MAKING SURE EVERY VOTE COUNTS:
A GUIDE TO THE LAWS ON CERTIFYING AND COUNTING PRESIDENTIAL ELECTORS FOR THE IN 2020 ELECTION

BY THE DEMOCRATIC TRANSITION WORKING GROUP
OF
THE UNIVERSITY OF DAYTON SCHOOL OF LAW

INTRODUCTION

Understanding and following the law in ways that give effect to all legally cast ballots is crucial to protecting our democracy. Lawyers, judges and public officials play a critical role in assuring that protracted legal disputes do not prevent counting the votes by the statutory deadlines or erode public confidence in the election by allowing political influence to inappropriately affect the outcomes. Towards these ends, this summary (1) provides a simple explanation of a complex electoral process, (2) raises important legal issues that could arise in a close and disputed election, and (3) gives legal resources to assist those beginning more in-depth legal research.

PRESIDENTIAL ELECTORAL PROCESS – SIMPLIFIED

A. Overview of the Presidential Electoral System.

The President is selected based on a majority vote of "electors" chosen every four years by each state under the laws of that state. Currently, every state's law provides that its popular vote determines the selection of electors. After the popular vote, the electors meet separately in their respective states and vote as the "Electoral College." Each state is allotted a number of electors equal to the number of Representatives that state has in the House plus its two Senators. The District of Columbia also has three electoral votes, so there are presently 538 electors (435 + 100 + 3). The majority of electoral votes needed to become President is therefore 270.

B. Laws that Govern a Presidential Election Process

There are three sources of law that establish how a president is elected: (1) the United States Constitution, the Elector's Claus Art. 2 § 1, cl. 2, the 12th Amendment, and the 20th Amendment; (2) laws in each of the 50 states governing the selection of electors for that state, and (3) federal laws concerning the selection of a President, The Electoral Count Act of 1887 ("ECA") and the Presidential Succession Act.

C. The Election Process Timeline

1. **November 3, 202: Popular vote.** States appoint presidential electors every four years on the first Tuesday in November.[1] Neither the constitution nor the ECA require states to appoint electors based on the popular vote. However, all states now require electors to be selected based on the popular,[2] and 33 states require electors to follow the popular vote as "bound electors."[3]

2. **December 8, 2020: Certificate of Ascertainment.** Once a state's vote determines its electors, the "state executive" (governor) provides "Certificates of Ascertainment" to Congress that identify the electors. This must be done six days prior the date when the Electoral College meets (on December 14, 2020).[4]

3. **December 14, 2020: Electoral College votes to choose President.**

   a. On this day electors meet in their respective states to vote for a presidential candidate.[5]

   b. Except for Maine and Nebraska,[6] in all states the candidate obtaining a plurality of electors is given the entirety of the state's electoral votes.

4. **January 6, 2021: Electoral college votes counted in Congress**.

   a. The newly elected Congress convenes on January 3, 2021. Under the ECA, on January 6, 2021, the Presiding Officer of the Senate (Vice President Pence) counts the electoral votes before a joint session. [7]

---

[1] U.S. Constitution, Art. 2 § 1; ECA, 3 U.S.C. § 1.

[2] www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx

[3] www.fairvote.org/faithless_elector_state_laws

[4] ECA, 3 U.S.C. § 5

[5] Id. § 7

[6] Maine and Nebraska allocate votes between districts with the candidate obtaining the plurality of votes in that district obtaining the district's share of the votes.

[7] ECA, 3 U.S.C. § 15

b. If a candidate has a "majority of the whole number of Electors appointed," (270 of 538), he or she wins.

5. **January 6-20, 2021: Possible "contingent election."** If, based on the count of the valid electors, as determined by Congress under the ECA , no candidate has a majority of "Electors appointed," then the U.S. House of Representatives selects the President by majority vote, with each state's delegation receiving one vote.[8] States with large populations such as California and Florida receive the same single vote per state delegation as Wyoming and Montana. Currently, Republicans hold the majority of state delegations in the house, and that is not likely to change in the 2020 election.

6. **January 20, 2021: Inauguration day**

a. On this day, the previous President's term ends, and a newly selected President must be sworn in.[9]

b. If a new President has not been selected, the Presidential Succession Act provides that the Vice President, and if he or she is not available the Speaker of the House, will serve temporarily as the President until the selection is made.[10]

FAQ'S ABOUT THE ELECTORAL PROCESS

Confusing legal issues lurk within each step of the electoral timeline. Disputes about those issues threaten to derail and delegitimize the legal process of counting all the votes. In the Frequently Asked Question (FAQ) format below, this discussion addresses some of the most urgent legal questions in four broad groups: A. Choosing Electors in the States; B. Counting Electors in the U.S. Congress; C. Provisions for a Contingent Election in the U.S. House; and D. What Can Be Done to Protect Lawful Votes?

A. Choosing Electors in The States

1. What threats to conducting elections and accurately counting the popular votes do states face in 2020?

The 2020 presidential election will likely raise many troubling legal and factual disputes. State efforts to protect the franchise in the face of the COVID-19 pandemic raise challenges to states' dissemination of absentee

[8] 12th Amend.

[9] 20th Amend.

[10] Presidential Succession Act, 3 U.S.C. § 19.

ballots, the propriety of state witness and notarization requirements, limitations on ballot collection locations, and more. Social distancing concerns will exacerbate normal concerns about long lines and long waits at the polls. Legal contests about what, if anything, should be done are almost inevitable.

Mail-in ballots, though useful to slowing the spread of COVID-19, may be more difficult to count, which, in turn, could erode public confidence in the accuracy of our voting. Indeed, President Trump has declared that only votes counted on election night should be included in the vote, that all others are "massively rigged" or "fraudulent." In addition, in a year when the need to vote by mail is arguably more important than ever before, there are questions about the Postal Service's ability to timely deliver ballots to and from voters. We can expect legal challenges regarding the timeliness of votes received after November 3rd and the veracity of mailed-in ballots.

Potential irregularities at polling places raise additional concerns. President Trump has called for legions of poll watchers. What are they to watch for? What if they are armed? What if they are or look like police officers? What if they challenge voters in predominately black precincts? This will be the first year since 1982 that the Republican Party will not be operating under the terms of a consent decree aimed at preventing voter harassment that originated from precisely such conduct.

There might be even *more* serious problems. What happens if a cyberattack disables some or all of the voting machines in a state or throughout the country? What happens if armed groups or violence prevent voting from occurring? What happens if, in the face of violent demonstrations, the President declares an emergency under the Insurrection Act (or governors do so) and access to the polls is prevented by the imposition of curfews or more dramatic limitations on citizen mobility? What happens if all of the above occur in combinations that make counting the votes impossible or highly questionable?

All of the foregoing are certain to raise issues in the minds of citizens; many are possible sources of protracted litigation. Welcome to the 2020 election.

2. How are disputes in the states about conducting elections and counting votes resolved?

The Constitution vests the states (specifically their legislatures) with the authority to select their presidential electors. All 50 states have enacted laws providing means for their citizens to vote for President and for any disputes about those elections to be resolved through judicial processes. The ECA contemplates counting electors who have been selected by states.

A party can challenge a state's voting procedures and the application of those procedures on the basis of (1) a state's constitution, (2) a state's electoral laws, (3) the U.S. Constitution, or (4) federal election laws. Such challenges can be brought in either state or federal court under normal jurisdictional rules. They can be raised either before an election, as when a party wishes to dispute anticipated procedures, such as mail-in ballot security envelopes, or after an alleged violation has occurred, such as when a voter is turned away from the polls for allegedly insufficient identification.

To the extent that disputes over voting procedure and counting practices are addressed prior to the election, they would not jeopardize the ability to finalize the popular vote count and have electors selected on the basis of that vote. However, Congress considers a state's certification of electors "conclusive" only if it certifies its electors by the "safe harbor" deadline six days before the Electoral College votes. In 2020, states must certify their electors by December 8, 2020, six says before the Electoral College votes on December 14, 2020. In *Bush v. Gore*, the Supreme Court forced Florida to submit its electors based on its preliminary vote count, despite the fact that recounting and litigation were ongoing, so that it could meet the safe harbor deadline.

Resources:

- U.S. Constitution, Art. 2, § 1, Cl. 2.
- ECA, 3 U.S.C. §§ 5, 6, 15
- *Bush v. Gore,* 531 U.S. 98 (2000)
- www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf
- www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020
- www.everycrsreport.com/reports/R44659.html#_Toc477184060

3. Do a state's electoral votes count if it cannot certify its electors by the ECA deadlines?

As noted, if a state is unable to certify its electors by the requisite deadline of six days prior to the meeting of the electoral college, it loses its "safe harbor" for having its electoral votes counted under the ECA. (For more on the nature and implications of the safe harbor deadline under the ECA see questions 17-23 of the FAQ below.) Importantly, *this does not mean* that the state's electoral votes cannot be counted after the safe harbor deadline. Rather, the validity of those electors is not "conclusive" when Congress counts electoral votes on January 6, 2021. Even "conclusive" evidence of a state's electors can be challenged by Congress in a variety of ways, leading one scholar to say that missing the December 8 deadline means that the state loses the presumption

of validity of the state's certified slate of electors - a presumption that could be overcome in any event.

In contrast, the date that the Electoral College votes, December 14, 2020, is established by the ECA - a federal statute. In all likelihood, that date could not be extended, except by another federal statute, though no case has ever addressed this issue. Perhaps a national emergency such as a pandemic or widespread civil unrest could be the basis to argue for an extension. Certainly, a single state would not have the power to extend the deadline for voting in the Electoral College. Barring a national extension of voting in the Electoral College, if a state fails to certify electors by the December 14, 2020, vote, that state's votes would not count in the selection of a President. Indeed, the ECA deadlines drove the court in *Bush v. Gore* to stop Florida's unconstitutional recount process so that its preliminary count could be the basis for certifying electors by the safe harbor date in 2000. This puts state in the position of having to either resolve disputes very quickly or certify electors based on preliminary counts, without the benefit of their state's judicial processes for challenging votes.

Resources:

- ECA 3 U.S.C. § 5
- *Bush v. Gore*, 531 U.S. 98 (2000)
- E.B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loyola U. Chicago L.J. 309 (2019) (This excellent article is a valuable resource on all the issues raised in this paper, including the consequences of missing ECA deadlines.)
- https://constitutioncenter.org/interactive-constitution/blog/does-the-constitution-allow-for-a-delayed-presidential-election

4. Can a state change its laws on selection of electors after an election?

No, a state cannot change its laws on the selection of electors after an election conducted for the very purpose of determining those electors. There are several reasons why this is so. First, under the ECA a state enjoys the benefit of the "safe harbor" provision, making its certification "conclusive," only if it certifies electors by means of "laws enacted *prior to* the day fixed for the appointment of the electors." Second, under the ECA, one ground for objecting to electors is that the appointments were not "lawfully given." Congress could therefore object to electors certified under a law not in effect before voting occurred. Third, if a state's legislature were to retroactively try to change its laws on the selection of electors in such a manner, it would likely constitute a

due process violation under the U.S. Constitution. (For more on this issue, see questions 6 and 7 below.)

With that said, just because a state cannot *legally* change its laws on the selection of electors after the election, this does not bar a state legislature from certifying electors under color of law in extraordinary circumstances. If a state were to submit competing slates of electors, the question would become how the presiding officer of the Senate (currently, Vice President Pence) would handle such certifications on the day the votes of the electoral college are scheduled to be counted (for election 2020, January 6, 2021) and how a partisan Congress would handle the competing slates. See the next question in this FAQ for more on this disconcerting scenario.

Resources:

- ECA 3 U.S.C. § 5
- *Roe v. Alabama*, 43 F.3d 574, 580–81.
- Foley, *supra* at 325, 331.
- Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004) (this excellent article provides a thorough legislative history of the ECA).

5. Under what circumstances, if any, could a state legislature certify its own slate of electors, while the popular vote was undecided?

One disconcerting scenario leading to clashing slates of electors making their way to Congress would be through a conflict between the state's legislature and governor. Consider, a scenario in which state X's election is marred by allegations of fraudulent mail-in ballots, voter intimidation at polling places, non-citizens voting improperly, and cyber attacks on voting machines. Early election night counting of ballots and attendant media commentary puts candidate A in the lead. Hours, days or even weeks later, counting and contentious litigation over the counting shows candidate B garners the greatest number of popular votes, but that conclusion remains subject to multiple appellate challenges as the December 14, 2020, deadline for Electoral College voting. Faced with this deadline, the governor certifies electors for candidate B, despite pending appeals on numerous election disputes.

The legislature, dominated by the political party of candidate A, and egged on by loud popular support and media outcries, certifies electors for candidate A. The legislature relies on a claim that candidate A won the popular vote or that he would win if allegedly fraudulent votes were purged and subtracted from Candidate B's tally. Pointing to the climate of uncertainty it may well have contributed to whipping up, the legislature further argues that the only way to assure the state will cast votes in the Electoral College is

through the state's only democratic institution - namely the legislature itself. The legislature also relies on the U.S. Constitution, Art. 2, § 1, giving state legislatures the power to appoint presidential electors, and on ECA, 3 U.S.C. § 2 that says, "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." It also quotes *Bush v. Gore*, 531 U.S. at 104, "[T]he state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself . . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. . . . [T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." (internal quotes omitted)

Under this scenario, it goes without saying that the longer the delay between the initial vote count giving the lead to candidate A and any later certification of candidate B as the true winner on the basis of litigation and a full counting of the popular vote, the greater the peril. This is because the longer this delay, the greater the possibility for candidate A's premature declaration of victory to become a proverbial lie repeated often enough to take on a kind of apparent truth. With enough believers in the lie, including among the state's own lawmakers, one could imagine state X's legislature trying to beat state X's opposing party governor to the punch by proclaiming the legislature's own authority. In so doing, whether lawful or not, state X's legislature would, in effect, be prematurely submitting an alternative slate of electors - pledged to candidate A instead of B - as those who should serve as the state's electors. At the end of the full counting of the popular vote by state election officials, therefore, even if state X's governor submitted the properly certified slate of electors, there would be two slates in front of Congress. Faced with competing slates of electors, and colorable claims of validity by each slate, Congress could, under the ECA deadlock on how to count state X's electoral votes. Although the ECA provides for resolution of such deadlocks, even the failsafe provisions in the ECA would not guarantee Congress's agreement on how to apply the failsafe provisions. In such a case, state X's votes might not be counted at all.

Resources:

- Foley, *supra* at 324-34.

6. What state remedies would exist if a state legislature certified a slate of electors without complying with its own state laws?

There are a number of problems with the potential arguments advanced by the state legislature in the example in question 5 above. While it is true that the United States Constitution authorizes state legislatures to directly appoint electors, *this does not mean* that such a method could be instituted at whim by a state legislature. To institute such a method, would require doing so through enacting new laws in the state by its ordinary lawmaking method. This would require first repealing relevant existing laws that already provide for the appointment of electors by the popular vote. Moreover, similar to what is noted in the answer to question 4 above, a state's legislature could not make such changes after an election. Any reversion to direct appointment of electors by the legislature rather than as based on an existing popular vote-based measure would clearly be unlawful if it was instituted after an election for the purposes of negating the results of the popular vote of that very election. Barring a genuine emergency, this would likely violate both the U.S. Constitution and state election laws.

A party challenging the legality of actions by a state legislature could seek to enjoin those actions in either state or federal court. If the actions interfere with an election, state or local prosecutors might even bring criminal actions for violation of election laws against such interference, though such actions seem unlikely. Although state attorney generals might be charged with enforcing state laws against election interference, including interference committed by legislatures, they would have obvious conflicts of interest and serious questions about who their clients would be. Although candidates and voters would have standing to seek injunctive relief, they would not have the authority to bring criminal charges.

Resources:

- Foley, *supra* at 324-35.
- Siegel, *supra* at 613-34.
- campaignlegal.org/sites/default/files/2020-09/State_Legislature_Paper.pdf

7. When can the federal government take action to protect votes?

States have the primary role in administering both state and federal elections. This limited role is grounded in the Constitution and in subsequent federal law. States determine their own electors, and federal courts must defer to state court's decisions on the application of their own election laws.

Despite the federal court's deference to state courts on matters of state election law, in the face of unlawful and/or unconstitutional action of the kind detailed in the scenario laid out in questions 5 and 6 above, federal intervention to protect the vote could take a number of different forms. Depending on the circumstances, it would probably constitute a due process violation of the U.S. constitution for a state's legislature to institute a system of direct appointment of presidential electors by the state's legislature itself. Federal courts could enjoin such unconstitutional behavior. Indeed, under the standard elaborated by the United States Supreme Court in the *Bush v. Gore* decision from 2000, it is clearly well within the Supreme Court's power to take appropriate remedial action against constitutionally improper state procedures relating to the certification of presidential electors.

In *Bush v. Gore*, of course, the Supreme Court went so far as to stop a manual recount of the popular vote in Florida in the wake of an initial certification by the Florida Division of Elections of Republican presidential candidate George W. Bush as the winner of the state's presidential election on the basis of a margin of victory of less than 0.5% (or only some 1,700 votes). The vanishingly small size of the initial margin of victory triggered a statutory requirement for an automatic machine recount, which reduced Bush's margin of victory still further to 327, without the machine recount at that point even as yet taken place in 18 counties. Vice President Gore opted to narrowly pursue his rights under Florida Election law by only asking for a manual recount in four counties that traditionally voted Democratic and in which he expected a sizable margin of victory. Regardless of the limited course of legal action Vice President Gore's campaign opted to pursue, a wider manual recount in the state was still afoot. Across the state, even in the face of a state deadline for Florida counties to certify their election results to the state Secretary of State within seven days of the election, that manual recount remained ongoing when the Florida Supreme Court ultimately clarified that counties could, in effect, certify their final results to the Secretary of State after the state-law deadline. It was *this* statewide *manual* recount, then, that the U.S. Supreme Court rushed to halt. It did so by a 5-4 decision in which the majority claimed that Florida lacked a statewide standard for recounting votes. The majority held that the manual recount amounted to violation of equal protection under the 14th amendment of the U.S Constitution. *Bush v. Gore* indicates that a federal court could enjoin practices by a state legislature that violate constitutional due process.

Resources:

- R. Sam Garrett, Federal Role in U.S. Campaigns and Elections: An Overview. CONGRESSIONAL RESEARCH SERVICE 1 (September 4, 2018) available at: https://fas.org/sgp/crs/misc/R45302.pdf
- ECA, 3 U.S.C. § 5
- *Bush v. Gore*, 531 U.S. 98 (2000)

B. Counting Electors in the U.S. Congress

8. What is the process for counting votes from the Electoral College in the U.S. Congress?

On January 6, 2020, the President of the Senate (Pence), in the presence of the House and Senate, opens and counts the votes from the electors. Following the count, members of the House and Senate can object to the validity of electors. An objection must be jointly made in writing by at least one Representative and one Senator. Immediately after hearing all objections, the House and Senate convene separately to consider those objections under strict time limitations. Each Senator and Representative may speak to such objection only once for five minutes, and total debate is limited to two hours. If the House and Senate agree on an objection - either allowing or disallowing electoral votes - then their consensus controls. If they "shall disagree as to the counting of such votes," then the electors certified by a state's governor "shall be counted."

Resources:

- U. S. Constitution, Amend. 12
- ECA 3 U.S.C. §§ 5, 6, 15, 17

9. How do states assure that their electoral votes will be counted in Congress under the ECA "safe harbor" provisions?

If a state (1) adopts laws on certification before the election, (2) those laws include judicial or quasi-judicial mechanisms (3) for finally resolving disputes about the validity of electors, and (4) the state's governor follows those laws in certifying electors (5) by the deadline six days before the Electoral College votes, then the state's determination of electors "shall be conclusive." These are known as the "safe harbor" provisions.

Resources:

- ECA, 3 U.S.C. § 5

10. What are the grounds for members of Congress objecting to a state's electors?

Congress can object to electors on the grounds that they do not satisfy the "safe harbor" provisions of the ECA, and, therefore, those certifications are not "conclusive." Such objections could challenge either (1) the state laws themselves for failing to meet the safe harbor requirements of the ECA or (2) the state's failure to follow those laws. If both the House and Senate were to

agree that objections are valid, then a state would lose its presumption that the electors it certified are valid, and Congress would be left to determine what electors, if any, to count from that state.

Congress can also object on the grounds that the electors' votes were not "regularly given." This provision refers to irregularities after certification such as fraud or bribery.

Congress can also object to electors on the grounds that their selection violates the U.S. Constitution or has been procured by fraud. Presumably, constitutional objections would include both challenges based on the express requirements in the constitution, such as the rule that electors cannot be office holders, and the broader range of constitutional defects, such as denying voters due process or equal protection.

Resources:

- ECA, 3 U.S.C. § 5, 15
- Siegel, *supra* at 590-603.

11. What does Congress do if presented with disputed slates of electors from a state?

If a state submits multiple, inconsistent slates of electors, the House and Senate meet separately to consider which slate is valid and should be counted. If they agree, then the agreed upon slate is the one that counts. If they disagree, the slate of electors certified by the governor controls. If, however, there are pending objections to the slate the governor has certified, there is no clear mechanism for resolving the dispute. One possibility is that the pending objections would result in the state's votes not counting at all. Thus, one way a candidate or group might avoid a state's electoral votes from being counted would be to certify a competing slate of electors while simultaneously objecting to the governor's certified slate.

Resources:

- ECA, 3 U.S.C. § 15
- Foley, *supra* at 329-34.
- Siegel, *supra* at 624-34.

12. Under what circumstances could Congress refuse to count a state's votes in the electoral college?

There are two situations under which Congress could refuse to count a state's electoral votes. First, under the ECA, if both houses of Congress agree

not to count a state's electors, then those electors are not counted. Second, if a state has certified more than one slate of electors, both of which are under the color of legal authority, and the House and Senate do not agree on which slate of electors to count, then that state's electors may not count.

Resources:

- Foley, *supra* at 331-33.

13. Could an entity certify a slate of electors for the sole purpose of creating a dispute that could threaten to disqualify a state's electors?

Given that disputed slates of electors can threaten the counting of a state's electoral votes in Congress, partisan entities might try to certify competing slates for the sole purpose of creating controversy that could lead to the disqualification of that state's lawfully certified electors. Fortunately, several factors prevent this. First, the U.S. Constitution provides that state legislatures shall certify electors, so any group acting outside of legislative authority would have no ability to certify a slate of electors. Second, although the ECA does not expressly state what groups may certify electors, it does provide a safe harbor for electors certified under existing state law. Such certifications enjoy a presumption of "conclusiveness." Third, a rogue certification would likely be enjoined by state or federal officials for violating state and federal election laws.

Resources:

- ECA, §§ 5, 15.
- U.S. Constitution, Art. 2 § 1
- Siegel, *supra* at 607-08.

14. What does it mean that 17 states do not "bind" their electors, and how could that effect the election?

Neither the U.S. Constitution nor federal law require electors to vote for the candidate selected by the popular vote. Only 33 states have laws that require electors to vote in the Electoral College for the candidate selected by the popular vote, and, of those state, only 16 impose penalties for violating those laws. In the 17 states that do not "bind" electors at all, electors are not required to vote for any particular candidate. As a practical matter, however, the electors are selected based on their pledge to cast their vote for a party's candidate. They are expected to fulfill that pledge, and they almost always do.

The U.S. Supreme Court recently considered a related issue in the context of "faithless electors" in Washington State who violated their pledges to vote for Hillary Clinton in the 2016 election. Washington State does have a sanctions-backed pledge law. The U.S. Supreme Court upheld the constitutionality of state enforcement (via fine) of an elector's pledge to support his party's nominee—and the state voters' choice—for President.

Although the U.S. Supreme Court has upheld both the constitutionality of state pledge laws and the enforcement of those laws, it remains unclear what might happen if electors do not vote for the candidate that won the popular vote in their state or do not vote for their party candidate. An "unbound" elector could conceivably change his or her vote if the election results appeared to be so disputed as to be undeterminable or so obviously corrupt as to be unreliable.

Resources:

- www.fairvote.org/faithless_elector_state_laws
- www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx
- www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

15. What constitutes a majority of the electoral votes if Congress rejects a state's electors?

Unfortunately, there's no clear answer to this basic question. To be elected President, a candidate must receive "a majority of the whole number of Electors appointed." U.S. Const. Amend. XII. However, both the Constitution and the ECA are silent as to what constitutes a "majority" if Congress rejects a state's electors. Would that change the denominator used to calculate whether a candidate has a majority of the electoral vote? For example, assuming 538 total votes, if Congress rejects Ohio's 18 electoral votes, would the winning candidate still need 270 electoral votes (a majority of 538) or would the winning candidate need only 261 votes (a majority of 520)? To make matters worse, Congress has been inconsistent on this issue. It included rejected electoral votes in the denominator in 1873 but not in 1865. This issue is further complicated as there is no requirement for consistency in electoral vote calculations between the House and the Senate. Thus, the House could conclude that one candidate got the majority, while the Senate could conclude the other candidate did.

Resources:

- Siegel, *supra* at 653-54.
- fas.org/sgp/crs/misc/RL32717.pdf

- en.wikipedia.org/wiki/Electoral_Count_Act#cite_note-12thAmendment-7

16. If the House and Senate do not agree on objections to electors, can the SCOTUS decide the validity of objections?

If the House and Senate do not agree on a state's slate of electors, either because one body declares the result inherently unreliable or because the two bodies cannot agree on which of competing slates of electors is valid, then who resolves that dispute? Because this seems to be a dispute about the application of federal law (the ECA), it would appear that the federal courts, and ultimately the SCOTUS, would have authority to resolve disputes. However, the legislative history of the ECA indicates that the law did not intend to give the federal courts any role in resolving disputes that would decide elections. Justice Breyer's concurrence in *Bush v. Gore*, argued that the ECA does not give any jurisdiction to the federal courts to resolve disputes under that statute. He reasoned that the courts should not be involved in the quintessentially political question of how to select the President. Rather, that role should be left to democratically elected institutions such as the House and Senate. In any event, the law remains unclear about how to resolve objections to electors in Congress under the ECA if the House and Senate do not agree.

Resources:

- *Bush v. Gore*, 531 U.S. 98, 153-58 (2000) (Breyer dissenting)
- Foley, *supra* at 347-50.

C. Provision for "Contingent Election" in the U.S. House.

17. What happens if no candidate gets a majority of votes in the Electoral College?

The 12th Amendment seems to anticipate the possibility of failure to achieve a majority because three or more candidates split the vote. If, as in 2020, there are only two candidates, and Congress counts all 538 electoral votes, then one of the two candidates will necessarily receive a majority of the votes. However, if unresolved objections under the ECA result in electors of some states not being counted, then it is possible that neither candidate would obtain a majority of votes by failing to get 270 votes - assuming Congress would not use a different denominator. Under those circumstances, the House of Representatives selects the president, under the "contingent election" procedure in the Twelfth Amendment. In that procedure each state delegation receives one vote. Currently, the House delegations consist of 26 majority republican, 22 majority democratic, and 2 tied. The newly elected House of Representatives would select the President,

not the current House, but poling indicates that the new state delegations are also likely to be majority republican.

Resources:

- U.S. Constitution, Amend. 12
- https://www.forbes.com/sites/alisondurkee/2020/09/28/how-the-house-could-decide-the-presidential-election-electoral-college-tie-contingent-election/#6176462c1bb6
- https://centerforpolitics.org/crystalball/articles/the-dreaded-269-269-scenario-an-update

D. What Can Be Done to Protect Lawful Votes?

18. What can states do in advance of election day to assure that their state's laws will apply, and their popular votes will select their electors?

Because states are vested with the authority to select the method by which their electors are chosen, states should make sure that all rules, orders and administrative procedures comport with the state's election laws. Deviations from those laws might be found to constitute violations of Article II, § 1, Cl 2. of the US Constitution. *See Bush v. Gore,* concurring opinion. To avoid findings that their laws or procedures violate the equal protection requirements of the Fourteenth Amendment or federal discrimination laws, states should scrutinize their laws and procedures to make sure that they don't improperly disadvantage one group of voters over others, including, for example, disabled voters. For the same reasons, states should have in place uniform state-wide procedures for the taking and counting of votes to prevent varying treatment of votes cast.

If there are known challenges to rules or procedures, states should seek judicial review of such challenges and do so in advance of the election. Numerous courts are presently considering such challenges.

Resources:

- www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020

19. What should states do if faced with questions arising on or after election day to assure their votes are counted?

As noted previously, the ECA provides a safe harbor for a state's electoral votes provided that the electors are certified by the state by December 8th. In

view of *Bush v. Gore*, states must recognize the potentially determinative significance of having votes counted by December 8th and prepare to seek expedited judicial resolution of any disputes regarding vote counting that would preclude counting from being completed by that date. To this end, actions that should be considered include:

- Start counting mail-in votes in states where that is authorized by law.

- Anticipate areas likely to raise factual disputes, such as the security of drop boxes and voting machines, the administrative steps in the counting process, and voter safety at polling places. Take steps to eliminate such factual disputes with video recordings and bipartisan witnesses at crucial stages.

- Provide the state judiciary election law primers in advance of the election to assist judges in understanding the law and the importance of expedited resolution of the issues before them.

- Urge judges to allow at least provisional counting to continue while issues are addressed.

- Anticipate the nature of potential challenges and prepare briefing to address them.

- Be prepared to challenge in state court and on the basis of state election laws any assertions of authority by groups or entities to certify alternative slates of state electors. Seek declarations as to the validity of the state's official slate of electors and enjoin presentation or certification of alternative slate.

- Prepare to challenge frivolous challenges to vote counts. Specious challenges by poll watchers may be grounds for criminal charges based on election interference and voting rights laws.

- Frivolous court actions interposed for the purpose of delay may be grounds for sanctions and bar discipline.

- Review state election laws to determine what provisions may apply if an election is disrupted (cyberattack, emergency declaration, poll disruption) including provisions for election continuance, re-counts and the use of provisional ballots and make preparations necessary to utilize such mechanisms. However, all must be reviewed with an eye to completing the election by December 8th.