and balances, has a share in the legislative power.

This way of looking at what the Pennsylvania General Assembly has done actually comports with the minority opinion, written by Chief Justice Roberts, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. Roberts rejected the notion that the word “Legislature” in the Elections Clause refers to the legislative power not the body that primarily holds the legislative power. But he did acknowledge that when legislatures act by enacting a statute in most states they share power with other governmental bodies. He concluded that this sharing of power is legitimate under the US Constitution: “Under the Elections Clause, ‘the Legislature’ is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be exclusive in congressional districting, but neither may it be excluded.”³

In extending the deadline for the receipt of mail-in ballots, Supreme Court of Pennsylvania acted under the authority of the PA Constitution to interpret the statute passed by the General Assembly that set up our election machinery and empowered the people to choose presidential electors. In so acting, the Supreme Court did not exclude the General Assembly from influencing the deadline—indeed the General Assembly could have acted to restore the original deadline—but it also asserted its own power under the PA Constitution to decide whether a statute is constitutional or not.

Thus it seems that the Pennsylvania Supreme Court were to reject the General Assembly’s attempt to choose electors and thereby replace the vote of the people in doing so by a resolution that is not submitted to the governor, that action would be supported by both the majority and minority opinions in the Arizona case and should be upheld by the US Supreme Court.

³ARIZONA STATE LEGISLATURE, Appellant v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION et al. 135 S. Ct. 2652 (2015); <https://supreme.justia.com/cases/federal/us/576/13-1314/#tab-opinion-3428052>.