

The electoral college is a ticking time bomb

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There could be few better testaments to the lunacy of our electoral system than the fact that, on Wednesday, the Supreme Court, made up of the most august judges in the land, spent time considering whether one random guy somewhere should be able to decide who the next president is.

But that's just what happened. And even if the judges take what might be the most practical course in this case — which concerns the question of “faithless electors” — it's a good reminder that, because our system is so uniquely undemocratic, we could be heading for yet another election in which the person who gets the most votes is not the one who wins.

And that's not even the most terrifying prospect.

This Supreme Court case asks whether, having been sent to the electoral college on the presumption they'd cast their votes for a particular candidate, electors are allowed under the Constitution to change their minds and act as free agents.

In 2016, a small group of electors tried to organize a rather complex switcheroo involving recruiting a few dozen Republican electors from states President Donald Trump won to change their votes and deprive him of a majority, thereby throwing the election into the House of Representatives, which would, they hoped, have elected a different Republican.

The question the court has to answer is whether the states can punish or prevent electors from changing their votes. While it's difficult to tell exactly how the decision will go, given the court's new round-robin format for oral arguments, it appears the justices



are concerned about chaos if they allow electors to be faithless.

And it certainly could happen. It's easy to devise a plausible scenario in which we end up with a 269-to-269 tie in the electoral college. Were that to happen, all it would take would be one elector changing his or her vote to determine who the president is.

That person could be bribed. Or maybe they were a kind of “Manchurian elector” all along, placed there long before in preparation for just such an eventuality — a Democratic elector in Maryland, say, who is secretly a Republican and will change their vote to give Trump back the White House.

Is that unlikely? Sure. But the fact that, under the system, it's even possible (pending the Supreme Court's decision) is utterly mad.

The electoral college makes all kinds of nightmare scenarios possible, even beyond the one in which Trump became president despite losing the popular vote by nearly 3 million votes. Election law expert Rick Hasen suggests one scenario in which this campaign comes down to one state where Trump is leading on election night and he declares victory, but then days later all mail-in ballots are counted and Joe Biden wins the state (and the election), leading to who knows what kind of civil unrest.

Given the inevitable increase in mail-in ballots being cast this year, something like that has become more likely than ever. Mail-in ballots take longer to count, and many states will have to deal with more than they've ever handled before, which could lead to lengthy delays in learning the outcome.

Here's an even worse series of events. Biden wins a clear victory in the popular vote, but the electoral college has him up only 274 to 264, which could happen if Biden takes Pennsylvania, Wisconsin and Arizona — but not Michigan. The Republican-led legislature of Wisconsin, convinced that their state suffered massive fraud in the form

of too many Democrats voting, decides that since the Constitution says electors are appointed “in such manner as the Legislature thereof may direct,” they will simply appoint Republican electors for their 10 electoral votes. Trump wins.

That may sound ludicrous, but both Chief Justice John Roberts and Justice Samuel Alito raised the possibility when questioning Washington state's solicitor general during Wednesday's argument. The solicitor general responded that, under court precedent, once the right to vote has been granted to the public (as the legislature did by establishing that electors will be chosen by the voters), the legislature can't go back after the election to retroactively take away that right.

Yet the fact that Roberts and Alito thought it an open enough question suggests that, well, you never know. Anyone who lived through Bush v. Gore can't have faith that a conservative court majority — confronted even with such a brazen move to steal an election — would rule according to any principle other than “Republicans win.”

The answer, of course, is to amend the Constitution to get rid of the electoral college so that, like every other democracy on Earth, we have a system in which we have an election, and the candidate who gets the most votes wins.

But, of course, we can't do that because the amendment process itself gives outsize power to less-populated states, which mostly happen to be controlled by the Republicans who currently benefit from the electoral college's bias toward those less-populated states. Check and mate.

So we'll have to live with the very real possibility that, for the third time in six presidential elections, in 2020, the person who receives fewer votes could win the presidency.

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