

No, Jan. 6 Isn't Another Chance for Trump to Reverse the Election

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Caplin & Drysdale's Trevor Potter authored the December 27, 2020 op-ed "No, Jan. 6 isn't another chance for Trump to reverse the election." for *The Washington Post*. Below is the full op-ed, and please visit this link to view the op-ed as it appears in *The Washington Post*.

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Jan. 6 is not another Election Day. Don't let President Trump convince you it is.

What will happen then — a joint session of Congress to receive the presidential and vice-presidential election results transmitted by the states — typically occurs every four years in relative obscurity. But this election cycle has been anything but typical. While there's no realistic chance of anything happening Jan. 6 to disrupt the peaceful transfer of power consistent with the will of America's voters and Monday's electoral college votes, there is still a good chance Trump will try to make the day a super spreader event for the election disinformation with which he is relentlessly trying to infect American democracy.

Foreknowledge is, however, a form of inoculation here. By understanding exactly what does and doesn't happen Jan. 6, all of us can contribute to making that day a reaffirmation of our democratic process rather than part of a continued assault on it.

As required by the Constitution's Twelfth Amendment, the House and Senate will gather in a joint session presided over by Vice President Pence. There, the slates of electors for president and vice president from the 50 states plus the District of Columbia, received by Congress from the state governments and accompanied by certificates from the governors, will be read out, and the vote totals will be counted. This is usually a routine process — as it should be, because federal law urges any disputes over such slates to be resolved in the states by Dec. 8, ahead of the electoral college meeting Dec. 14. That is to say any disputes (which are rare to begin with) are meant to be disposed of well before Congress gathers to count the electoral votes. It's "really a formality," as Sen. John Cornyn (R-Tex.) has rightly called the coming session.

But it is at least possible for members of Congress to raise objections to one or more slates of electors as they're read aloud. Under a 130-year-old law called the Electoral Count Act, if one representative and one senator jointly object to a slate, then the whole process pauses while the House and Senate separately debate the objection, then vote on whether to sustain it.

Trump's scheme for state legislatures to overturn the election won't work

This gives Trump's die-hard supporters in Congress an opportunity to again provide more disinformation about the election on national television Jan. 6. At least one Republican House member, Rep. Mo Brooks (Ala.), has said he is considering making such an objection — much to Trump's delight. He's thinking of objecting even though his ostensible reason, purported election fraud, has been resoundingly rejected by state and federal courts, state election officials of both parties and even Trump's own attorney general. (It has also been

rejected by Trump's lawyers, who have mostly refrained from bringing fraud charges in actual court proceedings where they would have to prove them, even as they fling accusations around outside of court.)

Even if Brooks finds one or more colleagues and senators to join him, there's no real possibility of overturning the outcome of the election: the Electoral Count Act requires both the House and the Senate to reject a slate of electors, and there is no sign that either chamber would do so. A number of Republican senators have already rejected such a challenge to the votes of the people, and Senate Majority Leader Mitch McConnell (R-Ky.) is telling his caucus not to join any such effort. Surely a majority-Democratic House won't do so.

As with so much that's happened since Nov. 3, however, it's not the threat of actually changing the outcome that's most worrisome here. Instead, it's the danger of spreading disinformation and undermining the perceived legitimacy of American democracy, planting the seed for future attempts by the losing party to change election results if they control state legislatures or Congress.

Imagine how Trump might frame the votes that he could push for in January as he continues to deny his election defeat. First, just as Trump has turned on Georgia's Republican Gov. Brian Kemp — previously a close ally — because Kemp would not take illegal steps to disrupt that state's vote certification, the soon-to-be-former-president could start tweeting demands that objections be lodged in Congress. Trump has also attacked Arizona's Republican Gov. Doug Ducey for not preventing that state's certification of electors for President-elect Joe Biden, and the U.S. Supreme Court for rejecting a far-fetched lawsuit by his supporters in Texas. Second, if one or more objections are made, Trump might frame the potential votes in the House and Senate to be a vote for him or for Biden — and Trump might, in turn, excoriate any Republican who votes "for Biden," as he would misleadingly frame it.

That's why it's essential to immunize the American people against these falsehoods now, before they can spread. There's simply no vote for or against any candidate Jan. 6 when Congress meets. No representative or senator is being asked to choose between Trump or Biden. That's something they were all entitled to do along with other Americans, when they as citizens voted before or on Nov. 3. As Sen. Mitt Romney (R-Utah) said recently, "trying to get electors not to do what the people voted to do is madness."

Instead, there's only one thing that could be put to a vote Jan. 6: American democracy. The question is whether to respect the choice already made by the American people in every state, as certified by each state's own election system, whether any particular member of Congress likes that choice. The alternative is to lodge a legally futile but psychologically damaging blow against the integrity of America's fundamental democratic process and the principles of federalism and the sovereignty of voters.

There's a way to prevent all of this, of course. No member of Congress should have to choose between casting a vote for democracy itself or avoiding excoriation by the sitting president on Twitter. If lawmakers do not indulge in partisan, baseless claims of election fraud by joining an objection Jan. 6, no vote occurs. Instead, the day proceeds just as it should: as a routine ceremony finalizing the votes already cast by the American people, proceeding the inauguration ceremony Jan. 20.

Don't let Trump claim otherwise. There's nothing left to vote for or against. We already voted — and he lost.

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