



Why the Electoral Count Act Is Unconstitutional

The Founders did not want Congress to be able to choose the president because that would give the legislature too much power.

March 6, 2022

Regarding Thomas Berry’s letter “The Electoral Count Act’s Constitutional Role” (Letters, March 1): The ECA in its present form gives Congress essentially unfettered authority to invalidate state-certified slates of presidential electors. This is profoundly unconstitutional.

As we pointed out in our op-ed “Congress Sowed the Seeds of Jan. 6 in 1887” (March 19, 2021), the Framers, after much debate, determined to give Congress no substantive authority to select the president and vice president, except in the rare instance in which no candidate gains an Electoral College majority. The Constitution’s Electors Clause gives state legislatures plenary authority in choosing how to select electors. It allows Congress to determine only the day on which the Electoral College casts its votes.

The Framers’ choice reflected separation-of-powers considerations—if Congress could select the president, this would make the executive branch a subordinate, and not a coequal, branch. This would greatly augment the power of the federal legislature, which the Framers were determined to limit. Moreover, disputes over the selection of presidential electors involve a legal, not a political, discernment, that is appropriate for a judicial body. Congress is not a court.

To the extent that disputes about presidential electors arise, they can be resolved by courts. When state legislatures determine the manner of selecting electors, they exercise power granted to them by the U.S. Constitution, making these determinations a unique species of federal law. Hence, any disputes about specific selection of presidential electors involve the application of federal law. Since the power to determine what federal law requires rests with the judiciary, the federal courts have the primary responsibility to resolve these disputes.

To facilitate timely resolution, Congress should enact a statute providing for an expeditious judicial handling of any presidential elector-related challenges, with the Supreme Court as ultimate decision maker. The only power that Congress legitimately possesses here is a purely ministerial authority to receive the letters featuring certified state electoral results, have them opened by the vice president and counted in the presence of both houses. Congress should amend the Electoral Count Act to reflect this constitutional reality. Holding itself out as able to overturn

the people's will and choose the president will add to political polarization and inspire future violence, putting Congress itself at risk.