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Bent but Not Broken: The Constitutional, Legal, and Procedural Issues in the 2020 Electoral College Vote Certification

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Abstract

After the raw votes in the 2016 U.S. presidential election were tallied and showed Donald Trump to be the Electoral College victor, Democrats protested in Trump-won states, asking Electoral College members to vote with their conscience and against their state's popular vote. On January 6, 2021, supporters of President Trump stormed the U.S. Capitol demanding that the certification of the Electoral College vote in favor of Joe Biden not move forward. Are the laws, court decisions, and the Constitution itself set up to cause such an uproar around a routine item? Was the 2021 iteration of counting the Electoral College votes an aberration, or is this the new normal? This article examines the constitutional, legal, and procedural issues around the Electoral College certification vote. The author investigates the constitutional beginnings of the system for electing the U.S. president and discusses "faithless electors" and the power that 538 individuals have in the presidential selection process every 4 years. The author concludes with a discussion of the 2021 Electoral College vote certification and the mob that attempted to stop it.

Keywords: Electoral College, Trump, Biden, Congress, Pence, Constitution, Chiafalo, Federalist Papers, Hamilton, hyper-partisanship

America's Founding Parents were geniuses, but, if one uses history as a measure of their predictions, they did not always get things right. In "Federalist No. 9," Alexander Hamilton stated, "A Firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection" (Bailyn, 1993, p. 339). Perhaps the Union is not as firm as Americans once thought.

In 2016, supporters of presidential candidate Hillary Clinton protested, disrupting votes of the Electoral College taking place in state capitals across the country. They pleaded with electors to vote with their conscience, even if it was against their state's popular vote winner. Four years later, on January 6, 2021, a violent mob stormed the U.S. Capitol with the intent to somehow halt the certification of the Electoral College vote that would make Joe Biden the official president-elect.

Early on January 6th, Trump encouraged rioters, "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard" (Naylor, 2021, para. 5). However, the rioters listening to the president had a much more violent protest in mind. Trump had incited these people over the course of 4 years of divisive and hurtful rhetoric, and he lost control of their actions on a day that would see the largest attack on the Capitol in over 200 years.

After the rioters had spent hours in the Capitol building (some engaging in hand-to-hand combat with Capitol Police), President Trump reluctantly released a Twitter video instructing the mob "to go home" while continuing to make baseless claims about a fraudulent election:

We had an election stolen from us. It was a landslide election and everyone knows it. Especially the other side. But you have to go home now. We have to have peace. We have to have law and order. We have to respect our people in law and order. We don't want anyone hurt. (ABC News, 2021)

Due to his involvement and his encouragement of the rioters in the January 6th insurrection, Trump was impeached—for a second time—by the Democratic-led House of Representatives. Trump is the only president to hold the distinction of being twice-impeached. After Trump left office and the Democrats regained control of the Senate (albeit by the tie-breaking vote of Vice President Kamala Harris), the Senate took up the second impeachment trial of President Trump. With an even political split in the Senate, the two-thirds vote needed to convict Trump was not achieved.

The attack on the Capitol and the vitriolic hyper-partisanship that it highlights have divided the United States even further and raised many questions: Is the protesting of Electoral College votes the new normal? What is the procedure for counting Electoral College votes, and should that procedure be changed to avoid future protests and attacks? Can the United States get back to a place where most members of the political party that loses a free and fair presidential election accept the results?

On January 6, 2021, the Constitution and the general rule of law came under attack. The Constitution almost broke, but ultimately it did not, and the Union stands firm—though perhaps not as securely as it should. This article examines the constitutional, legal, and procedural issues surrounding the counting of the 2020 Electoral College votes and discusses the future of accepting the results of American presidential elections in a hyperpolarized environment.

Electoral College Certification Vote

The main event on January 6th was the official counting of Electoral College votes in the House chamber before a joint session of Congress presided over by President of the Senate and Vice President Mike Pence and Speaker of the House Nancy Pelosi. The rioters had been convinced by President Trump that stopping this count would halt the formal processing of the election and allow him to stay in power (Mascaro et al., 2021). Moreover, the rioters believed that the election had truly been stolen through fraudulent and conspiratorial voting practices in several states (Bort, 2021). How did this official ritual begin? Where did the Electoral College come from, and what is its purpose?

Constitutional Foundations of the Electoral College

Although the Founders knew that George Washington would be the first president of the United States, what lay beyond was a mystery. The creation of the Electoral College at the Constitutional Convention in 1787 seemed to represent a compromise that would preserve the superiority of the large states (Amar, 2006, pp. 149–151). However, in light of the three-fifths compromise and the economic inferiority of the South, James Madison knew that the Electoral College was really meant to preserve the opportunity for the Southern states to have a say in who became president (Amar, 2006, p. 150). In the final analysis, though the large states might have thought they had won, they had not.

Article II, Section 1 (and subsequently the Twelfth Amendment) of the Constitution devolves the choice of president to the House of Representatives in event that one candidate does not achieve a majority in the Electoral College (National Archives, 2021). Many of the Founders believed that the Electoral College would be a place for the nomination of candidates, not their election. There would be so many candidates that a majority would be difficult to achieve, and eventually the president would be chosen in the House and the vice president in the Senate (Rakove, 1996, pp. 265–270). This would even further dilute the power of the large states and strengthen the power of the Southern states. Now, a minority of the Southern states with a few Northern allies could install a president of their choosing, regardless of the state's size.

Even though the Framers knew that George Washington, as the first president, would “fill in” Article II to the best of his ability, they had unknowingly laid the foundation for political parties to erupt in the future. As Rakove (1996) noted,

No feature of the Constitution stimulated the organization of political parties more than the recognition that control of the national government depended on control of the presidency. That was hardly the result the framers intended, nor was it even an outcome that they could plausibly imagine. (p. 268)

Hamilton Defends

In “Federalist No. 68,” Hamilton lauded the establishment of the method for choosing a president. The creation of a body for this specific purpose insulates its members from corruption and coercion according to Hamilton (1787):

It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture. (para. 2)

This stroke of genius, according to Hamilton, allows the president to be chosen by the people through their electoral representatives, perhaps by the House, but, in any case, less desirable candidates will be filtered out through this process. History, however, did not agree with Alexander Hamilton.

The Election of 1800 and the Twelfth Amendment

After the first two successful elections of George Washington and the successful, albeit close, election of John Adams as president in 1796, the Election of 1800 would emerge as one of the first major constitutional stress tests for Article II. Political parties were beginning to take hold in significant ways, enough to affect national politics: “Although party politics was still in its infancy, the techniques, strategies and machinery that became commonplace in later years could already be found in embryo in various states” (Witcover, 2003, p. 67). Vice President Thomas Jefferson faced off against President John Adams in a 1796 rematch. Unfortunately, the coordination of the nascent Democratic-Republicans was disorganized, and the election ended in a tie: 73 electors each for Jefferson and his Democratic-Republican running mate Aaron Burr. According to Article II, electors cast votes for president and vice president without designating which vote was for whom.

The election was thrown into the House of Representatives to choose the president. Up to and including the 35th ballot, Jefferson could not command a majority of states since he was consistently one short. On the 36th ballot, Jefferson did win, with two states switching their votes in his favor. The Senate then elected Burr as vice president (Witcover, 2003).

This election spurred the passage of the Twelfth Amendment. The presidential selection scheme derived by the Founders had flaws from the beginning. One of the major flaws was that the second-place finisher in the Electoral College automatically became vice president. After passage of the Twelfth Amendment, and in time for the Election of 1804, electors would denote specifically their vote for president and for vice president. After the razor-thin and contentious Election of 1876, many of the statutes relating to the counting of votes in the Electoral College were changed, and some of those remain today (Amar, 2006).

Faithless Electors

Throughout U.S. history, electors have either abstained from voting as a member of the Electoral College or voted for someone else (Engel, 2021). More recently, an elector from the District of Columbia abstained from voting for Al Gore in the 2000 Electoral College over Washington, DC’s lack of representation in Congress, and in 2004, a Minnesota elector cast a vote for John Edwards for president and vice president—allegedly by mistake (Engel, 2021). However, in 2016, there was great consternation from Democrats alleging that the election results just could not possibly be true. The Democratic National Committee filed a lawsuit in 2018 against the Trump campaign, the Russian government, and WikiLeaks accusing them of conspiring to disrupt the 2016 Election (Mangan, 2018). The judge in the case subsequently threw it out (Thomsen, 2019). Hillary Clinton herself decried Trump’s presidency:

No, it doesn’t kill me because he knows he’s an illegitimate president. I believe he understands that the many varying tactics they used, from voter suppression and voter purging to hacking to the false stories—he knows that—there were just a bunch of different reasons why the election turned out like it did. (Itkowitz, 2019, para. 4)

Sinclair et al. (2018) found a “winner effect” in presidential elections: “Voters who cast ballots for winners are more likely than voters on the losing side to believe their vote was counted correctly” (p. 854). Clinton showed this in 2016, and in 2020 the winner effect was on exhaustive display by January 6th rioters and some Republican elected officials.

Democrats and party-aligned activists attempted to derail the workings of the Electoral College by denying Trump a majority and throwing the contest into the House of Representatives, where, presumably, Trump would have still been elected president with a House and state delegations controlled by Republicans (Cheney, 2016). Hillary Clinton had won the popular vote by millions of votes, but the method of selection of the U.S. president denied her the presidency.

In the Electoral College balloting of 2016, three Washington State electors—pledged to Clinton by virtue of her winning Washington’s popular vote—voted for former Secretary of State Colin Powell. Two Texas electors who should have voted for Donald Trump voted instead for former Texas Congressman Ron Paul and former Ohio Governor and 2016 presidential contender John Kasich, respectively. One Hawaii elector voted for Senator Bernie Sanders (I-VT), and another Washington elector voted for Faith Spotted Eagle, the first Native American to receive a vote in the Electoral College and only the second woman behind Hillary Clinton (Whittington, 2017). Some electors wanted to make it known that they were taking part in an outdated system. Peter Chiafalo was one of them.

Chiafalo v. Washington

Chiafalo, citing “Federalist No. 68,” was a lead agitator in attempting to convince enough Republican electors to abstain or vote for another candidate, thereby denying Trump the majority in the Electoral College—an effort that failed spectacularly. His motives were not only to deny Trump the presidency, but also to show the inefficiencies of the Electoral College. However, Chiafalo still had his own vote to cast as a member of the Electoral College representing Washington State. Chiafalo voted for Colin Powell instead of Hillary Clinton, for whom, by law, he was pledged to vote. Under state statute, Chiafalo was fined \$1,000 for not voting for Clinton. He and two other electors from Washington who voted for Powell filed suit against Washington, and the Washington Supreme Court upheld these fines (*Chiafalo v. Washington*, 2020).

In *Baca v. Colorado Department of State* (2019), the 10th Circuit Court of Appeals reversed a district court decision stating that the fine imposed on the three Colorado electors for voting for someone other than the winner of the popular vote of their state was unconstitutional—an opposite outcome from *Chiafalo*. The Supreme Court agreed to hear these two cases, and they were consolidated into *Chiafalo*; thus, the Court had to resolve the different court split. On July 6, 2020, as the nation was preparing to vote for a new president, the Court unanimously found that Washington’s law was valid, and electors had to vote for whom their state’s popular vote directed them to vote. The Constitution, according to Justice Kagan’s majority opinion, “gives States broad power over electors, and gives electors themselves no rights” (*Chiafalo v. Washington*, 2020).

States could also pass constitutional laws removing electors who would not vote for the candidate who won the state’s popular vote and seat a replacement (*Chiafalo v. Washington*, 2020). This precedent now meant that although the nation would have to wait until the counting and certification of the Electoral College vote on January 6 to officially have a president-elect and vice president-elect, the map colored in on election night was all but final.

Procedural

Congress is sworn in on January 3 of each odd-numbered year, and the president and vice president take office on January 20, both according to the Twentieth Amendment. Originating from the Electoral Count Act of 1887, 3 U.S.C. § 15 (U.S. House, 2014) sets the date when a joint session of Congress, presided over by the president of the Senate (vice president) must open the official certificates from the chief executive of each state and announce the electoral votes thereof. January 6, then, is an ideal date for the counting of the Electoral College votes because it is the new Congress that elects the president in the case that one candidate cannot reach an Electoral College majority. In the Election of 1800, the balloting for president in the House began before the new Congress was sworn in. This meant that the Congress that was elected in 1798—full of Federalists who had just lost their seats to a Democratic-Republican wave—would elect the new president (Witcover, 2003). The timing was altered by the Twentieth Amendment; now, should the vote for president need to be decided by the House, the newly elected House will decide on the new president, not the potentially electorally defeated House.

Historical Objections to the Counting of Electoral Votes

3 U.S.C. § 15 (U.S. House, 2014) also allows for a member of the Senate and a member of the House of Representatives to object to counting a certain state's electoral votes if the objection is written, specific in nature, and signed by both members. Before 2020, there had been two times in U.S. history when both chambers of Congress debated rejecting electoral votes. The first was in 1969 when a North Carolina elector, pledged to incoming President Richard Nixon, voted for segregationist George Wallace in the Electoral College. Representative O'Hara (D-MI) and Senator Ed Muskie (D-ME) objected to the counting of North Carolina's electoral votes on the grounds of this faithless elector's vote. Democrats were attempting to set up the debate to reform the Electoral College in the upcoming Congress. The objection was defeated 33-58 in the Senate and 170-228 in the House, with opposition led by Southern Democrats (U.S. House, 2020).

The second attempt occurred in 2005 when Representative Stephanie Tubbs-Jones (D-OH) and Senator Barbara Boxer (D-CA) jointly objected to the counting of Ohio's electoral votes during George W. Bush's reelection. Their aim was not to change the election outcome but to bring to light "irregularities" they perceived in Ohio's balloting and general inequities in voting laws (Neuman, 2005). Boxer and Tubbs-Jones's objection was defeated 31-267 in the House (109th Cong., 151 Cong. Rec. H127, 2005) and 1-74 in the Senate, with Boxer the only member voting in favor (109th Cong., Cong. Rec. S56, 2005).

The 2020 iteration of this process was unlike the two preceding instances. In 2020, Republicans in Congress wanted to weaponize the Electoral College Act to change the outcome of the election. This was not the goal in 1969 or 2005. The infrequency of objections to the Electoral College votes show that members of Congress typically put their faith in state elections officials. Unfortunately, due to the hyperpolarized nature of modern American politics and the distrust sowed by ostensible leaders of the country in recent years, this is now not the case.

Objections to Counting Electoral Votes From the 2020 Election

President Trump put public pressure on Vice President Pence to "be the hero" and, in some way, halt or alter the official counting of the Electoral College votes, thereby not certifying

Joe Biden as the winner of the 2020 Election. In his speech on the morning of January 6th, President Trump made his views about Vice President Pence evident:

I hope Mike is going to do the right thing. I hope so. I hope so. Because if Mike Pence does the right thing, we win the election. All he has to do, all this is, this is from the number one, or certainly one of the top, Constitutional lawyers in our country. He has the absolute right to do it. We're supposed to protect our country, support our country, support our Constitution, and protect our constitution. States want to revoke. The states got defrauded. They were given false information. They voted on it. Now they want to recertify. They want it back. All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people. (Naylor, 2021)

Vice President Pence issued a press release at the exact moment he was walking to the House chamber to convene the joint session according to law. In the release, he stated,

As a student of history who loves the Constitution and reveres its Framers, I do not believe that the Founders of our country intended to invest the Vice President with unilateral authority to decide which electoral votes should be counted during the Joint Session of Congress, and no Vice President in American history has ever asserted such authority. (Pence, 2021, para. 8)

Despite much posturing by congressional Republicans and even President Trump goading his supporters to lobby Pence to “do what is right,” the vice president had made his stance known. Pence knew that history would judge this critical moment in American democracy, and his actions on this day would be scrutinized. Pence gavelled the joint session in and began the process of counting the electoral votes—and almost immediately received an objection. To applause from their Republican colleagues, Representative Paul Gosar (R-AZ) and Senator Ted Cruz (R-TX) objected to the counting of Arizona’s Electoral College votes. The Senate retired to their chamber while the House debated the objection in the House chamber.

While Senator Lankford (R-OK) was speaking on the Senate floor about the Arizona objection, Senate President Pro Tempore Senator Chuck Grassley (R-IA) recessed the Senate, and Vice President Pence was whisked away as rioters were only dozens of feet away from him. Speaker Pelosi and House members were also brought deep inside the Capitol as rioters infiltrated the building. Chaos ensued, people died, and a mob attempted to stage a coup of the U.S. government.

After the deadly mob that attacked the Capitol was quelled, order was restored in both chambers. The House and Senate voted on the objection, and it was not sustained in the Senate by a vote of 6-93 (117th Cong., Cong. Rec. S31-32, 2021) and in the House by a vote of 121-303 (117th Cong., Cong. Rec. H93, 2021). The joint session of Congress then reconvened shortly before midnight, with a determined Vice President Pence presiding and visibly shaken but equally determined Speaker Pelosi standing stoically next to him. There were 47 states and the District of Columbia left to tally.

After several more states were called, the electoral votes of Pennsylvania were called to be tallied. Even after a violent attack on the Capitol, when their colleagues’ lives were put in danger, Representative Scott Perry (R-PA) and strongly conservative (and 2024 presidential contender) Senator Josh Hawley (R-MO) rose to object to the counting of Pennsylvania’s

electoral votes. The Senate withdrew from the House chamber and did not sustain the objection by a vote of 7-94. Senator Rick Scott (R-FL), another potential 2024 Republican presidential primary contender, voted to sustain this objection and voted against sustaining the objection of counting Arizona's electoral votes. The objection was further not sustained by the House by a 138-282 vote.

Notably, in both chambers after the violent riotous mob ensnarled the seat of U.S. government, the number of those voting to sustain the objection of counting the electoral votes of a free and fair election increased in both chambers. All Democrats present and voting voted to not sustain the objections. Even after a potential coup and overthrowing of the government, members of Congress got back to work immediately. Their decision to continue the joint session of Congress after the harrowing day showed the country's resolve.

President Trump's Second Impeachment and Trial

Before Donald Trump, only two presidents had been formally impeached: Andrew Johnson, for being a Southern sympathizer after the Civil War, and Bill Clinton, for lying under oath during the Lewinsky scandal. Nixon was sure to be impeached and removed but resigned before that could happen. Trump was twice impeached by the U.S. House of Representatives. His first impeachment centered on his alleged attempt to use the Ukrainian government to investigate conspiracy theories surrounding Joe Biden and his son, Hunter Biden. The House impeached Trump on two articles: abuse of power and obstruction of Congress. The Republican-controlled Senate acquitted Trump of all articles of impeachment.

After Trump's incitement of the mob on January 6th, the House again impeached Trump on one article: incitement of insurrection. Ten Republicans joined all Democrats in voting to impeach the president—the most bipartisan presidential impeachment vote ever. After a long, brutal trial, the Senate acquitted Trump by not reaching the necessary constitutional two-thirds vote needed to convict him. Seven Republicans, including conservative stalwarts Senators Cassidy (R-LA) and Burr (R-NC), joined all 50 Democrats in voting to convict Trump. The final vote was 57 to convict and 43 to acquit. If the Senate had convicted Trump, they could have also exercised the option to not allow him to run for federal office ever again.

Where Are We Now?

In the public debates about the ratification of the Constitution, "Cato"—the pseudonymous author of a series of anti-Federalist papers written between 1777 and 1778—took the position that the Constitution was a direct overreach of state governments and that the Founders were setting up a new monarchy. Cato wrote that one national government for a growing country would never work because the federal government would not be able to govern such a large geographic region and further that a government would not be able to quell insurrections across such a large nation. In "Americanus IV," John Stevens, Jr., countered:

Cato insinuates that a large Republic is less capable of suppressing domestic insurrections than a small one. From what causes do insurrections generally arise? Some turbulent individual infuses jealousy and discontent into the minds of the people. *But the personal influence of an individual cannot extend far.* The contagion therefore must spread progressively, if it spreads at all; indeed, it can never happen but from some gross error in Government, that the great body of the people, spread over a large extent of country, can

all be infected with this spirit of discontent at one and the same time. (Bailyn, 1993, p. 459)

Unfortunately, in this instance, an author opposed to the ratification of the Constitution argued more effectively than someone in favor. Many people across the country were infected with the vitriol spewed by President Trump during his term in office. His candidacy announcement comparing Mexicans to rapists set the tone for the entirety of Trump's two presidential campaigns and presidency. The culmination of the rage that Trump incited was the attack on the nation's seat of government on January 6th.

For the first time since the Civil War, American troops slept in the halls of one of the government's most sacred buildings to protect it from potential rioters. American soldiers had to physically protect democracy from Trump's mob. People stormed the Capitol because they believed the election had been "stolen" and that Trump had to remain president of the United States. Their brazen and violent attempt to halt the counting of electoral votes needlessly cost people their lives. Watching this horrid act unfold in real-time was devastating. At that moment, I felt despair and sorrow for the country. How could the nation come back from this?

Since Trump supporters stormed vote counting centers in swing states and attacked the Capitol, misinformation campaigns have infected every part of the republic. Issues pop up every day, and each side hardens almost immediately. Americans are broken down into a country of "wear a mask" versus "don't wear a mask," "get the vaccine" versus "don't get the vaccine," pro-life versus pro-choice—the list is endless. Although such disagreements have been present since the country's inception, the personal nature of those disagreements has become scary.

One hears of congresspeople in the 1970s and 1980s who would take each other to task in floor speeches and debates and then go out for a drink to get to know each other, or of bipartisan cajoling on family vacations and in recreational activities. However, the middle is gone. Rarely does one side talk to the other in a meaningful way on the big issues of the day.

Conclusion

The January 6th attack on the U.S. Capitol should not have happened. A free and fair election took place. The tallying of the votes of the members of the Electoral College should have occurred peacefully and without death. Unfortunately, that did not happen because of a rageful mob incited by Donald Trump. The Founders attempted to put into place safeguards against despotic leaders trying to take over the country. Yet perhaps the mechanism they set up to choose the national executive has outlived its use. To award the highest office in the land to a candidate who does not receive the most votes seems quite antithetical to democratic government. Although the Constitution may have bent to its limit, as it has done time and time again, it did not break.

If nothing else, Americans must learn from the events that occurred on January 6th and try to better understand where their fellow citizens are coming from. It is the job of citizens to live with one another, work with one another, and above all, respect one another. Without this, they have nothing, and the country will be suspended in perpetual peril.

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