2020

Congress Must Count the Votes: The Danger of Not Including a State's Electoral College Votes During a Disputed Presidential Election

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JOSHUA A. DOUGLAS*

Imagine this (nightmare) scenario: In the November 2020 election, one party wins control of both Houses of Congress, and the presidency comes down to a disputed election in a state that typically leans toward the other party. Let's say that Republicans take back a majority of the House of Representatives, retain control of the Senate, and the presidency will depend on a swing state like Pennsylvania—a state that voted for the Democratic nominee from 1992 through 2012 but the Republican nominee in 2016. Assume also that Congress, now fully under Republican control, receives two competing slates of electoral college votes from Pennsylvania stemming from ballot counting disputes: one slate for Donald Trump and the other for Joe Biden. Or perhaps Congress receives only one slate of electoral college votes, in favor of Biden, but Trump and other Republicans claim that voter fraud make the totals from Pennsylvania inaccurate. On January 6, 2021, Congress will count the electoral college votes and announce the winner of the presidency. During a dispute, can Congress refuse to count *any* electoral college votes from a particular state that is embroiled in controversy? Could Congress simply ignore Pennsylvania's submission in this scenario?

The short answer is that although Congress has the statutory authority to disregard a state's electoral votes entirely, that option should generally be off the table.

In the unfortunate situation that a disputed presidential election ends up in Congress, the two Houses could theoretically refuse to count any electoral college votes from a particular state under the federal Electoral Count Act (ECA), which provides rules for Congress to follow when resolving a disputed presidential election. To be sure, the ECA already includes a presumption that Congress must count electoral college votes unless both Houses agree not to count them. But there are no standards to guide Congress's decision, meaning that both Houses could reject a state's submission based on pure partisanship. In addition, the ambiguous language of the statute leaves open the possibility that Congress could fail to credit a state's electoral college votes even if only one House rejects them.

Instead, the presumption, though not absolute, should be almost impenetrable: absent evidence of bribery or the like, and unless there is strong bipartisan agreement in both Houses, Congress should count votes from *all* fifty states (and D.C.), even if one or more states are disputed. This short essay explains why a refusal to count electoral college votes—absent a bipartisan

agreement that actual evidence proves bribery or something similar—would be wrong as a matter of democratic principle and would violate core constitutional norms.

THE PROBLEMATIC 1887 STATUTE THAT CONGRESS WOULD USE TO RESOLVE A DISPUTED PRESIDENTIAL ELECTION

Congress has seemingly given itself the option not to count a state's electoral college votes in several situations. The Electoral Count Act, which Congress passed in the wake of the Hayes-Tilden presidential election dispute of 1876, has several (confusing) provisions that are relevant to the question of whether Congress can simply refuse to count the electoral college votes from a state.

First, the statute provides,

> 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.* (emphasis added)

The ECA therefore includes a presumption to count a state's submission of its electoral college votes—unless both Houses agree not to count them. That is, once a state submits a single slate of electoral college votes for a particular candidate, Congress must count those votes unless both Houses "agree that such vote or votes have not been so regularly given." Yet, problematically, there are no standards to determine if the votes of a state "have not been so regularly given," providing Congress with immense discretion. Congressmember George E. Adams remarked, in the congressional debate over the bill in December 1886, that "by the insertion of the words 'regularly given,' everything is thrown into as much confusion as if this conclusive presumption [to count a state's submission] had not been established." Indeed, there seems to be nothing in the language that would prevent the two Houses from rejecting a state's electoral college votes based purely on partisan motivation. This reality is why the hypothetical above starts with Republicans controlling both Houses of Congress: presumably they could act solely with politics in mind to reject a state's electoral college votes for Joe Biden if that state would give Biden the presidency. Of course, we could just as easily reverse the partisan make-up of Congress in the hypothetical, or have the Houses split on partisan control, and have the same problem.

Second, the Electoral Count Act provides that if a state submits two competing sets of electoral college votes, perhaps because of a vote counting dispute in the state, Congress must count the votes that comply with the so-

called Safe Harbor provision (Section 5 of the Act). The Safe Harbor provision says that Congress will count a state's votes so long as the state has a dispute resolution process set out before Election Day, follows that process, and resolves the dispute within at least six days before the electors are to meet. But if there is a dispute as to which of two submitted returns actually receives Safe Harbor status, then Congress may count only those votes that the two Houses "concurrently decide is supported by the decision of such State so authorized by its law." That is, both Houses must agree as to which electoral college submission to count in this situation. Presumably, if they cannot agree, then Congress cannot count either slate, meaning the state goes unrepresented in the final electoral college count. Alternatively, the following sentence of the statute (discussed next) might apply, which says that Congress should count the return signed by the Governor.

Finally, if there are multiple submissions of electoral college votes from a state, and neither claim Safe Harbor status (perhaps because both were finalized after the statutory deadline), then the Electoral Count Act says that Congress should count the ones "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." Essentially, both Houses must either agree or not agree to count a particular electoral college submission. Yet the very next sentence adds a wrinkle to the prior statement that both Houses must agree to count a submission, providing essentially a tiebreaker: "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." This sentence suggests that, in a situation where the Houses disagree, Congress should count the votes submitted by a state's Governor (the "executive of the State"). So, which is it? Can Congress count a particular submission of electoral college votes only if both Houses agree, and otherwise it cannot count any votes from that state, or must it count the votes that the Governor has certified? Scholars have disagreed on the proper interpretation of the statute, because, as Professor Ned Foley notes, "the fact is that the text is not sufficiently clear to rule out the possibility of alternative interpretations."

Here is the bottom line: the statute Congress would invoke to resolve a dispute regarding a state's electoral college submission includes enough ambiguity to allow Congress not to count any electoral college votes from that state.

But refusing to count any votes from a state is problematic for two main reasons, one based on democratic theory and the other based on constitutional law principles, though both come from the same place: failing to count any submission from a state, after the state has run a presidential election, would unfairly disenfranchise thousands, if not millions, of voters.

THE IMPORTANCE OF THE RIGHT TO VOTE

The right to vote is not merely a nice phrase or an abstract concept: it is the very foundation of our democracy. Refusing to count the electoral college votes from a state, after the state has administered a presidential election, is tantamount to taking away the right to vote for the nation's highest office.

The U.S. Constitution does not directly confer an individual right to vote. In fact, it says that state legislators may determine how to award their electoral college votes. Early in the country's history, many states simply appointed their electors for whichever candidate the state legislature chose. But as the Supreme Court pointed out in *Bush v. Gore*, "[h]istory has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors." Moreover, the Court held that when a state grants the right to vote for president, "the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." As the Court explained in its case involving so-called faithless electors in July 2020, the Constitution can provide "checks" on a state's ability to appoint its electors: "A State, for example, cannot select its electors in a way that violates the Equal Protection Clause." That is, although the Constitution gives states the authority to determine their electors, presidential elections still implicate the constitutional right to vote.[1]

The Constitution therefore implies a fundamental right to individuals to vote for president, once a state decides to award its electoral college votes through a statewide popular election. Congress's refusal to count a state's electoral college votes during a disputed election would violate this core principle, effectively disenfranchising all voters in the state. Although Congress's decision in this context would certainly implicate the political question doctrine, suggesting that the Supreme Court would not want to resolve the controversy, the action would still raise questions surrounding equal protection, substantive due process, and the foundational nature of the right to vote for democratic legitimacy.

Americans would also likely refuse to accept a result that disenfranchises an entire state. In a slightly different context, during the 2008 primary season the Democratic Party initially refused to seat delegates from Florida and Michigan at its National Convention because those states had broken party rules by scheduling their primaries earlier than the party wanted. Florida Republican Governor Charlie Crist (now a Democrat in Congress) and Michigan Democratic Governor Jennifer Granholm said that the party was "silencing 'the voices of 5,163,271 Americans' who voted in their primaries." Their votes would count for nothing. Amidst this uproar, and after it would no longer make a difference in deciding the nominee, the party eventually agreed to count half of the delegates from these states and then ultimately seated the delegates with full voting power. This episode demonstrates that Americans would likely balk at Congress's decision not to credit any votes from a state.

A failure to count electoral college votes also would implicate the "equal dignity of the states" idea that the Supreme Court recognized in *Shelby County v. Holder* when it invalidated an important provision of the Voting Rights Act. The Court stated that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." Regardless of whether the Court properly invoked this principle in *Shelby County*, wholly failing to count the electoral college votes from a state would likely violate this equal sovereignty ideal, absent a particularly compelling justification. Again, the Supreme Court is unlikely to involve itself in a question that is up to Congress to decide, but the lack of a judicial remedy does not make the constitutional infirmities any less concerning.

But what if there is evidence that the electoral college votes a state submits are truly fraudulent? What if both houses of Congress find, for instance, that those electoral college votes are a result of bribery, or in the words of Congressmember Adams from 1886, a "rank forgery"? Must Congress still count votes from that state?

In a word, no, but this is a very narrow exception to the strong presumption that Congress should count votes from all states absent truly extraordinary circumstances. The default should be that Congress cannot refuse to credit a state's submission unless there is overwhelming bicameral and bipartisan agreement to do so. This is the only context in which, in the first portion of the statute mentioned above, Congress might find that the votes were not "regularly given." In this circumstance, the validity of the democratic process itself could counterbalance the individual constitutional right to vote, as a submission based on bribery would truly impinge the will of the people. It would be best if Congress limited its own authority by codifying a rule that it must count electoral college votes from every state unless a supermajority of legislators from *both* parties in *both* chambers agree that there is fraud or another similar reason to ignore a state's submission. In addition, as the Electoral Count Act seems to contemplate already, if only one House objects and the other House wants to accept the votes, then again the default rule must be to count those votes.

But what if a state sends in competing slates of electors? Why is choosing one or the other better than counting none of them, if the winner of that state is truly unknowable? The answer once again comes down to democratic legitimacy, the fundamental nature of the right to vote, and the equality of the states. In the situation of competing slates of electors with no real evidence of bribery, refusing to count any votes for a state disenfranchises *all* of the state's voters. Counting one of the slates of electors at least gives a voice to roughly half of the voters who chose that candidate. That is true even when that final state would determine the national winner. Democracy, which requires the "consent of the governed," should credit voters whenever possible. In any disputed election with competing slates of electors, each candidate likely received roughly half of the vote, meaning that the election is essentially a toss-up. In that situation, roughly half is better than none, and not counting the state

at all should be off the table. After all, in other states where a candidate indisputably received more votes than any other candidate, our winner-take-all system allows a plurality of the electorate to enjoy full representation in the electoral college (though Maine and Nebraska split their electoral college votes based on who won each congressional district). With no ability for a re-vote, the entire state should not suffer full disenfranchisement just because the election in that state is disputed. Thus, although there is no great solution in this situation, counting one of the slates is the better of two poor options. Of course, the decision of which slate to count will be inherently political. But so would the refusal to count any votes from the state. Better to allow the voices of about half of the voters to be heard in the selection of the president. In this situation, Congress should do its best to determine the will of the voters in that state, perhaps through a truly bipartisan commission that can consider the dispute.

We therefore land on an almost-categorical rule, or at least an extremely strong presumption: Congress must count electoral college votes from every state unless there is a strong bipartisan agreement from both Houses that bribery or something similar tainted that submission.

CONCLUSION

The confusing nature of the Electoral Count Act underscores an important point: perhaps the electoral college itself has outlived its usefulness and a popular vote plan would be better. But it is the system we have for 2020 and the foreseeable future, so we must work within its confines. That reality includes guiding Congress on how it should resolve a disputed election.

Since the Hays-Tilden dispute of 1876 and the passage of the Electoral Count Act, Congress has never refused to count electoral college votes from a state. For example, in 1961, Congress faced competing slates of electors submitted by Hawaii and ultimately determined which one to count, yet the decision did not affect the final outcome. The statutory language supports a general notion that Congress will usually count all electoral college votes.

But the statutory language—both explicit and through interpretation—also leaves the door open for Congress to disregard a state's electoral college votes entirely. There is nothing to prevent a wayward, partisan-motivated Congress from using the Act to exclude a state's submission. The language of the statute is so obtuse that it would be easy for Congress to find legal support for that action. There is also precedent not to credit a state's electoral college votes: before the Electoral Count Act, Congress did not count electoral college votes from Arkansas and Louisiana in 1872 due to civil unrest in those states; excluding those states had no bearing on President Grant's re-election that year.

Therefore, Congress should conclude that, unless there is bipartisan and bicameral agreement that something extraordinary like bribery occurred, it will count electoral college votes from every state. Rejecting a state's submission would represent the worst-case scenario: it would disenfranchise voters, treat

states unequally, and undermine the foundational concept of the right to vote to democratic legitimacy. Ultimately, Congress must count the votes.

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[1] Under the U.S. Constitution, states could theoretically take back the right to vote for president and simply award their electors to whoever the state legislature wanted, as occurred in many states at the Founding. Yet, given our modern understanding of the constitutional right to vote, as the Supreme Court has recognized through the Fourteenth Amendment's Equal Protection Clause, that action would raise similar disenfranchisement concerns—especially if it occurred *after* the state's citizens had already voted. Indeed, it is not clear whether the Court would sanction a state's elimination of a popular election for president given the Court's understanding of the right to vote under the Equal Protection Clause. This Essay focuses on a situation where a state has its citizens vote for president but Congress still decides not to count the electoral votes from that state.