AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

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Supplementary Material

Chapter 12: The Contemporary Era – Elections and Political Parties

**Liz Cheney, Letter on Presidential Election Challenges** (2021)

*The 2020 presidential election was hotly contested and rendered all the more unusual by the effects of the global pandemic. States altered their voting procedures to accommodate a wider range of voting methods and a more extended process of counting votes. Although public opinion polls had suggested through the Trump presidency that he would struggle to assemble an electoral majority to win reelection, he nearly managed to pull off the same feat that he did in 2016 and win narrow majorities in just the right states to pull off a victory in the Electoral College. Nonetheless, by late in the night on Election Day it was evident that the president had failed to repeat history and pull off the upset victory over his Democratic rival.*

*President Trump and his most ardent supporters refused to concede defeat, however. The Trump campaign launched an unprecedented effort to overturn the apparent election results in the weeks following the election. Those efforts repeatedly met failure, but the president eventually landed on one last option. On January 6, 2021, the two chambers of Congress would meet in joint session to perform their duty under the Twelfth Amendment to count the votes cast by the presidential electors on December 14, 2020. The Twelfth Amendment dictates that, “the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and votes shall then be counted.” Republican Representative Louie Gohmert had filed a federal lawsuit seeking to judicial declaration that the vice president could unilaterally refuse to count votes from any state’s slate of presidential electors, but the suit was rejected. President Trump and his attorneys lobbied Vice President Mike Pence to accept that theory and reject a sufficient number of Democratic votes to give Trump the victory.*

*The Electoral Count Act of 1887 provides a statutory framework for Congress to exercise its Twelfth Amendment duty of counting the electoral votes. It also provides a mechanism for members of Congress to object to the electoral vote submitted by a state. Historically, that mechanism had not been used since states had regularly submitted a single certified result to Congress to be counted. In the twenty-first century, however, members of Congress, particularly in the House, have raised challenges to counting the votes of states favoring the opposite party. Those challenges have uniformly failed either for lack of a paired challenge in the Senate (a member of both chambers must lodge a challenge in order to trigger a debate and vote) or for lack of enough votes to sustain the challenge. In 2001, 2005, and 2017, Democratic members of Congress attempted to challenge the counting of the votes from states that had gone for the winning Republican presidential candidate. On January 6, 2021, Republicans in both the House and the Senate lodged challenges to states that voted for Biden. Those challenges trigged a debate and vote in each chamber. The challenges were overruled by a majority in each chamber, but an unprecedented number of House and Senate members voted to sustain the challenges.*

*On January 3, 2021, Liz Cheney, the House Republican Conference Chair, circulated a memo to her colleagues urging them not to mount such a challenge to the electoral vote. Cheney voted to overrule the challenges on January 6, and she subsequently voted to impeach Donald Trump for his post-election behavior. The House Republican caucus voted to oust her from the leadership in May 2021.*

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. . . . As you will see, there is substantial reason for concern about the precedent Congressional objections will set here.  By objecting to electoral slates, members are unavoidably asserting that Congress has the authority to overturn elections and overrule state and federal courts.  Such objections set an exceptionally dangerous precedent, threatening to steal states’ explicit constitutional responsibility for choosing the President and bestowing it instead on Congress.  This is directly at odds with the Constitution’s clear text and our core beliefs as Republicans. Democrats have long attempted, unconstitutionally, to federalize every element of our nation—including elections.  Republicans should not embrace Democrats’ unconstitutional position on these issues.

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Article II and the 12th Amendment to our Constitution govern how our Republic selects the President of the United States.  Although the Framers considered whether to confer the power to select the President upon the Congress of the United States, that proposal was specifically rejected.  Instead, the Framers conferred that specific power upon the States and the People. . . . “The person having the greatest Number of [Electoral College] votes for President, shall be the President.”

In accordance with Article II, every State Legislature has enacted a set of rules governing the manner in which the election of the President in that State will be conducted and how electors will be selected.  Those laws not only instruct state election officials how to conduct elections (and explicitly delegate authority to those officials for that purpose), but also set forth a state law process for challenging an election when problems arise.  The legal processes for challenging the election vary state to state, but generally provide a procedure for recounts and audits, and an opportunity to litigate disputed issues in state court. . . .

Because Article II commits to the States the authority and responsibility to conduct the election for President, and because State Legislatures have (consistent with Article II) provided a specific manner for challenging a Presidential election, allegations of election irregularities, fraud or other illegality must be resolved in accordance with those state laws.   This is our Constitutional process and the rule of law.  To date, dozens of cases challenging the 2020 Presidential election have been litigated in the six states at issue.  Many judges (including multiple federal judges appointed by President Trump himself), have already directly addressed the subject matter of objections members intend to make.  For instance, multiple judges have ruled state election officials were not acting contrary to state election laws.  And multiple judges have found that allegations about Dominion voting machines and other issues are not supported by evidence.

In addition to committing the power and responsibility for selecting the President to the People of the States, Article II and the 12th Amendment also explicitly identify the exceptionally limited role of Congress in this process.  First, “the President of the Senate shall receive certified copies of the electoral votes from each state” and “in the presence of the Senate and House of Representatives, open all the certificates.”   The votes “shall then be counted.”  Nothing in Article II, the 12th Amendment or any other Constitutional text provides for any debate, objection or discretionary judgments by Congress in performing the ministerial task of counting the votes.  Nothing in the Constitution remotely says that Congress is the court of last resort, with the authority to second-guess and invalidate state and federal court judicial rulings in election challenges.   Indeed, the Constitutional text reads: “The person having the greatest Number of [Electoral College] votes for President, shall be the President.”   It does not say: “The person having the greatest Number of [Electoral College] votes for President, shall be the President, unless Congress objects or Congress wants to investigate.”   The Constitution identifies specifically the only occasions when Congress can take any non-ministerial action – when no Presidential candidate has a majority of the electoral votes: “[I]f no person have such majority [of the electoral votes counted], then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. . . . .”  Thus, the Constitutional text tells us very clearly what Congress’ role is and is not.

For most of our nation’s history, the Framers’ straight-forward instructions regarding selection of the President prevailed.   In the aftermath of our nation’s Civil War, officials in certain Reconstruction Era state governments submitted competing slates of electors.  In 1887, Congress sought to resolve those issues by enacting the Electoral Count Act.  A principal provision of that Act instructs that a certificate identifying the Electoral College electors and their votes received from the Governor of a state shall be regarded as “conclusive.” Although the Constitutionality of that Act has been the subject of substantial debate, here there is no dispute that each Governor of the six states at issue submitted an official certification of the election, and those electors’ votes have been transmitted to this Congress.   Thus, under the Electoral Count Act, those certificates are conclusive and must be counted.   There is no discretion to do otherwise under that Act.  Accordingly, both the clear text of the Constitution and the Electoral Count Act compel the same conclusion – there is no appropriate basis to object to the electors from any of the six states at issue.

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