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GOP Senators' Electoral College Stunt Is a Dead End

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On Saturday, eleven Republican senators led by Ted Cruz (R., Texas) announced a plan to vote "to reject the electors from disputed states" when Congress convenes to count the electoral votes and declare a winner of the presidential election, unless and until an "emergency 10-day audit is completed." These senators want Congress to "immediately appoint an Electoral Commission, with full investigatory and fact-finding authority" based on the model of the Electoral Commission created to resolve the disputed 1876 election.

To better understand why this plan is both illegal and a terrible idea, some background history is necessary. The Constitution's Twelfth Amendment stipulates that the electors from each state must meet, vote, and record their votes in two separate lists, one for president and one for vice president. They must then "sign and certify" those lists and transmit them "sealed to the seat of the government of the United States, directed to the President of the Senate." Once the lists make their way to Congress, 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."

This passive-voice phrasing crucially leaves out *who* does the counting. And the Twelfth Amendment is also silent on the extent to which the power to count includes the power to judge whether particular votes *should* count. As Justice Joseph Story observed in his 1833 *Commentaries on the Constitution*, "no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes," and it "seems to have been taken for granted, that no question could ever arise on the subject."

Unfortunately, that assumption turned out to be overly optimistic. Controversies did arise, culminating in the disputed Hayes–Tilden election of 1876, which legislators settled by passing an emergency bill after the electors had cast their ballots but before Congress had counted them. The bill established a commission to determine the winner of each disputed state, but it did not attempt to set any long-term precedent.

After decades of uncertainty and ad hoc answers good for one election only, Congress resolved to definitively settle the Twelfth Amendment's ambiguities in 1887 with the passage of the Electoral Count Act (ECA). Avoiding the chaos and uncertainty of the 1876 election was a key goal of the bill; Representative Charles Baker expressed the common desire to "provide

against a recurrence of the vexed questions that once threatened the welfare and peace of our country" and to select a president in such a way "so that the possibility of dissension and strife shall be avoided." Representative John Eden noted the fraught history of election procedures being "decided upon the spur of the moment and amid the excitement of party contests." Representative Hilary Herbert, putting it even more starkly, recalled that eleven years earlier "the country was on the eve of civil war because we had a disputed Presidential election" and because there was no law in place "under which the count could be made."

Congress believed that filling the gaps in the text of the Twelfth Amendment was the way to prevent such chaos in the future. During the congressional debate over the ECA, Representative Samuel Dibble remarked with consternation that it had been "a question ever since [the Twelfth Amendment] was adopted, by whom the votes shall be counted."

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There was also significant disagreement and uncertainty over how much adjudicative authority the power to count entailed. To some members of Congress, the count was purely a formality. Representative Dibble described it as "the kind of ascertainment that the clerk of a court or a registering officer exercises when he reads the decree of the court, in order to record it," which is to say, "a ministerial act, not a judicial act." But others took a different view. Representative William Cooper argued that the power to count included the power to ascertain whether each list was "in fact the lawful vote of a State." Representative George Adams similarly believed that legal judgment is implied in the duty to count and that Congress's "determination that [an] alleged return is the legal return is the counting of the vote of that State within the meaning of the Constitution."

Representative Andrew Caldwell, one of the primary drafters of the ECA, proclaimed that its passage would end these debates and "settle all the questions which have arisen from time to time as to the electoral count." The act, he said, would establish "first, that the power to count the vote is not in the President of the Senate" but instead "in the two Houses of Congress," and, second, that the "power of the two Houses in counting the vote is something more than ministerial and perfunctory merely." Congress would have the power "to determine what are legal votes, and who has a majority of legal votes" because the "power to judge of the legality of the votes is a necessary consequent of the power to count."

To that end, the ECA gave Congress the authority to reject an illegal electoral vote by a majority vote of both houses. But the ECA's drafters knew how explosive and consequential that power could be if it were ever exercised, so they laid out narrow grounds for rejecting an electoral vote as illegal: Only those votes that have not been "regularly given by electors whose appointment has been lawfully certified" can be rejected.

Thus, the ECA creates two specific categories of illegality: To be illegal, an electoral vote must either have been not "regularly given" or not "lawfully certified." And at the time of the bill's passage, neither category was understood to cover a belief that the election of an elector was flawed.

The inquiry into whether an electoral vote was "regularly given" involves questions *not* about how the elector was chosen, but instead about the elector's *act* of voting for president itself — whether it complied with the basic, facially apparent requirements of procedure. Those who drafted and passed the ECA provided a helpful litany of examples of valid reasons for Congress to reject an electoral vote as not "regularly given," including: if the vote was not cast "by ballot as the law requires," if the vote was not cast "upon the day appointed by law," if an elector failed to "sign and certify" the vote, if an elector failed to cast at least one vote for "a citizen of another State," and if the vote were for someone not constitutionally "eligible to the office" of president (such as someone not "a native-born citizen, or over thirty-five years of age").

Complementing these potential *procedural* deficiencies, the category of votes not "lawfully certified" encompassed attempted certifications of persons rendered ineligible to be electors, most likely by some structural constitutional provision. Examples included: if the vote was cast by an elector "ineligible to that office" (such as someone already holding another office), if a state attempted to cast a total number of electoral votes not "equal to her number of Senators and Representatives," if a state attempted to cast electoral votes after abandoning a republican form of government, or if a territory not yet admitted as a state (or not yet *re*admitted as a state) attempted to cast electoral votes (a much more plausible problem for those who had lived through the gradual readmission of the seceded states after the Civil War).

Although Congress contemplated the unlikely event of someone claiming to be an elector despite the legally mandated election for electors having not occurred, conspicuously *absent* from the debate over the ECA was any discussion of objections based on a wholesale relitigation of the conduct of an election for the electors. Both the structure and history of the ECA support the view that general concerns about the administration of an election were *not* viewed as falling under either category of valid objection when the law was passed.

The ECA was expressly written to *prevent* a repeat of the interminable 1876 dispute. Rather than allowing Congress to kick the can of accountability to a commission, it requires that a decision on each objection to an electoral vote must be reached after a debate strictly limited to two hours. This structure makes sense only if objections are of a type that can be meaningfully considered and decided in two hours, i.e., if they involve *facial* legal problems with the electors rather than complex *factual* allegations of problems with their election.

What does all this history tell us about the eleven Republican senators seeking to "reject the electors from disputed states" when Congress meets to count the electoral votes and declare a winner on Wednesday? Well, first and foremost, none of their disputes with the 2020 election plausibly qualify as a challenge to an electoral vote as having not been "regularly given" or "lawfully certified." Indeed, the senators' stated plan to object to the votes as *both* "not 'regularly given' and 'lawfully certified' (the statutory requisite)" without differentiation between the two demonstrates that they are not even attempting to take seriously the text of the bill as it was understood at the time of passage. To be sure, the ECA can always be altered by the passage of a new bill, which is presumably the vehicle by which these senators will demand a new electoral commission. But unless and until such an amendment to the ECA passes, the ECA is still binding. And the very fact that these senators acknowledge they would need a commission

to meaningfully investigate their issues with the election shows that their challenge does not faithfully qualify as an ECA challenge.

The ECA codified an important lesson learned from 1876 and earlier elections: Congress as an institution is ill-suited to the type of quick, fact-intensive, and impartial investigation necessary to competently resolve questions about the administration of an election. Those questions are better left to the courts, so the ECA, among other things, moved the counting of electoral votes back to "more than double the time the states had to determine the outcome of their elector elections."

That is what happened, successfully, in the 2020 election. Although the letter by the eleven Republican senators disingenuously notes that the Supreme Court has twice declined review of cases arising from the 2020 election, this does not mean, as the letter implies, that courts have not "heard evidence and resolved these claims of serious election fraud." The state and federal judiciary encompasses vastly more than the Supreme Court, and cases have been heard and decided in dozens of courts across the country, as the ECA contemplates.

Speaking in support of the ECA's passage in December 1886, Representative Herbert presciently observed that the "country never will be satisfied in any political case with a temporary expedient or device under a law passed at the moment, after parties had taken sides on the question." The 1876 commission failed to attain legitimacy, he argued, because the people "want laws passed before cases arise, and not with reference to any special case that may have arisen" already.

Those senators inviting a repeat of the chaos of 1876 today would do well to consider the wisdom of Herbert and other men who lived through it.

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