

2020 Presidential Election

Is the Electoral Count Act Unconstitutional?

(I was surprised by some of the things I learned)

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TL;DR-1 Voting by the Electoral College picks the next President. The Electoral Count Act describes how controversies over that process are resolved. Various legal scholars believe that law to be **unconstitutional**.

TL;DR-2 The 100+ year old Electoral Count Act says the President might be decided by the combined actions of **one senator, one representative and one governor**.

Let's start with the easy part. There is no room whatsoever in the law to quibble or litigate over the following points.

1. November 3, 2020 is election day.
2. On December 14, 2020 the people appointed to the electoral college vote for President and Vice President. There is no law that requires **270** electoral college votes to be elected president. Instead, the law only requires a majority vote by the **appointed** electors. If for any reason one or more states does not complete the process of appointing electors, that does not stop the electors that have been appointed from proceeding as required on December 14th by voting on who will be the next President and Vice President.
3. On January 6th, 2021 any U.S. Senator acting together with any U.S. Representative can, at least temporarily, stop the process of electing the President and Vice President.
4. On January 20, 2021 the current term in office for Trump and Pence ends. There is no provision in the law for any kind of extension of their terms.
5. Also on January 20, 2021 someone will be sworn in as President. If there is no "President elect" and there is no "Vice President elect" due to ongoing controversy, then the Speaker of the House will be sworn in as "acting President".

Toward the end of this report you will find **links to articles** describing the uncertainty that will grip the nation as Trump tries any way possible to achieve a second term in office. Unfortunately, it turns out that **our election laws are grossly inadequate** for dealing with (1) a sudden large increase in voting by mail due to the COVID-19 pandemic combined with (2) a President like Trump who will fight in every way possible to remain in power.

When you are trying to understand a complex system it is often helpful to do a **detailed chronology analysis**. Such an analysis is shown below beginning with the national election. In preparing this chronology the work of the [National Task Force on Election Crises](#) was extremely useful. To see the chronology prepared by that task force:

Click the link two lines above

Click “News”

Click “Statement on Why the President Cannot Cancel or Postpone the Election”

Click the word “Here”

2020 Election Chronology

November 3, 2020

Election day.

The electors of President and Vice President **shall be appointed**, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

3 USC Ch. 1 §1. Time of appointing electors (emphasis added)

November 3, 2020 - December 14, 2020

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

3 USC Ch. 1 §2. Failure to make choice on prescribed day

It is almost certain that the winner of the race for President (i.e. process of choosing electors) will not be know in some states on November 3rd due to the number of votes cast by mail. **That delay may result in some state legislatures attempting to take some kind of action to appoint people to the electoral college.**

After the November 3rd election, the Governor of each state is required to certify the result of the election in that state. This happens “as soon as practicable” with the deadline being prior to when the Electoral College meets. For a reference in the law to this step, see near the end of 3 USC Ch. 1 §15.

What happens if (1) the Governor of a state never certifies the result of the election and (2) litigation is still underway on the date the Electoral College meets? See the section “December 14, 2020” below.

What happens if the Governor certifies one group of electors but the legislature of that state acts under 3 USC Ch. 1 §2 to appoint a different group of electors?

December 8, 2020

If (1) there is any dispute over who will be appointed to the electoral college on behalf of the voters of a state and (2) that dispute reaches a **final decision** under state law by December 8th, then that decision is **binding on Congress**. This is referred to as the **safe harbor** provision.

If any State shall have provided, by laws enacted prior to the day fixed for the **appointment** of the electors, for its final determination of any controversy or contest concerning the **appointment** of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, **shall be conclusive**, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors **appointed** by such State is concerned.

3 USC Ch. 1 §5. Determination of controversy as to appointment of electors (emphasis added)

Which states have already enacted laws for settling any controversy over the appointment of people to the Electoral College? Which states have not enacted any such laws?

Of course attorneys can always argue that a court decision in some state regarding that state's electors is not "final" and therefore not binding on congress.

December 14, 2020

People appointed to the Electoral College meet in each state capitol and vote. There is no requirement that in order to be elected President that a person must receive 270 votes at the Electoral College. Instead, all that is required is a majority vote of the **appointed** electors. If all states finish the process of appointing electors prior to when the Electoral College meets, then a majority is 270 or more.

The electors of President and Vice President of each State **shall** meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.

3 USC Ch. 1 §7. Meeting and vote of electors

There is no provision in the law for changing this date and there is a mountain of case law holding that the work "**shall**" creates a mandatory duty.

Assume that when December 14 arrives the electors of some states have not yet been appointed due to an ongoing controversy. The electors that have been appointed by December 14 will likely go ahead and cast their votes for President and Vice President. There is no way to know at this time whether that will favor Trump or Biden.

The electors **shall seal** up the certificates so made by them, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice President, are contained therein.

3 USC Ch. 1 §10. Sealing and endorsing certificates (emphasis added)

December 23, 2020

Senate and Archivist receive certificates of electoral votes.

January 3, 2021

The new Congress is sworn in. Note that the current Congress has nothing to do regarding the election. The sealed (See December 14) electoral votes are opened January 6 (see below) before a joint session of the new Congress. **The fact that it is the new Congress that reviews the votes by the Electoral College could turn out to be extremely important.**

Of course some races for Congress might still be undecided on January 3rd if ballots are still being counted and/or there is litigation.

January 6, 2021

This step requires particularly careful analysis. On this day the sealed electoral votes from each state are opened in alphabetical order before a joint session of the new Congress. There seem to be three possibilities for the status of things when this step **begins**.

Case #1 - Any controversy regarding electors is in “safe harbor” status and the Electoral College vote is not tied.

This is the simplest outcome of the Electoral College process. The majority vote by the Electoral College is binding on Congress and determines the next president.

Case #2 - Any controversy is in “safe harbor” status and there is a **tie vote** in the Electoral College for President and Vice President.

If there is a tie vote in the Electoral College then the 12th amendment to the Constitution requires the following process. The House elects the President with each state getting **one** vote and the Senate elects the Vice President with all 100 Senators voting. Here is a link to the 12th amendment:

<https://constitution.findlaw.com/amendment12.html>

In the current Congress there are 26 states where a majority of the representatives are republican. In addition, a majority of current senators are republican. But if there is an Electoral College tie it will be the **new Congress** that decides the outcome. If the Democrats take control of the senate then we might wind up with Trump being elected to a second term by the House and Kamala Harris elected vice president by the senate. The movie “**Odd Couple**” comes to mind.

What happens if the vote in the US House for President is tied?
What happens if the vote in the Senate for Vice President is tied?

What happens if a state has an equal number of R and D representatives? How does that state decide whether its vote will go for Trump or Biden?

Could the House and Senate voting be tipped one way or the other if one or more House/Senate races is still undecided?

Case #3 - There is at least one state where there is an election controversy that does not achieve “safe harbor” status by December 8th.

Below is the text of 3 USC Ch. 1 §15 which is captioned “Counting electoral votes in Congress”. The original is a single paragraph but it is presented below **one sentence at a time**.

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.

Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any.

Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by **at least one Senator and one Member of the House of Representatives** before the same shall be received.

(The actions of **just 2 members of Congress** can cause the election for President to be decided either by Congress or by a single state governor.)

When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but **one return** has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified

If **more than one return** or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of **two or more of such State authorities** determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.

(The above **sentence** contains 21 commas and 2 semi-colons!)

But **if the two Houses shall disagree** in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the **executive of the State**, under the seal thereof, shall be counted.

When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted.

No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 USC Ch. 1 §15. Counting electoral votes in Congress (emphasis added)

No doubt attorneys will find it easy to argue over the exact meaning of the above language. However some aspects of the above federal law are 100% clear. If there is an objection by at least one senator and at least one representative then each chamber will vote. It is safe to say that the Democrats will retain a majority when the new House is sworn in. Thus, if the Democrats take control of the Senate, then any voting under the above provisions will likely be resolved in Biden's favor.

Due to the possibility that Democrats will control both houses of the new Congress, Trump's #1 game plan has got to be litigating in key states to try and show that he won those states. His goal will likely be to get a final decision under state law and thus achieve "safe harbor" status by December 8th.

But wait. Now let us assume that the Republicans retain the senate majority in the new Congress. Also assume the above federal law is triggered (it only takes **one representative plus one senator**). It seems unlikely that the House and Senate will agree. If this happens then the electoral votes for that state will be counted according to the certification **previously issued** by that state's **Governor**.

<u>Battleground States</u>	<u>Governor's party</u>	<u>Electoral votes</u>
Arizona	Republican	11
Florida	Republican	29
Georgia	Republican	16
Michigan	Democratic	16
Minnesota	Democratic	10
North Carolina	Democratic	15
Pennsylvania	Democratic	20
Wisconsin	Democratic	10

Keep in mind that pursuant to the above federal law Congress reviews the electoral reports from each state in alphabetical order and any objections must be fully resolved before going on to the report from the next state.

If Trump is going to try for a "Hail Mary" **second term** then there will need to be (1) some controversy regarding the electoral votes from Arizona, Florida or Georgia and (2) that controversy must not reach 'safe harbor' status by December 8 and (3) the voting in the Electoral College must be sufficiently close such that the election will turn on how this controversy is finally resolved. The Republican Governor of Arizona, Florida or Georgia might be the **one person** that gives Trump a second term.

January 20, 2021

The current term of office for both Trump and Pence automatically ends at noon on January 20, 2021. So says section 1 of the 20th amendment to the Constitution. That language is crystal clear.

If there is no president-elect and no vice-president-elect at noon on January 20th, then the **Speaker of the House** will be sworn in as “Acting President”. See 3 U.S.C. § 19; U.S. Const. amend. XX, § 3.

That ends the chronology analysis.

If you would like to read more about how electoral college votes are counted by Congress and what happens if there is a controversy related to that process, then you can do a Google search on “**Electoral Count Act**”. To get you started, below are links to a few articles.

<https://carnegieendowment.org/2020/07/02/how-trump-could-refuse-to-go-pub-82260>

<https://www.theatlantic.com/politics/archive/2020/09/trump-biden-electoral-count-act-1887/615994/>

<https://www.rollcall.com/2020/06/01/old-law-could-leave-2020-presidential-race-in-stalemate/>

Here is a detailed article by the National Task Force on Election Crises

<https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f59223d94b21d2ebe8e6957/1599676990875/Electoral+Count+Act.pdf>

<https://www.cnn.com/2020/09/03/politics/electoral-college-vote-count/index.html>

The above article includes links to opposing views.

To read all of the next article you need to click the link at the bottom to go to page 2.

<https://www.fa-mag.com/news/worried-about-a-disputed-election--steel-yourself-57764.html>

<https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=2719&context=lucj>

Here is an article by two highly qualified legal experts. Let’s call this the ‘**nuclear option**’ since it concludes that the federal law for resolving controversy regarding the electoral college is unconstitutional.

At the end of the ‘Introduction’ the article states:

This article thus contends that the ECA [**Electoral Count Act**] unconstitutionally impinges on Congress’s internal procedural authority and is unenforceable, adding ever more uncertainty to an electoral system that has already engendered three constitutional crises in our Nation’s history.

https://rutgerspolicyjournal.org/sites/jlpp/files/Land_Schultz.pdf

Here is another legal analysis that concludes the **Electoral Count Act is unconstitutional**.

<https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4003&context=nclr>

Here is an early draft of a paper by another legal scholar that describes gaps and ambiguities in the **Electoral Count Act**.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685392