Who Decides Disputed Presidential Elections: Congress or the Vice President?

By John Yoo and Robert J. Delahunty

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Executive Summary

The 2020 elections raised fundamental questions about the resolution of disputes over presidential electors. Challenges to the legitimacy of President Joe Biden’s victory arose because of the 12th Amendment’s silence to the Constitution, saying in the passive voice that, after the vice president opens the electoral ballots before both houses of Congress, “the votes shall then be counted.”

We argue that the best reading of the Constitution finds that the vice president has the primary authority to resolve disputes over the legitimacy of electoral votes. While this is a difficult question with several alternative solutions, the constitutional structure and design should provide the answer. The Constitution rejects popular selection of the president by the electorate as a whole, Congress, or the House of Representatives.

Instead, the framers created a state-centric process for choosing the president that relies on state legislatures to choose electors. Allowing Congress to reject electors sent by the states on grounds created by Congress alone would undermine the founders’ design. Instead, the Constitution leaves the resolution of disputes over competing electoral slates up to the vice president as the least-worst option among the various alternatives. Short of dueling electors, the Electoral College system relies on the states to create a system for choosing electors and settling questions over their legitimacy.

This reading of the Constitution has important implications for recent proposals to amend the Electoral Count Act (ECA). These amendments would raise the minimum number of votes required to challenge electoral votes in the House and Senate, and they would set out presumptions in favor of different branches of state government in the certification of electors.

These proposals, while perhaps useful in the context of the ECA, do not address its core constitutional defect. Even if Congress adopts these proposals, it has still seized the power to reject electors even if a state has sent a single slate forward for opening and counting in the special joint session under the 12th Amendment. This violates the separation of powers and the founders’ design that presidential selection rest on the people acting through the states, rather than Congress.
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On January 6, 2025, Vice President Kamala Harris will open the electoral votes for president. Suppose she believes that changes in the voting laws of Georgia and Arizona, which prohibit vote harvesting and universal mail-in ballots, have depressed minority turnout. Could Harris refuse to count these suspect votes, deprive a Republican of enough electors to win, and award the presidency to incumbent Joe Biden or even herself?

President Donald Trump’s challenge to the 2020 elections revealed ambiguities in our electoral system that could allow Harris to execute this maneuver. Advised by John Eastman and Rudy Giuliani, Trump argued that Democratic voter fraud had deprived his electors of their victories in Arizona, Georgia, Michigan, Nevada, and Pennsylvania. Trump argued that Vice President Mike Pence could either reject these votes or delay their counting to allow state legislatures to reconsider their electors, investigate the election, and even send new electors.

Trump’s theory was mistaken. The text and structure of the Constitution, we argue, give the vice president authority to decide which electors should be counted only in the event that a state sends competing slates of electors to Washington, DC. We further contend that the best reading of the Constitution assigns the power to the states to resolve other disputes over the validity of electoral votes that fall short of multiple electoral slates—such as claims of voting fraud or improper election laws.

Our interpretation of the constitutional provisions at issue—primarily Articles I and II and the 12th Amendment—render suspect the Electoral Count Act (ECA) of 1887, which empowers a majority of the House of Representatives and Senate to reject electoral votes. We believe that proposed amendments to the ECA, which seek to raise the minimum number of votes required to force a debate over rejection of an electoral vote, still violate the Constitution’s structural design to remove Congress from the selection of the president. Reforms would be better aimed at clarifying the process of opening and counting the electoral votes, the vice president’s authority, and any role for the federal courts.

The States and the Choice of Electors

It is clear from the constitutional text that the states alone have the power to “appoint” presidential electors. Article II, Section 1 of the Constitution says that “each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors” equal to the state’s combined representation in the Senate and House. Underscoring that the states’ appointing power is independent of Congress and the federal government generally, the text adds that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

Once appointed “in such Manner as the [State] Legislature . . . may direct,” the electors are to “meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an inhabitant.
of the same State with themselves." (The requirement that electors meet in their own states rather than the nation’s capital quietly reinforces the idea of the electors’ independence from federal control.) The 12th Amendment directs that the electors “shall name in their ballots the person voted for as President, and in distinct ballots voted for as Vice-President.” Then they

shall make distinct Lists of all the Persons voted for as President, and the Number of Votes for each, which Lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.3

(Under Article I, Section 3, this means the vice president.)

Once the electors’ votes arrive in the capital, the 12th Amendment provides that “the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.” The use of the passive voice (“the votes shall then be counted”) has given rise to controversy. But it is at least clear that the language does not expressly authorize or mandate that Congress does the counting.4

Rather, the houses of Congress seem to be “present” only as witnesses to or spectators of the counting. Furthermore, the amendment gives each house a substantive role only if the counting does not yield “a majority of the whole number of Electors appointed.” In that circumstance—but only then—are any congressional powers activated. At that point, “the House of Representatives shall choose immediately, by ballot, the President” from no more than the three highest candidates voted for as president.5

Significantly, the House is to vote by state delegation, with each state having one vote—another sign that the presidential selection system relies on states, rather than on Congress. That the framers affirmatively left this system in place, rather than modifying it in the 12th Amendment, is telling.

The constitutional text elsewhere provides indirect but powerful evidence to support a minimal congressional role in the electoral vote count. Article I, Section 4 authorizes the state legislatures to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives.” But that power is subject to a congressional override, because “the Congress may at any time by Law make or alter such Regulations.” By contrast, Congress has no comparable power to override the “Manner” in which state legislatures regulate or provide for the appointment of presidential electors.6

Under Article II, “Congress may determine the Time of chusing the electors, and the Day on which they shall give their Votes; which shall be the same throughout the United States.”7 As the Supreme Court observed in In re Green, apart from prescribing these two dates, Congress’s only other role is to witness the opening of the votes. The Constitution limits Congress to different, clearly delineated roles in congressional and presidential elections.

Congress had an opportunity to clarify the ambiguities of Article II, Section 1 in the 12th Amendment. It proposed the 12th Amendment for ratification by the states on December 9, 1803. On January 24, 1804, Secretary of State James Madison declared that it had been ratified.

The 12th Amendment required electors to cast distinct votes for president and vice president. This change corrected the problem that had led to the tie between Thomas Jefferson and Aaron Burr in the 1800 election, which required resolution by the House. But it otherwise made no significant changes in the process of counting the electoral votes. It repeats Article II, Section 1’s process that the electors sign, certify, and transmit their sealed votes to the president of the Senate. As to the counting of the vote, it declares: “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”8 The amendment makes no significant change in the text on the counting of the electoral vote.

The 12th Amendment’s text does not clearly establish a mechanism for resolving questions about the legitimacy of electoral votes. It simply states that the “President of the Senate shall, in the presence of the Senate and House of Representatives, open all the
certificates and the votes shall then be counted.”

The text makes clear that the vice president opens the electoral certificates, but it then describes their counting in the passive tense. The basic question is whether that passive tense allows disputes over the validity of electoral ballots to be resolved by Congress through previous legislation, by the special meeting of both houses to observe the opening of the ballots, or by the vice president alone. Congress has claimed the power through its passage of the ECA. The 12th Amendment’s text is highly indeterminate—a fact that has long troubled political figures and legal scholars.

There are at least three ways to read it. First, the vice president’s role in opening the electoral votes may carry forward to their counting. We find this to be the most natural reading, consistent with practice at the time of its ratification. It gives the vice president the duty to resolve at least some disputes over the legitimacy of electoral votes. Who else would count the votes if not the presiding officer? But we readily admit that this reading is not free from doubt.

Alternatively, the 12th Amendment might mean that the vice president makes an initial determination of an electoral vote’s validity, subject to Congress’s agreement. That interpretation immediately leads to the question: How would Congress express its agreement or disagreement with the vice president’s initial ruling? Congress might resolve disputes by a simple majority of the members present and observing the event (with each senator and representative having a single vote), by concurring votes of both houses, by votes of the House alone or Senate alone, or perhaps by the House alone voting by state delegation. On this approach, either the vice president or Congress would effectively hold a veto over the decision, with the default rule being to either assume an electoral vote’s legitimacy or hold it in doubt.

On a third view, the vice president may play only a ministerial role by opening the electoral votes, with any disputes left solely to Congress to resolve by legislation. In 1887, Congress opted for the third view and accorded itself the maximum power. In the ECA, Congress assumed the authority to resolve disputes on its own and severely limited the vice president’s role.

Adopted in the aftermath of the bitterly disputed 1876 election, the ECA notoriously poses severe interpretative difficulties. A group of senators recently released proposals for its reform. As we explain, the ECA’s core provisions do not rest on firm constitutional ground. Nonetheless, since its enactment, it has provided the usual procedural framework for the counting of electoral votes.

Some argue that the 12th Amendment’s switch from the active to the passive voice indicates that the counter and opener of the votes are different. But the switch to the passive voice cannot exclude the president of the Senate from the counting function. Suppose I know that you are going to open an envelope addressed to you that includes a certain amount of cash and that you and I might disagree about how much cash is inside once it is opened. If I say to you, “open the envelope and the cash will be counted,” that does not exclude you from doing the counting (while I watch), though it might be taken to mean that we do the counting jointly.

A critic could also claim that the text’s failure to identify the president of the Senate as the person doing the counting in addition to opening the certificates suggests that Congress counts the votes. But the text’s failure to specify any role for Congress beyond being present suggests that the president of the Senate is to count the votes in addition to opening the certificates while the assembled members of Congress look on. In other words, the president of the Senate is the only named agent, as opposed to a spectator. If the passive voice is meant to indicate a constitutionally significant hiatus between the vice president opening the votes and the joint session counting them, why doesn’t the text say “and then Congress shall count the votes” instead of saying merely that Congress was to be present?

**Constitutional Structure and Background**

The Constitution’s structure and historical background bolster our reading of the text that grants the vice president a potentially substantive role. The framers were deeply preoccupied with separation of
powers. They created institutions vested with distinct, specialized governmental powers. In their view, separation of powers was necessary to ensure that the government operated through and under the law—something they considered a prerequisite to individual liberty and the protection of rights.

Each branch or department of the government thus had to be equipped to maintain its independence and avoid being absorbed or dominated by another. Judges were to enjoy lifetime tenure for good behavior and were protected against diminution of their salaries. Likewise, the president enjoyed a power (subject to being overridden by a supermajority of each house) to veto legislation, including such as might compromise his constitutional authority.

To that end, the Constitution substantially insulates the election of the president from congressional interference (except when the Electoral College’s votes fail to produce a winner). If Congress could effectively determine the outcome of that electoral process, for example by having the final say in the selection of electors through a power to judge their qualifications or reject their votes, then the goal of having an independent national executive would be undermined.

The United States’ experience in the interval between the Revolutionary War and the Constitutional Convention in Philadelphia taught the founding generation an important lesson about executive power. In that span, the states had generally made their executives dependent on their legislatures or even (as in parliamentary democracies nowadays) components of them. These approaches were, in the framers’ judgment, failures. In Federalist 48, Madison warned (with reference to the state constitutions that created weak executives) that the

legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our [state constitutions] ... seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.14

Buffering the selection of the national executive from congressional interference was an important aspect of the framers’ design.

The Constitution delegates only limited, enumerated powers to the federal government. Although they rejected the excessive decentralization of the Articles of Confederation, the founders did not create a purely national government. “The proposed Constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both,” Madison explained. It grants limited, enumerated powers to the federal government while reserving the rest to the states or the people. Madison further observed that the federal government’s “jurisdiction extends to certain enumerated objects only,” while the states continued to possess “a residuary and inviolable sovereignty over all other objects.”15

Without any clear textual authorization, Congress cannot claim any power over the manner in which states choose electors.16 The framers went further than just limiting the subjects over which Congress could regulate; they also established institutional checks, such as the Senate and the Electoral College, whereby the states themselves are crucial to the federal government’s workings. As Madison asked in the Virginia state ratifying convention: “Are not the States integral parts of the General Government?”17

Should the Electoral College fail to yield a winner, the 12th Amendment left Article II’s original backup system largely intact. To prevail in the Electoral College, a candidate must win “a majority of the whole number of Electors appointed.”18 If no candidate wins the necessary 270 of today’s 538 appointed electors, the amendment vests the right to choose the president in the House of Representatives, which picks from the top three finishers of the electoral vote. But “the votes shall be taken by states, the representation from each state having one vote.”19

The 12th Amendment requires a quorum of two-thirds of the state delegations and an absolute majority of the states to prevail.

In the event no candidate wins a majority of the electoral vote for vice president, the Constitution vests the right to select in the Senate, which votes by individual senators. Even here, the founders were
leery of Congress choosing the president, so they gave each house delegation the same vote, rather than allowing a simple majority of the members of the House to decide. Federalism (of a subdued kind) reenters, if through the back door.

In other words, the original Constitution excluded Congress from the resolution of disputes over electors. Article II, Section 1 ordered electors to meet in their states and vote for two candidates for president, with one having to come from a different state. They were to sign, certify, seal, and then transmit their votes to the president of the Senate. Section 1 then directed that the president of the Senate “shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.” 20 Whoever received a majority of the electors’ votes became president, and the runner-up became vice president.

Congress’s role in the presidential selection process, except when the electoral vote was tied or failed to produce a majority, was minimal. This result accorded with the framers’ conception of separation of powers and the president’s independence from Congress.

The Electoral Count Act

Despite the wealth of evidence that Congress has no power to question the validity of electoral votes, Congress began to claim such power with increasing insistence, especially during and after the Civil War and Reconstruction eras. Those claims culminated in the enactment of the ECA. Recent efforts in Congress to replace or amend the ECA have relied on the assumption that Congress indeed has the power to structure and regulate disputes over electoral vote counts. Some legal scholars have also defended that position, while others have attacked it. We believe that Congress lacks the relevant power. But it is necessary to confront the best argument for claiming that Congress has it.

Under the ECA, Congress primarily looks to the states to resolve electoral vote disputes. Section 5 of the act creates a safe harbor deadline, which fell on December 8, 2020, for the last election. As Chief Justice William Rehnquist explained in Bush v. Gore, Section 5 provides that

the State’s selection of electors “shall be conclusive, and shall govern in the counting of the electoral votes” if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. 21

If the states can complete a valid count of the popular vote by the safe harbor deadline, the ECA requires Congress to treat the electoral votes as conclusive. If there is a dispute and state law provides a mechanism to resolve it—and that mechanism produces an answer by the deadline—the ECA again requires Congress to treat that outcome as conclusive. A state still may miss the safe harbor deadline because of an uncertain count, litigation, or political conflict.

The ECA establishes the next crucial date (December 14, 2020, for the last election) for the meeting of electors in their states. Section 6 of the ECA calls on the governor, at some point before that date, to certify the electors “as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment.” 22 The governor’s Section 6 certification can become crucially important in a dispute. If a state sends more than one slate of electors (as in the hypothetical of a state legislature reclaiming its authority to select the electors), Section 15 of the ECA blesses the slate certified by the governor—unless both houses of Congress agree to reject it. If the House and Senate cannot agree, the ECA effectively gives the governor of a state the power to resolve disputes over electoral votes.

Section 15 of the ECA then creates a system for raising and resolving disputes over electoral votes. 23 The ECA calls for the House and Senate to appoint “tellers” who will tabulate the electoral votes as they are opened by the vice president. As she opens and reads the certificates, the vice president “shall call for objections.” 24 Section 15 requires that any objection
receives, in writing, the approval of at least one member of each the Senate and House.

If the electoral votes from a state “have been regularly given” by electors certified by the governor, the ECA declares that they cannot be rejected. The ECA, however, does not define “regularly given.” If there are multiple votes from a state or the votes are otherwise not regularly given, the ECA allows Congress to review their validity. After an objection, Section 15 requires the House and Senate to separate, meet, and vote on whether to reject an electoral vote. Only if both houses concur can an electoral vote be rejected. But the ECA makes clear that Congress has assumed the power to resolve disputes over the validity of electoral votes and even exercise the power to reject them.

Our review above of the constitutional text, structure, and background indicates that Congress cannot regulate the counting of the electoral votes. It follows that the current statutory dispute resolution procedure—the ECA—is unconstitutional. Two reasons stand out for denying that Congress has the power to ordain the dispute resolution process as it purports to do in the ECA. We outline each briefly below and then analyze each in more detail.

First, the Constitution provides no grant of pertinent authority to Congress. Neither Article II nor the 12th Amendment explicitly grant the House and Senate any authority over the electoral vote counting process. The constitutional text grants the only affirmative role to the vice president. (“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”). The 12th Amendment’s silence on dispute resolution stands in sharp contrast with the careful description of each house’s role elsewhere in the Constitution. Consider what the Supreme Court called Article I, Section 7’s “finely wrought and exhaustively considered, procedure” for the passage of bills, the president’s veto, the exact votes necessary to override, and even how the votes are recorded. Or take Article I, Section 8’s detailed enumeration of the powers vested in Congress. The constitutional text also carefully describes each house’s role and the votes required to act by approving treaties, consenting to nominees, impeaching and trying impeachments, and proposing constitutional amendments.

Further, consider the text of the 12th Amendment alone. If the electoral count fails to yield a majority for a single candidate, the amendment specifically states that “the House of Representatives shall choose immediately, by ballot, the President.” When the electoral count fails to yield a vice president, the 12th Amendment simply declares that “the Senate shall choose the Vice President” from the top two candidates. We should not read a constitutional amendment’s silence as vesting a power in the House and
Senate, when exactly the same provision specifically gives them a role when it wants to do so.

Reading the 12th Amendment to give Congress the right to resolve disputes over electoral votes does not just create textual problems but also strains the constitutional structure. Insofar as the ECA authorizes Congress to determine the electoral vote count, Congress has used its legislative power to control the function of another constitutional actor—the vice president. But Congress cannot use a statute, which involves bicameralism and presentment, to govern the operation of other parts of the federal government in the performance of their unique constitutional duties.

Congress, for example, cannot directly regulate how the president fulfills his responsibility to “take care that the laws be faithfully executed.” As the Supreme Court made clear in 2020, Congress cannot prevent the president from removing principal executive officers who assist him in the execution of the laws. Nor can it instruct the president whom to nominate to a principal federal office or a federal judgeship.

Congress cannot pass a statute instructing the Senate on how to hold an impeachment trial, nor can it dictate the process for Senate consideration of treaties or appointments. It also cannot order the federal courts to hear cases beyond their jurisdiction or reopen their final judgments. Indeed, the defense of judicial review in *Marbury v. Madison* rests on the principle that Congress cannot instruct the judiciary on the performance of its unique constitutional duty to decide federal cases and controversies. To conclude otherwise would violate the separation of powers by allowing one branch of the federal government to interfere with another branch’s execution of its core constitutional functions.

This central principle of the separation of powers requires rejection of the ECA’s core. Under the 12th Amendment, the electoral votes submitted by the states are to be unsealed, opened, and counted. Logically, those functions could only be performed by either the presiding officer—the vice president—or the entirety of both houses assembled together. But the latter operation would be cumbersome, if not impossible, for such a large body. What rules of procedure would govern its actions, and how would such rules be adopted?

In any case, the amendment specifies, without saying more, only that the two houses are to be present and observe. Hence the functions in question (opening and counting) fall to the vice president—a different constitutional actor from Congress. But in the ECA, Congress has purported to prescribe, by legislation, how those functions are to be performed. It may not do that without violating separation-of-powers norms. The vice president is carrying out electoral functions, which, although performed in the presence of the House and Senate, do not require (and are not subject to) the consent of either body—or of both. While the ECA might establish helpful deadlines for the state selection of presidential electors, the statute cannot bind actors under the 12th Amendment as to their judgment of the validity of disputed votes.

In the debates (which trace back years) over the ECA, proponents of the legislation repeatedly affirmed (and opponents denied) that the basis of Congress’s power to resolve disputes over electoral vote counts was the necessary and proper clause in Article I, Section 8 (the so-called sweeping clause). That clause authorizes Congress to make all Laws which shall be necessary and proper for carrying into execution the Foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The sweeping clause’s meaning has been debated since the Washington administration. Jefferson, the first secretary of state, and Alexander Hamilton, the first secretary of the Treasury, took opposing views on whether the clause justified the creation of a national bank. The clause was central to Chief Justice John Marshall’s celebrated 1819 opinion in *McCulloch v. Maryland* upholding the bank, and it formed an important part of Chief Justice John Roberts’s opinion upholding Obamacare in *National Federation of Independent Business v. Sebelius*. 
We do not believe that the sweeping clause authorizes Congress to enact legislation that, like the ECA, empowers it to challenge and potentially reject electoral votes. Given the mass of evidence that the Constitution was designed to bar Congress from selecting the president, to assert that it may achieve that result under the sweeping clause would be like saying that the framers had carefully locked all the doors of a house to stop an intruder but then had visibly left a key in one of the locks that would open all the doors.

Let’s break down the sweeping clause. First, Congress has the power to enact legislation that is “necessary and proper” to carry “the Forgoing Powers” (i.e., the powers enumerated earlier in Article I, Section 8) into execution. The powers to resolve vote count disputes or create a structure for their resolution are not enumerated in Section 8, nor, for that matter, anywhere else in the Constitution. The sweeping clause has no application under this subclause of Section 8.

Next, Congress has the power to enact necessary and proper legislation for executing “all other Powers vested by this Constitution in the Government of the United States.” These powers are those “vested” in one of the three branches of government by Articles I, II, and III. The reference to “all other Powers vested by this Constitution” (emphasis added) seems naturally to denote the powers vested in Congress outside Article I, Section 8. For example, under Article IV, Congress may admit new states to the Union or dispose of or provide rules and regulations regarding federal territory or other property. The Reconstruction Amendments give Congress the power to enforce their terms with “appropriate” legislation. But, like the congressional powers in Section 8, Congress’s non–Article I powers do not refer to disputed electoral votes.

As for Articles II and III, Congress cannot use the sweeping clause as a bootstrap to invoke the powers that belong exclusively to the other branches—the executive and the judiciary. As the Supreme Court affirmed in the 2015 Zivotofsky v. Kerry case, when an exclusive presidential power is exercised, Congress is disabled from acting on the subject.

The same principle applies to the exclusive powers of the vice president or other holders of constitutional power. Even if the president of the Senate is deemed to be a legislative officer, Congress cannot dictate how that officer exercises constitutional powers assigned exclusively to her. For example, the president of the Senate has the constitutional power to cast a tie-breaking vote in the Senate. No act of Congress or even Senate resolution can dictate how that power is used.

Moreover, even if opening and counting the electoral votes is considered a ministerial function, that does not wholly deny the president of the Senate any discretionary authority. Even when strictly charged with the execution of specific duties, officials may need to exercise a degree of judgment. State elections officials, charged with counting the popular vote, may have to use good judgment in deciding whether a signature on a mailed-in ballot sufficiently matches a signature on file.

The Anglo-American legal tradition has long recognized the need for discretion by government agents, even when their authority is severely cabined. In the 1598 Rooke’s Case, for example, Chief Justice Edward Coke wrote that though the commissioners of sewers had discretion in their repair work, they needed to be sure they were properly applying it and not deciding “according to their wills and private affections.”

It is possible to view the vice president, when presiding over the electoral vote count, as the agent acting on behalf of the states from which she has received those votes. Her fundamental duty is to make sure that the will of those states is reflected in that count. If the state has delivered its votes to her, her only duties are to open the certificates in the presence of both houses of Congress, count (or supervise the counting of) them, and then announce the tally. But there are unusual circumstances in which it is unclear what the will of the state is—most notably, when different state authorities have certified different electors to her. At this point, she may properly exercise her judgment in discerning the state’s will.

This interpretation is compatible with a state-centric view of the electoral process. It differs from a more rigid and inflexible state-centric view only
by recognizing the reality that a state may not have evinced its will clearly and unambiguously by the time the electoral votes are to be counted. In those narrow circumstances, the president of the Senate has some interstitial authority—but only to use good-faith judgment to determine the actual will of the state.

The point is that the exclusive power to appoint electors belongs to the states—or, more precisely, the state legislatures. Congress may no more regulate or constrain the states’ appointive power than it may regulate or constrain the president’s constitutional power to appoint (with the Senate’s consent) federal judges or principal executive officers. Congress’s powers under the sweeping clause apply only to powers of the federal government, its branches, and its officers; they simply do not reach the powers of the states. Accordingly, Congress has no constitutional authority to interject itself into the counting of electors’ votes by determining which votes are to be considered valid and which are to be counted. For Congress to do so would be tantamount to appointing electors itself—or at least to constraining the states’ appointments.

The Relevance of Practice

But what about the ECA’s continuing effect? Does longevity favor its constitutionality? Does it guide interpretation of the ambiguous 12th Amendment?

Arguably, the ECA deserves significant weight in deciding how to construe the 12th Amendment. First, it is the product of mature reflection by several Congresses over an extended period, going back to the 1860s. Constitutional objections to it, though forcefully pressed and repeated over that period, were rejected. Second, unlike the Electoral Commission Act of 1877, it was not emergency legislation—an ad hoc response dictated by the necessity to head off a national crisis. Third, Congress—and vice presidents presiding over the electoral vote count—has treated it over the succeeding decades as a benchmark. Thus far, it has not been successfully challenged in the courts.

This is by no means to say that the ECA is constitutional. On the contrary, we think the objections to it are decisive. Nonetheless, its practical application over time carries interpretive weight. But we do not see post-enactment practice under the ECA as so entrenched in the workings of our government that it should be regarded as constitutional.

Congressional challenges under the ECA were rare until the George W. Bush–Al Gore contest of 2000, but they have become somewhat more common since then. In 1969, when a “faithless elector” from North Carolina voted for George Wallace instead of Richard Nixon, Sen. Edmund Muskie (D-ME) and Rep. James O’Hara (D-MI) raised objections under the ECA, but they were rejected by each house. After the 2004 election, Sen. Barbara Boxer (D-CA), joined by Rep. Stephanie Tubbs Jones (D-OH), objected to the certification of Ohio’s presidential electors’ votes. The Senate and the House rejected Sen. Boxer and Rep. Tubbs Jones’s objections by 74–1 and 267–31, respectively.

The vice president’s actions when presiding over the joint session provide examples of practice under the ECA. These examples are more significant for interpretive purposes than are episodic congressional protests. Three occasions deserve note: Nixon in 1961, Gore in 2001, and Biden in 2017.

The presiding officer at the joint session on January 6, 1961, was Vice President Nixon, who had been the Republican presidential nominee the preceding November. Nixon received three certificates “from persons claiming to be the duly appointed electors from the State of Hawaii.” The initial popular vote count in Hawaii appeared to have given Nixon victory in that state by a narrow 141-vote majority, and that result had been certified by the governor. However, the initial result was contested, and a recount was made. The recount was not completed until December 28, 1960.

Two sets of (purported) electors cast their votes on December 19, 1960, and forwarded their certificates to Washington, DC. On December 30, a Hawaiian state court, acting under the state’s electoral contest statute, ascertained that Nixon’s Democratic opponent, John F. Kennedy, had carried the
state by 115 votes, and the governor certified the Kennedy electors on January 4, 1961. At the joint session, Nixon stated that “the Chair has knowledge, and is convinced that he is supported by the facts” that the certificate for the Kennedy electors “legally portrays the facts with respect to the electors chosen by the people of Hawaii.” Nixon, “without the intent of establishing a precedent,” asked for (and received) unanimous consent from the joint session to accept the Kennedy electors. Nixon’s action may not even have rested on the ECA.

Second, Vice President Gore, the Democratic nominee in the 2000 presidential election, chaired the January 6, 2001, joint session, at which he announced the election victory of his Republican rival. Several Democratic members of the House of Representatives repeatedly raised objections to the count of electors and sought the assistance of at least one senator to force a debate under the ECA. Relying on the ECA, Gore urged Senate Democrats not to join this request, and none did. In the absence of support from any senator, Gore gaveled down the protesting House members.

Third, in counting the 2016 election, several House members, including Rep. Barbara Lee (D-CA), objected to the acceptance of electoral votes for Trump. The presiding officer, Vice President Biden, asked if any senator joined the objection. Being told there was none, Biden ruled that the objection “cannot be entertained.”

Taken together, these instances indicate that members of Congress have intermittently used the ECA as a framework for voicing challenges to electoral votes and that two vice presidents presiding over vote counts before 2021 invoked or alluded to the ECA in rejecting attempted challenges by members of Congress. Overall, however, the pre-2021 practice tilts mildly in favor of the ECA’s constitutionality. But it is far too sporadic to be dispositive.

The 2021 Electoral Vote Count

What about the 2021 electoral vote count? According to his then legal counsel, Vice President Pence apparently believed either that the Constitution did not empower him, in any circumstances whatsoever to resolve electoral vote count disputes or that it affirmatively (if implicitly) barred him from doing so. Whatever bearing it might have on the ECA, does Pence’s view tell against our interpretation of the 12th Amendment?

The fundamental reason Pence gave for his reading depends on the principle, ultimately derived from Roman law, that no one may be the judge in his own case—nemo judex sua. This axiom was firmly rooted in Anglo-American common law before the framing of the Constitution. As Madison observed in Federalist 10: “No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity.” Invoking the rule in Calder v. Bull, the early Supreme Court characterized it as among “the first principles of the social compact.”

This principle remains entrenched in our system, but is it a constitutional rule? By the Constitution’s text, it is not. Indeed, the constitutional text frequently seems to permit self-interested parties to adjudicate disputes in which they have a personal interest. For example, the president can veto legislation harmful to his financial interests or pardon himself in any case except impeachment. Members of Congress can vote against their own expulsion. Further, nothing in the impeachment clause prevents the vice president from presiding over her own impeachment, while it does expressly prohibit her from presiding over the president’s impeachment.

One might argue that our interpretation of the Constitution is too text bound. Former Justice John Paul Stevens argued that the sovereign was bound by the rule of law to govern impartially and that the 14th Amendment’s equal protection clause was but one aspect of that duty. Accepting Stevens’s position, one might maintain that if Pence had any power to decide on electoral votes (at least in a case in which he was a candidate), he would be acting, or anyway seeming to act, with unconstitutional partiality toward himself. Justice Stevens’s theory, however, has never been adopted by the Court, and it has had no discernible impact on the Court’s opinions. Moreover,
it proves too much by making every instance in which a constitutional actor decided a question favorably to its own interest an unconstitutional choice.

The Constitution’s separation of powers requires multiple decision makers. As the Supreme Court noted in a 2020 decision, “Aside from the sole exception of the Presidency, the constitutional structure scrupulously avoids concentrating power in the hands of any single individual.” But the authority we ascribe to the president of the Senate, though it might indeed decide the outcome of a presidential election in exceptional circumstances, is extremely limited. Only one circumstance calls on her to judge: when state authorities certify rival electors or slates of electors.

The 2025 Electoral Vote Count

How might our view play out during the 2024 election? Vice President Harris’s power to resolve electoral disputes would arise, tautologically, only if there are disputes. She does not have a free-ranging commission to challenge or reject votes. If she receives only a single set of certified votes from, say, Pennsylvania, and that certification is provided by a Pennsylvania official with apparent authority to act, such as the governor, she has no role beyond the ministerial.

What happens if she receives two or more sets of certificates, each coming from a state actor with some colorable claim to authority? These might be a set certified by the state governor and another certified by the state attorney general, as occurred with Oregon in 1876. Or there might be a set certified by an outgoing governor and a later set certified by that governor’s successor, as occurred in Hawaii in 1960. Or the same governor might send two distinct but incompatible sets. Or the governor might certify one set and the legislature another. In these circumstances, a genuine dispute has arisen, calling for Harris to exercise discernment.

No such scenario occurred in 2021. Here, we think, is the critical flaw in Eastman’s analysis, when he provided legal advice to the Trump campaign. He argued that a group of individual legislators (but not the legislature as a body) could object to the official certification of electors by their state and present another slate of electors. He further argued that this would create the grounds to ask the vice president to throw out the state’s certified electoral votes. However, a group of legislators or self-appointed electors could not act with the authority of the state.

What if the outcome of the popular vote, and with it the appointment of a state’s electors, is still tied up in litigation on the date that Congress has designated for counting the electoral vote? If no competent authority in the state (such as the governor or the legislature) has certified a slate of electors by that date, then there would be no dispute for Harris to resolve, because there would be no electoral votes to count. The state would simply lose its electoral votes because it did not speak.

What if the state speaks with one voice, but that voice is not backed by the popular vote? This could occur if the outcome of the state’s popular vote remained in litigation as the day appointed for counting the electoral vote approached, the state legislature resumed its constitutional authority to appoint electors, and the legislature certified a slate of electors. Here the state would be speaking with a single voice. But the question of whether the legislatively designated slate was validly appointed is difficult, indeed unprecedented.

The Supreme Court may provide some guidance before the 2025 electoral vote count. The Court has decided to review Moore v. Harper, a redistricting case from North Carolina, which asks whether the North Carolina Supreme Court has the authority, consistent with the federal Constitution, to reject a congressional districting map adopted by the state legislature. Although the question arises under the constitutional clause applying to congressional—not presidential—elections, the issues are similar. In both cases, the Constitution vests authority in the state legislature, not just the state. The court’s decision in Harper may bear directly on the putative power of a state legislature to appoint presidential electors on its own. Four justices have already
indicated that they believe the legislatures do have at least some power to act independently.

Nonetheless, Vice President Harris might need to decide in 2025 whether the state constitution prohibited the legislature from appointing electors on its own and whether that prohibition conflicts with the federal Constitution. It could be left to her discretion, subject to possible judicial review, whether such putative electors were constitutionally appointed.

Conclusions

These questions of application should not distract from our main point that the best reading of the Constitution finds that the vice president has the primary authority to resolve disputes over the legitimacy of electoral votes. The 12th Amendment’s use of the passive voice creates a lacuna in the constitutional text. We resort to the constitutional structure and design to resolve the question.

We argue that the Constitution rejects popular selection of the president either by the electorate as a whole, Congress, or the House of Representatives. Instead, the framers chose to create a state-centric process for choosing the president that relies on state legislatures to choose electors. Allowing Congress to reject electors sent by the states, on grounds created by Congress alone, would undermine the founders’ design. Instead, the Constitution leaves the resolution of disputes over competing electoral slates up to the vice president as the least-worst option among the various alternatives. Short of dueling electors, the Electoral College system relies on the states to create a system for choosing electors and settling questions over their legitimacy.

Our reading of the Constitution has important implications for recent proposals to amend the ECA. These amendments would raise the minimum number of votes required to challenge electoral votes in the House and Senate, and they would set out presumptions in favor of different branches of state government in the certification of electors. We believe that these proposals, while perhaps useful in the context of the ECA, do not address its core constitutional defect. Even if Congress adopts these proposals, it has still seized the power to reject electors even if a state has sent a single slate forward for opening and counting in the special joint session under the 12th Amendment. This violates the separation of powers and the founders’ design that presidential selection rest on the people acting through the states, rather than Congress.

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Notes

3. US Const. amend. XII.
4. US Const. amend. XII.
5. US Const. amend. XII.
8. US Const. amend. XII.
9. US Const. amend. XII.
14. Federalist, no. 48 (James Madison).
15. Federalist, no. 39 (James Madison).
18. Commentators have differed over whether this means a majority of the 538 possible electoral votes or a majority of the electors actually chosen. This would make a difference, for example, if a state failed to send any electoral votes, which would reduce the number of electors needed to win. If the text requires a majority of the possible 538 electors, then the winner must always garner at least 270 electoral votes. This seems to have been the practice. The question was raised by the 1876 election. See Edward Foley, Ballot Battles: The History of Disputed Elections in the United States (Oxford, UK: Oxford University Press, 2016), 413–14.
19. US Const. amend. XII.
22. Credentials of Electors; Transmission to Archivist of the United States and to Congress; Public Inspection, 3 U.S.C. § 6 (1948).
27. For a full statement of the doctrine, see Loving v. US, 517 US 748, 757 (1996). The relevant quote is “although separation of powers ‘does not mean that these [three] departments ought to have no partial agency in, or no control[!] over the acts of each other, one branch of the Government may not intrude upon the central prerogatives of another. . . . Even when a branch does not arrogate power to itself . . . The separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” (Citations omitted.)
36. Former Judge J. Michael Luttig and David P. Rivkin Jr., who argue that the Electoral Count Act is unconstitutional in key respects, note the rarity of practice under it: “The most constitutionally offensive provision gave Congress the absolute power to invalidate electoral votes as ‘irregularly given,’ a process that a single representative and senator can trigger by filing an objection. Fortunately, this provision has seldom been invoked—only twice before 2021—and no objection has ever been sustained.” J. Michael Luttig and David B. Rivkin Jr., “Congress Sowed the Seeds of Jan. 6 in 1887,” Wall Street Journal, March 18, 2021, https://www.wsj.com/articles/congress-sowed-the-seeds-of-jan-6-in-1887-116161686776.
42. Federalist, no. 10 (James Madison).