A DEMOCRACY CRISIS IN THE MAKING

How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration

AUGUST UPDATES AND TRENDS

2022 EDITION
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Introduction

This report is a partnership between the States United Democracy Center, Law Forward, and Protect Democracy.

In the 21 months since the 2020 election, we have seen a breakdown in the longstanding consensus that election administration belongs in the hands of professional, dispassionate experts, and that naked political interference in vote counting is anathema to a functioning democracy. Over the course of 2021 and into 2022, state legislatures have embarked on a sweeping campaign to propose, consider, and, in some cases, enact measures that increase the risk of election subversion—that is, the risk that an election’s declared outcome does not reflect the choice of the voters.

In May, we published the 2022 edition of our ongoing analysis of these efforts. In A Democracy Crisis in the Making: How State Legislatures Are Politicizing, Criminalizing, and Interfering with Election Administration, we identified a pattern across more than 30 states of lawmakers menacing independent and accurate election administration through proposals that, if enacted, would impact practically every step of the electoral process. In the most extreme examples, none of which has been enacted to date, legislators have proposed claiming for themselves the right to reverse election results altogether and to install their own preferred candidates. Other proposals are less overt—bills that would shift power to legislatures to choose and control election officials or that would tie the hands of professional local election administrators. Legislators have also embraced targeting election administrators and election results with unprofessional and biased reviews, designed to sow doubt about the legitimacy of the results. Finally, some of the legislators’ proposals would impose onerous and unrealistic burdens on election administration—for example, a requirement to count all ballots by hand—that would introduce errors and delays.

These proposals have a unifying theme: they would make it far easier for hyperpartisan actors to stir up the doubt, chaos, and confusion that could be used as a pretext for election subversion. They set the stage for a rerun of the democracy subversion playbook of 2020—only this time, if these measures are put in place, anti-democracy players will have more powerful tools at their disposal, and the effort will have a higher chance of success.

As the 2022 general election nears, the integrity and reliability of our voting systems are key campaign issues. For much of the period since the Civil Rights Era, election administration was not an issue for the campaign trail, nor was it one that drove voter choice. Expertly run, accurate, safe, and unbiased elections have been the foundation of our democracy. However, in the wake of the January 6 attack on the U.S. Capitol, and during a nearly two-year onslaught of lies and disinformation, public confidence in our voting systems has plummeted. According to one recent poll, about 48 percent of Americans believe it’s likely that elected officials will overturn an election in the coming years simply because their own party did not win.

Since the release of our May report, the landscape has only darkened. In this update, we describe three evolving trends—each of them a distinct threat, but connected in the danger they pose to the future of free and fair elections. As we explain in Part I, the number of bills that heighten the risk of election subversion has increased. In Part II, we detail a gathering storm cloud as the Supreme Court prepares to consider a case that could rewrite constitutional elections doctrine with an extreme legal theory, upend decades of election law, and accelerate election subversion efforts. Finally, in Part III, we discuss how the insider threat trend—misconduct by officials in trusted election administration roles—has sharpened. With an election less than three months away, it is imperative that these threats be acknowledged and mitigated.
UPDATE ON LEGISLATIVE PROPOSALS AND ENACTMENTS THAT INCREASE THE RISK OF ELECTION SUBVERSION
I. Update on Legislative Proposals and Enactments That Increase the Risk of Election Subversion

In May, we identified 229 bills of concern—175 introduced in this calendar year alone and 54 that rolled over from the last calendar year—in 33 states. A total of 50 bills had been enacted or adopted, 32 last year and 18 this year. As of July 31, 2022, with most state legislative sessions having drawn to a close, there have been at least 244 bills introduced in 33 states that would interfere with election administration—and 24 of this year’s bills have become law (or have been adopted) across 17 states. See Chart 1.

CHART 1

Bills introduced or under consideration as of July 31, 2022, that allow state legislatures to politicize, criminalize, or interfere with elections

In the first half of 2022, significantly more bills have been introduced that would allow legislatures to politicize, criminalize, or interfere with elections than at this time in 2021.
Broadly, we classify a legislative proposal as increasing the risk of election subversion if it falls into one of the following five categories:

1. **Usurping control over election results.** A handful of states have considered bills that would give legislators direct or indirect control over election outcomes, allowing lawmakers to reject the choice of the voters. Although we do not expect any of these proposals to become law in 2022, that they are even being introduced indicates that legislatures are considering the option to overturn future elections. This raises obvious alarms for democracy.

2. **Requiring partisan or unprofessional “audits” or reviews.** Legislation of this type has surged in 2022. As of July 31, we have found 47 bills introduced this year and five more held over from 2021 that propose unprofessional or biased reviews of election results. They call for procedures that are vague or subject to abuse, and in some cases hand the power to call for audits to political parties or the legislature. These bills threaten to call election outcomes perpetually into doubt. They would tie up election administrators and likely would amount to state-sponsored vehicles for disinformation.

3. **Seizing power over election responsibilities.** Legislatures have proposed shifting power from professional election administrators to partisan legislatures or legislatively appointed officials. These bills increase the danger of partisan election manipulation and raise the risk of an election crisis. As of July 31, we have found 40 bills introduced this year and 15 more held over from 2021 that fall into this category.

4. **Creating unworkable burdens in election administration.** As of July 31, legislatures have proposed or passed 101 bills this year and held over 21 from 2021 that increase the risk of subversion by intruding on the granular details of election administration. One particularly dangerous flavor of these bills, under consideration in six states, would require all ballots to be counted by hand, practically guaranteeing delays, higher rates of counting error, and increased risk of tampering by bad actors.

5. **Imposing disproportionate criminal or other penalties.** Legislatures have proposed criminal prosecution of election officials for poorly defined offenses and have created criminal and civil liability for steps that election officials routinely take to help voters cast ballots. States are also escalating the enforcement of election laws by creating entirely new law enforcement agencies. As of July 31, we have found 62 bills introduced so far in 2022 and 18 more held over from 2021 that encourage distrust in elections and election officials and interfere with effective election administration.

*See Chart 2.*

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<th>State</th>
<th>Usurping Control</th>
<th>Unprofessional “Audits”</th>
<th>Seizing Responsibility</th>
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*Chart 2: analyzes bills in A Democracy Crisis in the Making*
UNDERSTANDING THE INDEPENDENT STATE LEGISLATURE THEORY: *MOORE V. HARPER* AND THE DEMOCRACY CRISIS

In June 2022, the Supreme Court agreed to hear *Moore v. Harper*, a case from North Carolina that could fundamentally alter the way elections are administered by removing most or all state-level checks on legislatures when they regulate federal elections. It could further empower legislators to enact the policies detailed in our May Report and throw elections into chaos.

In *Moore*, members of the North Carolina state legislature invoke the radical and erroneous “independent state legislature” (ISL) theory to argue that they were not bound by a state constitutional prohibition on partisan gerrymandering when drawing congressional maps this redistricting cycle. Proponents of the theory assert that the federal Constitution gives a state legislature the power to regulate federal elections without any checks from other state officials or the constraints of the state's constitution. Although *Moore* is a redistricting case, the theory, if adopted, could upend many aspects of election law.

**Understanding the Independent State Legislature Theory**

The ISL theory reads the federal Constitution’s reference to state “legislature” in the Elections and Electors Clauses to confer unusual, nearly unchecked power on state legislatures when they regulate federal elections. The theory, if adopted by the Supreme Court, would upend over 200 years of practice, during which state legislatures conducted federal elections while being bound by their states’ constitutions, gubernatorial veto, and citizen ballot initiatives, and while state courts interpreted state election law. In *Moore*, petitioners rely on the theory to argue that a state legislature’s regulation of federal elections cannot be struck down by a state court on state constitutional grounds—exactly what the North Carolina courts did in *Moore*. In addition, the *Moore* petitioners claim that the federal Constitution’s reference to legislatures bars state legislatures from delegating power to other state actors, like courts or election officials, even to implement or interpret state election law where the legislature fails to address an issue.

But the Court’s decision in *Moore* could sweep even more broadly and nullify other state-level checks on legislatures as well. For example, governors could not veto state laws concerning federal elections, and citizens could not use ballot initiatives to regulate federal elections. And, in still other iterations of this kaleidoscopic theory, federal courts could also step in and block state courts’ and state election officials’ interpretations of state election law and related state constitutional provisions if federal courts find those interpretations stray too far from the plain text.

**Understanding the Theory’s Accelerating Effect on Election Subversion**

Previous versions of this Report have detailed ongoing efforts by state legislatures to usurp the power of election administrators, restrict or chill the exercise of administrators’ discretion, and drown administrators in unworkable burdens. If adopted, the ISL theory would both facilitate and exacerbate these schemes, in addition to causing litigation and regulatory chaos that could create further opportunities for election subversion.

By removing state constitutional checks, the ISL theory, if adopted, would remove some of the most powerful backstops against partisan manipulation of elections. Most simply, and as an example, if governors could no longer exercise their state constitutional power to veto election legislation, several dangerous bills in Wisconsin that had been thwarted only by Governor Evers’ veto could become law in short order. Much the same can be said in Pennsylvania and Michigan. As another example, the last edition of our Report detailed efforts by legislatures, including Arizona’s, to essentially anoint itself the ultimate canvassing board and certifying authority for elections. This would likely run afoul of Arizona’s and other states’ constitutional prohibitions on legislatures performing “executive” functions. But if the ISL theory were adopted, those state constitutional provisions would no longer act as a constraint.

Critically, the ISL theory would only affect the rules that govern federal elections. State constitutions and other state-level checks would still apply to state elections. Were the theory adopted by the Supreme Court, election administrators would therefore need to use two dif-
different—and sometimes conflicting—rules for elections. Consider the following example: if a set of signature-matching standards for absentee ballots were struck down by a state court because they violate the state’s constitution, under the ISL theory, those standards would be void for state elections but might still apply to federal elections. Election administrators would then be forced to apply two sets of rules when processing absentee ballots. They might reject some ballots for failing a signature match for federal races, but still accept those same ballots for state races. Administering such a two-track system would lead to uncertainty and chaos as election officials try to navigate and apply two sets of rules.

This two-track system would compound other new challenges imposed on our election officials. The ISL theory itself could dramatically limit their ability to interpret and implement state law. State legislatures have already set out to add burdens like universal hand counts and unprofessional and partisan audits. These burdens will push election systems to the limit at the same time that election administration has become highly partisan and baseless claims of fraud are rampant. This setting—overburdened election officials, two sets of uncertain rules, and an overly punitive and high-stakes environment in which to apply them—would be ripe for false claims of fraud and subversion.

ISL would neither give legislatures the right to overturn their voters’ choices nor leave our democracy without any protections. Federal legal constraints on state legislatures—including the U.S. Constitution and statutes like the Electoral Count Act and the Voting Rights Act—would still apply under all versions of the ISL theory. But given the current federal courts’ hostility to the Voting Rights Act and to federal constitutional protections for voting rights, these checks are often less robust than the state-level checks that ISL would remove, substantially raising the risks of subversion if the ISL theory were adopted.
INSIDER THREATS COME INTO SHARPER FOCUS
III. Insider Threats Come Into Sharper Focus

“Insider threats”—that is, misconduct by officials in trusted election administration roles—continue to pose a risk of election subversion. Although this is a non-legislative form of subversion, it is often driven by the same disinformation that motivates legislative efforts and on some occasions has been openly encouraged by state legislators. Insider threats involve election personnel who engage in misconduct to ensure their preferred candidates win, or because they believe in false conspiracy theories themselves. Multiple instances of insider threats arose during and since the 2020 election. Fortunately, none of these threats have affected election results. However, the three strands of this trend that we noted in our May report continue to grow.

A Significant and Evolving Risk

Three recent examples demonstrate that the insider threat is working its way into new corners of the election administration system.

In Otero County, New Mexico, three county commissioners initially refused to certify the results of the state’s June primary election, citing debunked conspiracy theories about Dominion Voting Systems machines. Two of the commissioners eventually relented, providing the majority necessary to certify the results, but only after the state’s Supreme Court ordered them to, and after being told that they faced removal from the board and/or criminal penalties. The third commissioner, Couy Griffin, who was convicted in June for his role in the January 6 attack at the Capitol, continued to vote against certification, saying that he had a “gut feeling” not to trust the results of the election.

A similarly concerning example is ongoing in Pennsylvania, where, more than three months after the state primary, several counties refuse to certify the full results of the election. Three counties—Berks, Fayette, and Lancaster—have refused to count absentee and mail-in ballots cast by eligible voters that were received in a timely manner and otherwise valid except for the fact that the exterior return envelope was not hand-dated by voters. In litigation earlier this spring, a federal appeals court ordered that comparable ballots cast in an earlier election must be counted. And in June, a Pennsylvania court ordered that these ballots be canvassed. Nevertheless, the three counties refused to include the valid ballots in their counts. A commissioner from one county stated that he decided not to follow the earlier court order to canvass the ballots during a hearing regarding in a lawsuit brought by Pennsylvania’s Secretary of State against the counties. On August 19, a court ordered the counties to certify the election including those ballots. It is unclear as of the date of publication whether or not the order will be appealed.

Separately, in Pennsylvania, in late July, the Butler County Board of Elections decided to conduct an extra-legal and unusual “audit” of the 2020 election. The review is ongoing.

Against this backdrop, election officials are warning about the insider threat. A recent Politico article reported interviews with “a dozen chief election administrators [who] detailed a growing number of ‘insider threats’ leading to attempted or successful election security breaches aided by local officials.”

A Threat That is Expanding in Scope

In May, we noted that there was a concerted effort to, among other things, place conspiracy theorists in seemingly minor and below-the-radar roles in key states around the country. This “precinct-by-precinct” approach has been matched by efforts to recruit and support candidates who deny the official results of the 2020 election to run for statewide offices from which they could try to overturn the will of American voters in future elections.

As 2022 began, more than 100 so-called election deniers were in the running to be either governor, attorney general, or secretary of state. Many of them were campaigning on lies and conspiracy theories. For example, Kari Lake, who is the Republican gubernatorial nominee in Arizona, has said she would not have certified her state’s election of President Joe Biden in 2020. Tim Michels, the Republican nominee for governor in Wisconsin, declined to say, as recently as this June, whether he will certify the 2024 election if former President Donald Trump runs and loses in the state. Overall, looking at the 29 states that have already chosen
A recent survey by the Brennan Center for Justice reveals that the pattern of intimidation and harassment is extensive. The survey found:

- 1 in 5 local election officials are “very” or “somewhat unlikely” to continue serving through 2024 because of politicians’ attacks on the system and the stress of the job under current conditions.
- More than 3 in 4 local election officials feel that threats against local election officials have increased in recent years.
- Nearly 1 in 3 election officials know of at least one fellow election worker who has left their job at least in part because of fears for their safety, increased threats, or intimidation.

The exit of experienced and nonpartisan elections officials because of harassment or threats has opened the door to potential insider threats. For example, the Nye County, Nevada, clerk resisted pressure to stop using voting equipment from a company at the center of conspiracy theories, but eventually resigned in the face of increased public anger and distrust. She was replaced by an interim clerk with no election administration experience who plans to discard the county’s election equipment and hand-count all ballots. Even where the loss of experience has not created an opening for bad actors, the risk of election subversion has increased. One Arizona county, Pinal, has had three election directors in the last two years and is short-staffed as a result, in part, of the hostile environment for election workers. In the lead-up to the state’s August primary, the office erroneously left a number of races off more than 60,000 early voting ballots, resulting in substantial disruption to the election. And in Gillespie County, Texas, persistent threats and harassment drove the entire elections staff to resign, leaving the county unsure how it would administer the upcoming November election.
IV. Conclusion

When we issued the first edition of this Report, in April 2021, we warned of an impending disaster for American democracy. At that time, we called attention to what was then a burgeoning trend—legislation that would unravel centuries of progress toward fair elections and erode the bulwark of nonpartisan election administration.

Almost a year and a half has passed, and our alarm has only increased. The threat from state legislatures has advanced. Dozens of election-interference bills are now written into state law, and many more have been introduced. What’s more, the legislative threat has joined and amplified other efforts to chip away at the simple proposition that election results should reflect the will of the voters.

In recent months, officials in scattered American counties have simply refused to certify valid election results. These attempts have not succeeded so far: they were stopped by a court in New Mexico and are the subject of litigation in Pennsylvania. But they are brazen nonetheless, and amount to a probing of the electoral system for weaknesses. At the same time, politicians who refuse to accept the outcome of the last election are running for statewide jobs that would give them oversight over future elections. Many have already secured their party’s nomination. Less noticed, a campaign of harassment and threats is driving trusted local election administrators from their jobs. Looking ahead, the Supreme Court is poised to consider a fringe legal theory that would give partisan state legislatures virtually unchecked power over federal elections.

There is yet cause for hope. The vast majority of state legislatures have adjourned for the year, and most of the bills of concern that we identify in this Report have not become law. Some leaders in both parties have openly acknowledged the threat to democracy and stood up against it. We still have a democracy crisis in the making, but committed Americans can come to democracy’s aid and reject efforts to subvert elections.
In our May 2022 report, we found 36 legislative proposals in 6 States United Democracy Center, for much of American history, and even to this day, the promise of full access to the franchise and free and fair elections has been illusory for many voters. See U.S. Commission on Civil Rights, An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report, September 2018, usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf.

To quantify the number of legislative proposals that create a risk of election subversion, we relied on the Voting Rights Lab database and supplemented it with other legislative proposals that we discovered via independent research. We included legislation introduced between December 15, 2021, when our last update stopped, and July 31, 2022. We also included legislation from our 2021 Reports that was still active this year. The States United Democracy Center, Protect Democracy, and Law Forward worked together to analyze each proposal to determine whether it would—if adopted—materially increase the risk of election subversion, and to filter out those that we concluded did not meet that criterion. See Voting Rights Lab, State Voting Rights Tracker, https://tasker.votingrightslab.org.


Migliori v. Lehigh County Board of Elections, 36-4:153 (Id Cir. 2022).


In our May 2022 report, we found 36 legislative proposals in Wisconsin that promoted election subversion according to our criteria. We also highlighted a dangerous legislature-funded “investigation” of the 2020 election in the state. On August 12, Assembly Speaker Robin Vos fired Special Counsel Michael Gableman, the nominal leader of that “investigation.” See Molly Beck, “Vos fires Special Counsel Michael Gableman, ending a 2020 election review that’s cost taxpayers more than $1 million and produced no evidence of fraud,” Milwaukee Journal Sentinel, August 12, 2022, https://www.jsonline.com/story/news/politics/2022/08/12/robin-vos-fires-michael-gableman-ending-1-million-review-2020-election/10299570002/. The consequences of that termination remain unclear as of this writing.


Migliori v. Lehigh County Board of Elections, 36-4:153 (Id Cir. 2022).


Id.


Id.


Note 1: See, e.g., Ariz. Const. Art. III (2021) (“The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial, and, n o one of such departments shall exercise the powers properly belonging to either of the others.”).

Note 2: For much of American history, and even to this day, the promise of full access to the franchise and free and fair elections has been illusory for many voters. See U.S. Commission on Civil Rights, An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report, September 2018, usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf.
## Appendix

### Bills usurping control over election results

1. Bills requiring partisan or unprofessional election “audits” or reviews
2. Bills seizing power over election responsibilities
3. Bills creating unworkable burdens in election administration
4. Bills imposing disproportionate criminal or other penalties

Bill is an addition to appendix
Bill’s status has changed since May 2022 report

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States United Democracy Center

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy.

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Protect Democracy is a nonpartisan, nonprofit with an urgent mission: to prevent our democracy from declining into a more authoritarian form of government.

For more information, visit protectdemocracy.org

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Law Forward is a nonprofit law firm focused on protecting and advancing democracy in Wisconsin. We use impact litigation, the administrative process, and public education to protect Wisconsin’s fundamental democratic principles, and revive Wisconsin’s traditional commitment to clean and open government.

For more information, visit lawforward.org