Supreme Court agrees to hear “independent legislature” case as Republicans prepare their next coup

Tom Carter
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On June 30, the US Supreme Court granted a petition to hear an appeal from the Republican-controlled North Carolina legislature, which is seeking to overturn a decision of the state’s own high court on the grounds of the supposed unilateral, un-reviewable and “independent” powers of state legislatures to control elections.

The Supreme Court’s announcement that it will hear the appeal has triggered anxious commentary throughout the American political establishment and judicial system. The “independent legislature theory” being invoked by the North Carolina Republicans is the same theory that was invoked in the theft of the 2000 presidential election and once again by Trump in connection with the attempted overthrow of the results of the 2020 election.

In preparation for the violent coup attempt on January 6 of last year, Trump’s legal team, headed by the fascistic ex-mayor of New York City, Rudy Giuliani, insisted that state legislatures, invoking baseless accusations of fraud, could unilaterally overturn the popular vote, reject electors committed to Joe Biden, and certify pro-Trump electors to vote in the Electoral College.

It was on this legally fraudulent basis that Trump conspirators, including Giuliani, John Eastman and Ginni Thomas, the wife of Supreme Court Justice Clarence Thomas, urged Republican-controlled legislatures in battleground states won by Biden to submit fake slates of electors pledged to Trump.

The fact that the Republican-controlled political establishment in North Carolina is pursuing this appeal—and the far-right majority on the Supreme Court will entertain it—is one more sign that the January 6 conspiracy is not over. Undeterred by their failure on the first attempt and emboldened by the fecklessness of the Democrats, the Republicans—who control 30 of the country’s 50 state legislatures—are actively making preparations for the next coup attempt.

Nervous commentary in the American media has called the “independent legislature theory” a “fringe” theory (*Washington Post*, *Politco*). But a theory’s total lack of legal, political and historical validity was not an obstacle for the Supreme Court during its most recent term, which culminated in a historic attack on abortion rights on June 24. There is a sense that the Supreme Court, controlled by an ultra-right majority of Republican appointees—including three justices appointed by Trump himself—is now capable of anything.

The “independent legislature theory” is based on a tendentious interpretation of brief references to state legislatures (“the Legislature thereof”) in the text of clauses in the US Constitution describing elections and the appointment of electors. The argument is that these clauses not only grant the power to legislatures to oversee election procedures, but prohibit the legislature’s conduct from being challenged in court—even if the legislature flagrantly violates the state’s own laws and constitution, and even if the legislature ignores and overturns the popular vote.

As a reactionary legal doctrine, the “independent legislature theory” is a close cousin of the authoritarian “unitary executive theory” that was embraced by both the Bush and Obama administrations, according to which the Constitution not only grants dictatorial powers to the president, but prevents the president’s conduct from being challenged in the legislature or in the courts.

Presenting itself falsely as a return to the “original” meaning of the Constitution, the doctrine also belongs to the same family of reactionary “originalist” legal formulas that were used to abolish the right to abortion last month, and which are being deployed to attack and roll back democratic rights in the US all down the line.

The “independent legislature theory” in its modern form sprang from the Supreme Court’s decision in *Bush v. Gore*—the 2000 case in which the Court halted the counting of votes and installed George W. Bush as president.

In its decision stealing the election, the Supreme Court made the extraordinary and provocative claim that an “individual citizen has no federal constitutional right to vote for electors for the President of the United States” independent of the voting procedure the state government imposes, because no such right is specifically mentioned in the Constitution. A concurring opinion filed by then-Chief Justice William Rehnquist, joined by Clarence Thomas and Antonin Scalia, expressly endorsed the independent legislature theory as grounds for the decision to halt the vote recount in Florida that had been ordered by the Florida Supreme Court.

Analyzing the theft of the 2000 elections as a historic break with the forms and traditions of American democracy, the *World Socialist Web Site* wrote at the time: “America has been changed in a fundamental way, and nothing will ever be the same in the United States, or, for that matter, the world.”

The ongoing relevance of the legal precedent set by that case in today’s political crisis in America—and its specific role in Trump’s 2020 coup attempt—is proof of the truth of that warning.

Under the peculiar American procedure for voting for president, the winner of the presidential election is determined not by the nationwide popular vote, but rather by who wins a majority of electoral votes in the 538-member Electoral College. As a result, candidates who lose the popular vote can win the Electoral College vote and the presidency. Trump, for example, lost the popular vote by approximately three million votes in 2016, but won the vote in the Electoral College by 304 to 227.

After the popular vote is counted, each state sends electors pledged to vote for the winning presidential candidate in that state. The number of electors from each state equals the number of the state’s representatives in the US House of Representatives plus the number of its US senators (two

from each state). This means that a voter in a rural state like Wyoming casts a vote for president that is weighted four times as much as a vote cast in California.

The "independent legislature theory" embraces the idea that the state legislatures can simply pick their own electors, either through sham findings of "fraud' or in open defiance of the popular vote. And nobody can take them to court or stop them, because they have the "independent" power to do as they please.

On January 6, 2021, this was the theory that the Republican coup plotters actually attempted to put into effect.

In the run-up to the coup attempt, pro-Trump legislators in Arizona, Georgia, Michigan, New Mexico, Nevada, Pennsylvania and Wisconsin submitted alternate slates of electors—on the theory that the legislature could invalidate the popular vote and declare Trump the winner.

The coup was to take place on January 6, the day set for a joint session of the US Congress to certify the Electoral College vote. Trump's fascist mob was unleashed to storm the US Capitol and compel Congress to halt the certification.

Working in tandem with far-right Republican representatives and senators who raised objections to the duly certified elector slates from certain states won by Biden, Trump's fascist foot soldiers were to create the conditions, if necessary by kidnapping and killing elected officials, for Trump to declare an emergency and maintain power as de facto dictator. The fake elector slates submitted by Republican state legislatures were to be used to give the coup a pseudo-legal cover.

The North Carolina case itself arises from a brazen instance of partisan gerrymandering on the part of the state legislature, which the state's own Supreme Court struck down as illegal. While the case has attracted national attention because of the invocation of the "independent legislature theory," it is also highly revealing as a case study of an anti-democratic conspiracy by state government officials to subvert the will of the state's citizens.

The records of the case unceremoniously refer to these methods as "packing and cracking," which both the Democrats and Republicans employ to greater or lesser degrees in the respective states they control.

In this case, Democratic voters in North Carolina were "packed" into districts comprised overwhelmingly of Democrats, so as to prevent them from voting against Republicans in other districts.

The remaining Democrats were "cracked" among districts that are majority-Republican, ensuring that they will always be narrowly outvoted. Frequently, this type of gerrymandering takes the form of urban areas, which are majority-Democratic, being arbitrarily "cracked" like puzzle pieces and incorporated arbitrarily into rural districts, which are majority-Republican, with which they have no historical, social or geographical association.

Utilizing these methods, a party with a narrow popular majority can appear to have an overwhelming majority in the legislature. And by drawing and redrawing the redistricting maps, a party can retain a legislative majority even after it loses the popular majority.

Redrawing the voting maps for the 2022 midterm elections, the Republicans deployed these methods with mathematical and statistical precision to produce the maximum number of Republican votes in Congress. The result was the shifting, twisted, noodle-shaped voting districts that are familiar to Americans and infamous around the world.

North Carolina's Supreme Court ultimately struck down the redistricting maps in February, finding that they violated the state's own constitution, which prohibits the state government from depriving a "voter of his or her right to substantially equal voting power on the basis of partisan affiliation."

In response, the Republican legislators are claiming that the state Supreme Court had no power to rule on election-related matters—a doubly absurd position given that the North Carolina legislature itself passed laws granting the state courts the power to review legislative redistricting maps.

While the North Carolina case does not directly involve electors, the implications of the case go far beyond partisan gerrymandering, as the litigants on both sides are keenly aware. In 2015, the US Supreme Court expressly rejected the "independent legislative theory" by a narrow 5-4 majority in a case coming from Arizona—but three Trump appointees have been added to the court since the date of that decision.

In dissenting opinions filed in separate cases last year and this year, justices Brett Kavanaugh, Clarence Thomas and Samuel Alito have already signaled their support for the "independent legislative theory." The Republicans sense an opportunity and are determined to press it.

While the Democrats are litigating the North Carolina case in court, the response of the Democratic Party leadership to these moves is nowhere near proportional to the real danger.

Instead of alerting and mobilizing the population to face the threat of a far-right coup, Biden drones on about his "Republican friends" and "Republican colleagues," invokes "bipartisanship," and pretends to have achieved "national unity" behind the war with Russia. Meanwhile, the increasingly fascistic Republicans, having failed in their first attempt to violently overthrow the government, are doubling down on laying the pseudo-legal foundation for the next, stronger and more determined attempt.

On Saturday, Trump seized on a Wisconsin Supreme Court ruling on the validity of drop boxes for absentee ballots to demand that Wisconsin Assembly Speaker Robin Vos overturn the 2020 elections and certify that Trump had won—an implicit invocation of the "independent legislature theory."

"It's now up to Robin Vos to do what everybody knows must be done. We need FAIR and HONEST Elections in our Country," Trump wrote. "Speaker Robin Vos has a decision to make! Does Wisconsin RECLAIM the Electors, turn over the Election to the actual winner (by a lot!), or sit back and do nothing as our Country continues to go to HELL?"

When Trump says the state legislature must "reclaim" the electors and "turn over" the election to the Republicans, he is demanding, in line with the "independent legislature theory," that the legislature assert its supposed power to override the popular vote and make its own "independent" determination as to who won.

The Supreme Court's decision on June 30 to hear the North Carolina case is not a decision on the merits of the case, only a decision to hear the appeal. The secret votes of only four out of nine justices are required to hear the case. The case itself will be heard during the Supreme Court's next term, and the decision likely will be handed down in the first half of 2023—in plenty of time for the 2024 elections.