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Preparing for the Next January 6th

By **Jerry H. Goldfeder**

One need not be a partisan to easily see that the procedures by which we elect the President of the United States are fraught with problems. Were it not for the fact that the U.S. Supreme Court's decision in *Bush v. Gore* is generally off-limits as precedent, its holding that Florida's recount process violates voters' equal protection rights could be the basis for the invalidation of so many inconsistent state voting laws in presidential elections. After all, why should voting for electors in one state be different or more difficult than in another? Although this equal protection argument to challenge restrictive state laws is unlikely to prevail under current jurisprudence, free associational rights under the U.S. Constitution might. The Supreme Court in *Anderson v. Celebrezze* struck down an Ohio ballot access deadline for president because it hindered his ability to reach 270 Electoral College votes and thus diluted the votes of his supporters across the country. One could thus analogize that a New York voter's associational rights are likewise unconstitutionally impacted by restrictive voting laws in Texas or Arizona.

Beyond these observations about our crazy-quilt system of voting for president, the current focus by many election law scholars and members of Congress is how the Electoral College votes are counted once the states have actually voted. As most readers know by now, the U.S. Constitution provides that after winners are certified by the states (and Washington, D.C.), the results are sent to Congress and, with the Vice President (or president pro tem) presiding on January 6th (as per statute), "the votes shall then be counted." As readers also know, in 2020, as in 1877 after the infamous Hayes-Tilden election, it was argued that the Vice President had the authority to decide whether a state's electoral slate should indeed be counted. In both cases, this view was rejected. The prevailing view, even by Vice President Pence last year, was that this role was purely ministerial—to simply preside over the counting of the electoral votes.

In 1877, the view that the presiding officer had a discretionary role was advocated in light of competing electoral slates from three states, each having some imprimatur of legitimacy. This proposed procedure having been turned aside, Congress created an extra-constitutional Electoral Commission to determine the outcome, and it ultimately awarded the contested votes to Hayes. This is what led to the now-infamous Electoral Count Act, the statute written in 1887 to forestall a repeat of the uncertainty of the Hayes-Tilden election. It is, therefore, the ECA that lays out the procedures by which the states' electoral slates are tallied. And for the last one hundred and thirty five years, its rules have been followed without significant incident, and has avoided the kind of scrutiny that last year's election provoked. Today, there is widespread support for re-writing this statute—universally thought to be ambiguous and inconsistent—to clarify the role of Congress in our presidential election.

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Indeed, a bipartisan group of U.S. Senators has released a draft of its Electoral Count Modernization Act. Their proposal would explicitly provide that the Vice President's job is purely ministerial; give more time to the states to determine their results; require such results to be certified by a state's governor and then transmitted to Congress, and if a governor refuses, permit a chief election officer to do so; restrict Congress from objecting to any elector or slate of electors by spelling out a limited number of acceptable grounds; and require such objections to have at least one-third of each house of Congress (instead of the current provision of only one Representative and one Senator). As this draft has circulated, resolutions of support for various changes have been passed by the New York City Bar Association and the American Bar Association, election experts of all political stripes, and editorial boards intent on preserving an orderly transition of power.

Just as in 1887, though, when the original Electoral Count Act was enacted, legislators face a spate of issues that defy easy solution. I'll mention two. As NYU Law Professor Richard Pildes and others have asked, what happens if a governor, or an allied election official, simply refuses to certify a slate of electors? Does this allow the Congress to subtract that state's electors as it calculates which candidate has received a "majority of the whole number of Electors appointed"? If somehow a winner in Florida by a slim margin in 2024 is opposed by the governor and he refuses to certify the results or transmit them to Congress, does the state's 30 Electoral College votes not get included in the denominator when calculating who won the presidency? Put simply, would it take only 255 votes (1/2 of 508 + 1) to win instead of 270 (1/2 of 538 +1)? Professor Derek Muller suggests that a writ of mandamus issued by a federal judge would force a governor to exercise their duty to certify and transmit the results; I am not so sure. The drafters of a new law need to address this.

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A second issue that needs clarification is what the law means by providing that if a state has "failed to make a choice" on Election Day, its legislature can subsequently appoint electors. This section of the law has generally been understood as referring to a natural disaster, or more recently, a terrorist attack that interfered with voting. In 2000, however, the Florida legislature took steps to invoke this provision when it was unclear whether George Bush or Al Gore had won the state, and thus the election. When the Supreme Court ended the recount, reliance on this apparent authority became moot. But this almost-precedent could persuade legislators in 2024 who are unhappy with an unfavorable result to select their own slate of electors, superseding the voters of their state. The House of Representatives' Committee on Administration and a variety of election scholars have explained that this would not be the intended use of the law. Nevertheless, its abuse is feared, and it remains to be seen how Congress might clarify this provision to avert such a problem.

So, as Congress deliberates reform of the ECA, it behooves the legal community to keep a watchful eye.