

POLITICS

Kamala Harris Might Have to Stop the Steal

Constitutional scholars are already worrying about another January 6 crisis, and they warn that the next election might be harder to save.

By Russell Berman



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FOR A FEW HOURS inside the ransacked Capitol on January 6, then–Vice President Mike Pence helped to preserve the democratic order by insisting that he was powerless to change the outcome of the election. On January 6, 2025, that responsibility could fall to Vice President Kamala Harris, but the task of preventing a stolen presidential election won't be that simple.

The nightmare scenarios that most frighten election observers heading toward 2024 all culminate in a quadrennial Joint Session of Congress—the same formal meeting that rioters interrupted in their failed bid to keep Donald Trump in the White House earlier this year. What scares them, however, is not necessarily a reprise of that violent day. They fear a bloodless coup that begins in state capitals, wins the blessing of conservatives atop the courts, and then secures the decisive votes of Trump-supporting Republicans in Congress. The risk of an even worse crisis is greater in 2024, these election experts say, because Trump supporters are likely to be far better positioned than they were in 2020. “Our democracy is in great peril today,” Norm Eisen, a prominent Democratic lawyer who co-founded the nonpartisan States United Democracy Center, told me. “We’re in a Weimar moment in America.”

Should Trump or his acolytes try to subvert the 2024 election, the last Democrat with any power to stop the steal—or at least try to—would be Harris. “She’s certainly going to have quite a job on her hands on January 6, 2025,” Laurence Tribe, a Harvard law professor and liberal constitutional scholar, told me. Nine months ago, Tribe and other Democrats praised Pence for interpreting his authority narrowly, but the next time around, they might ask Harris to wield the

same gavel more forcefully.



Whether the vice president has any substantive role in certifying the electoral vote for president is a matter of some dispute. Leading up to January 6, most legal authorities—Democrat and Republican—argued that Pence’s power in presiding over the Joint Session of Congress amounted to little more than what the Constitution gives to the vice president on any other day, which is to say: virtually none. His responsibility, as the president of the Senate, was to oversee the tallying of the electoral votes, recognize members of Congress who wished to speak, and otherwise leave the decision making to lawmakers. “The presiding

officer's role is ministerial," attorneys for the nonpartisan Voter Protection Program wrote in a 30-page guide to the January 6 session late last year.

Trump saw it differently. He wanted Pence to reject certificates of Joe Biden's victory from the pivotal states (Pennsylvania, Michigan, Georgia, and Arizona) and "send it back" so that GOP-controlled state legislatures could declare Trump the winner instead. "If Mike Pence does the right thing, we win the election," the president told a rally of his supporters near the White House, shortly before the crowd marched up Pennsylvania Avenue and overran the Capitol. Trump, it is now clear, wasn't concocting his own legal theory out of thin air. He was relying on the advice of John Eastman, a conservative law professor and attorney who in a "privileged and confidential" memo asserted that Pence could in fact hand Trump the election.

"There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes ... and all the Members of Congress can do is watch," Eastman wrote in the memo, which the journalists Bob Woodward and Robert Costa first published in their recent book, *Peril*. Eastman outlined several scenarios that would lead to Trump's reelection and twice cited as validation the work of Tribe, who has argued dozens of cases before the Supreme Court and was part of then-Vice President Al Gore's legal team after the contested 2000 election.

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Tribe told me that Eastman's argument was "ludicrous," but they did agree on one point: Every four years on January 6, the vice president is not powerless. "I

don't think we can argue that Kamala Harris has absolute authority," Tribe said. "On the other hand, she is not simply a figurehead." Harris's principal role during the Joint Session, he said, could be to reject "ungrounded challenges" to state certifications. She may have other powers, he said, but he refused to discuss them with me. "I don't want to lay out a complete road map for the other side, because I think sometimes they're not as smart as they think they are," he said.

Last year, Republican officials in key states refused to do the president's bidding, and the Democratic majority in the House served as an extra backstop. When Trump backers in Congress formally objected to the certifications of Arizona and Pennsylvania—two states that Biden won—the House voted down the objections even though a majority of Republicans supported them. Since the election, however, GOP state legislatures in each of the tipping-points states have introduced or enacted laws that could make it easier to subvert elections, and Trump allies have moved to purge Republicans who bucked him in 2020. In Georgia, for example, Republican Secretary of State Brad Raffensperger faces a primary challenge from a conservative member of Congress, Representative Jody Hice, who backed Trump's efforts to overturn the election.

Next year's midterm elections, often a challenge for the party in power, pose an even greater threat to the future of American democracy. The GOP could regain majorities in Congress and oust Democratic governors seeking reelection in three states that narrowly voted for Biden—Pennsylvania, Michigan, and Wisconsin. Republicans already control the state legislatures in those states, and winning the governorship could allow them to enact more laws to restrict voting and shift authority over elections away from courts and nonpartisan election administrators. To consolidate power even further, conservatives want the Supreme Court to accept a legal theory that would allow state legislatures to pass

election laws that are not subject to review by state courts and possibly not even to a veto by their governor.

Victories by Trump-aligned Republicans over the next year in state races and in the courts could open the door to a worst-case scenario for 2024 that, if the election is as tight as the past two presidential races, is both dangerous and entirely plausible, says Ben Berwick, a counsel for Protect Democracy, a nonpartisan group founded in late 2016 to fight authoritarianism in the U.S. First, Berwick told me, Trump backers in the closest tipping-point states would “manufacture doubt about the results, and then use that doubt to allow state legislatures to step in and say, ‘Well, we can’t really be sure of the winner, so we’re just going to decide which slate of electors to choose.’” As my colleague Barton Gellman reported before last year’s election, ambiguities in the Electoral Count Act of 1887, which provides instructions to Congress for resolving disputes, could lead to chaos when lawmakers meet to tally the results.

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Presiding over the assembly will be Harris, who, as Pence, Biden, and Gore did in previous elections, will likely appear on the ballot herself. What will she do—what can she do—if Republicans empowered with congressional majorities refuse to accept the certification of a Democratic win in one or more key states? How would she handle a certification from a Republican governor or secretary of state that appeared to subvert the popular vote in that state? What if, in other words, it were up to her to stop the steal? I asked Harris’s office how she viewed her role and whether she had, more than three years in advance, received briefings on her authority in those scenarios. “Vice President Harris will always fulfill the

constitutional duties of the office,” Sabrina Singh, a spokesperson for Harris, replied. “We learned in 2020 that the most important principle in our democracy is that voters, not partisan politicians, choose the president.”

Worries about a constitutional crisis have led to a push in Congress to revise the Electoral Count Act to head off disputes about how it should be interpreted and who should have final say in a contested election. Multiple lawyers I spoke with said that Harris’s role would likely be moot if Republicans wield majorities in 2025 because they could simply overrule any decision she tried to make. “The principal responsibility will always lie with the members of the two houses,” Eisen said. “If they chose to, they could fight the actions of the vice president.” Tribe, however, suggested that the law wasn’t that clear.

Advocates have begun quiet talks on Capitol Hill with members of both parties, hoping to keep the issue separate from the more polarizing discussions over voting laws. But it may be too late. Republicans have unanimously opposed all Democratic election-related proposals since 2020, though a few conservatives outside Congress have invoked the possibility of Harris’s starring role in tallying electoral votes to prod the GOP to support a fix for the Electoral Count Act. “Common sense dictates that we act to ensure that no vice president ever steals an election,” Kevin Kosar, a scholar at the conservative American Enterprise Institute, wrote earlier this year. So far, however, elected Republicans have been silent.

Without new legislation clarifying the Electoral Count Act, advocates worry, the January 6 session could devolve into a messy battle of parliamentary maneuvers. “The current language of the statute leaves too much room for uncertainty regarding the vice president’s responsibilities,” wrote members of the National Task Force on Election Crises, a bipartisan coalition formed ahead of the 2020

election. Members of Congress could call for votes to overrule any decisions that Harris makes, or, as Eastman suggested in his memo, the vice president could try to declare a winner without any vote at all. Either way, the legitimate outcome of the presidential election would remain disputed, and the losing party would be left to take their fight to the Supreme Court or, worse, out into the streets.

Talking through the doomsday scenarios of a particular session of Congress more than three years away elicits a bracing sense of urgency from the lawyers and advocates for whom the shock of January 6 remains fresh. They acknowledge that nothing is inevitable in politics, that the system held in 2020 (if barely), and that for it to crumble in 2024, dozens of elections will have to go a certain way, as would nearly as many legal challenges. “If people pay attention in this moment, there’s lots of different ways that the American people can push back,” Joanna Lydgate, the CEO of the States United Democracy Center, told me.

Yet what pushes that urgency into something close to panic is a recognition that the public is not paying enough attention, that Congress is not acting, that the moment of crisis is the present rather than the future. “The failure to modernize federal law will allow this cancer to continue to creep through the system. We all know how it turned out for Weimar,” Eisen said. “And we may face the hypothetical, the worst-case scenario, where it’s only the vice president standing between totalitarianism and us, between a bloodless coup and democracy.”
