RESTORING AMERICA

How to stop a ‘rogue governor’ from interfering in the next election

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On January 6, 2021 , eight Republican senators and 139 Republican House members voted to reject the electoral votes submitted by either Arizona, Pennsylvania, or both. Since then, attention has turned to reforming the law under which they lodged those objections, the Electoral Count Act (ECA). This attention has understandably focused on reining in the ability of Congress to spuriously reject valid electoral votes, since that is the flaw in the ECA that these Republicans tried to exploit.

But there is another weakness in the ECA that should not escape attention, one that hinges on a strategy colloquially known as the “ rogue governor .” Fixing the law to prevent the “rogue governor” strategy should be an important part of Electoral Count Act reform. And as explained below, the best way to fix it is by shedding some of the ECA’s anachronistic historical baggage.

The danger of a strategy centered around a “rogue governor” has been forcefully explained by legal scholar Matthew Seligman, whose work has put this danger on the map for ECA reformers. See Matthew Seligman, Disputed Presidential Elections and the Collapse of Constitutional Norms (2022 working paper). As Seligman has laid out, the problem stems from the ECA’s so-called “governor’s tiebreaker” provision. See Seligman at 46–48.

If Congress has received more than one paper “purporting to be a return from a State,” on the day electoral votes are to be counted, then the House and Senate must each vote separately on which return to accept as the true list of electors from the state. “ But if the two Houses shall disagree ” on which purported return to accept, then whichever return is “certified by the executive of the State” must be counted. Put simply, if the House and Senate disagree on which of two purported sets of electoral votes to count, then the governor of the state breaks that tie.

As Seligman points out, this “tiebreaker” means that a governor and one house of Congress can work together to overturn the rightful outcome of a state’s presidential election. This could happen if the governor sends in a purported return at odds with the lawfully determined result of his state’s election. Assuming some other state official submits a return in line with the true outcome, there would then be a “multiple return” scenario, and

the two houses of Congress would vote on which to accept. If one house of Congress sides with the governor's submission, the candidate supported by the governor automatically wins the "tiebreaker" and the state's electoral votes — even though that outcome would contradict the true result in the state. See Seligman at 56–63.

Because it is relatively easier for hardline partisans of the same party to control the governorships of a few key swing states and one house of Congress, Seligman concludes that this strategy presents "the most dangerous risk of election subversion through manipulating the [Electoral Count] Act" — more dangerous than the risk of both houses of Congress rejecting lawful electoral votes. Seligman at 63.

How should this risk be eliminated? Seligman proposes that instead of the current governor's tiebreaker, "Congress should provide for judicial review as a tiebreaker if the chambers disagree about which of multiple submissions is valid." Seligman at 85. Seligman recommends that this judicial review process should come after the day for counting the electoral votes, triggered only if the two houses do in fact disagree on which votes to count from a state. Seligman admits that such judicial procedure "must proceed on an extremely expedited timeline" since there are "only two weeks between the joint session of Congress on January 6 and Inauguration Day on January 20." Seligman at 90. Seligman thus supports an expedited process with review by one lower court followed by "immediate and mandatory appellate review by the Supreme Court." Seligman at 90.

I agree with Seligman that the current governor's tiebreaker is a serious flaw in the ECA. The tiebreaker potentially gives conclusive power to a single partisan official, even if that official acts without any justifiable legal basis. And I agree that courts, rather than any state official or ad hoc commission, are the best institution to determine the rightful winner of a disputed state's electoral votes.

But there is a more elegant way to achieve judicial review, one that is neither rushed nor at the eleventh hour. The better approach is to conclude such review before Congress's electoral count, rather than after. Instituting such review would require eliminating the current ECA's paradigm of multiple "purported returns" entirely. And that is a change long overdue.

To understand why the ECA contemplates the possibility of Congress receiving multiple "purported" returns from a single state, it is crucial to keep in mind the historical background that led to the ECA's passage. The ECA was enacted in 1887 as a direct response to the disputed presidential election of 1876: the infamous Tilden vs. Hayes contest. In that election, Congress did in fact receive dueling sets of purported returns from three different disputed states: Florida, Louisiana, and South Carolina. In Florida, for example, the Republican governor certified that the electors for Republican Rutherford Hayes had won, while the Democratic attorney general certified that the electors for Democrat Samuel Tilden had won. See Edward B. Foley, Ballot Battles (2015) at 122.

To resolve these disputes, Congress created an ad hoc commission solely to resolve the disputes of the 1876 election, which eventually ruled for the Republican electors in all three contested states. To avoid a repeat of that chaotic and controversial process, Congress in 1887 enacted the ECA and established itself as the arbiter of any disputed states in future elections (with the state's governor serving as the tiebreaker of last resort).

It is eminently understandable that Congress chose to spell out a procedure for multiple purported returns in the 1887 ECA. In the wake of the 1876 election, it certainly seemed likely that such a situation would occur again and that some arbiter between multiple purported returns would be necessary going forward. The next time a potentially decisive state was close enough to be in dispute, it seemed inevitable that history would repeat itself and that some state official from each party would attempt to certify their own favored slate of electors.

In fact, however, this presumption no longer holds true, because the basic legal framework for conducting and contesting presidential elections is significantly different today than it was in 1876. Again looking to Florida in 1876 as a representative example, that state's canvassing board did not rule in favor of the Hayes electors until the day before the presidential electors had to meet and vote. This left "no time for Democrats to challenge the lawfulness of the board's determination before the electors cast their votes the next day." Foley at 122.

As recounted in depth by Professor Stephen Siegel, few options existed in the 1800s to legally challenge a state's presidential election outcome before it was certified. See Stephen A. Siegel, The Conscientious Congressman's Guide to the Electoral Count Act of 1887 (2004) at 568–573. States had not yet instituted expeditious court procedures for challenging presidential elections, so the only option was a "procedurally less efficient" lawsuit known as a "writ of quo warranto." Siegel at 573. While such challenges were attempted in the disputed states of 1876, none of these challenges "even had their trial phase completed before the electors balloted." Siegel at 573.

The upshot is that in 1876, political parties on the losing end of a state's initial result often had no choice but to do what Florida's attorney general did: purport to "certify" a competing slate of electors in the hopes of preserving a challenge that would later prove successful after the day the electors voted.

Today, however, there are many more legal options available to challenge a close presidential election. State and federal courts are well equipped to expeditiously handle disputes over the administration and counting of the votes in such elections. We saw this process play out in the 2020 election, when court challenges were heard and ruled on in several states well before the day the electors met. (And if the day the electors met were pushed later in the calendar — a reform that I and many others support — then courts would be even better positioned to handle all such challenges in time.)

In modern elections, all legal disputes over the true winner of a state's presidential election can thus be resolved in court before the day for elector balloting. And that means there is

no longer a good reason for the ECA to open the door to submissions of purported certificates by any state official who chooses to mail a paper to Congress. Such submissions are no longer necessary to preserve potentially valid challenges. And there is no principled reason why Congress should even consider a purported certificate that is inconsistent with the true outcome of a state as determined by the courts.

The ECA should therefore be amended so that the mere submission of a certificate by a state official no longer constitutes a " purported return " that triggers a "multiple return" scenario. Rather, as my colleague Andy Craig will explain in his soon-to-be-released comprehensive ECA reform recommendations, Congress should always be presented with only one presumptively valid return from each state. If any state official attempts to certify a winner at odds with the final outcome as settled by the state's own election procedures (and, if necessary, by the courts), the ECA should make clear that such a certification should not be presented to Congress. Instead, it should simply be ignored .

This does not mean Congress has no role to play in the electoral count. There are a few basic but important rules with which the electors must comply, and Congress should ensure those rules were followed. But Congress's role is not to second-guess or arbitrate the outcome of the general election in any state. The courts are equipped to handle such disputes, and they should do so before the electors meet, so that only one rightful slate is presented to Congress.

The best way to eliminate the governor's tiebreaker and the risk of a "rogue governor" is to ensure that Congress only considers one correct slate of electors from each state. That way, there can never be a vote on which Congress could "tie" in the first place.

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