

The Electoral Count Act & The Process of Electing a President

The Electoral Count Act of 1887 (ECA) provides the primary legal framework for casting and counting electoral votes for president and vice president in accordance with the requirements of the Constitution. In addition to setting a timeline for selecting electors and transmitting their votes to Congress, the ECA establishes certain dispute-resolution procedures for the counting process in Congress—including when Congress receives competing slates of electoral votes from the same state. Together with the Twelfth Amendment, the ECA also sets out the limited, ministerial role that the vice president, as the President of the Senate, plays in counting the electoral votes.¹

Although intended to bring clarity to the process by which Congress determines the winner of the presidential election, following the highly contested and chaotic election of 1876, the statute is extraordinarily complex and has been described as “almost unintelligible.” It undoubtedly needs to be revised. But it is the primary law governing the process for this year’s election and, importantly, considering the ECA’s text and legislative history together, it does provide some clarity as to how Congress should exercise its duties under the Constitution.² The Task Force has consulted many sources in conducting its analysis, including an extensive account of the statute’s legislative history.³ It is the collective view of the Task Force that the analysis of the ECA set forth below—which is consistent with the history of the statute—is the best one. We therefore offer this paper with the intent of providing a consistent, comprehensive guide to understanding this complex statute, which has the potential to become dispositive in the outcome of the general election.

CONSTITUTIONAL FRAMEWORK FOR PRESIDENTIAL ELECTIONS

Presidential elections in the United States are governed by a combination of the U.S. Constitution, federal statutes, and state and local law. The overall timeline of the election is set primarily by federal law within the constraints set by the Constitution. The mechanics of conducting the election are governed primarily by state and local law.

The president is chosen by the Electoral College, which is composed of electors from each state.⁴ Article II of the Constitution provides that each state “shall appoint” its electors for president “in such Manner as the Legislature thereof may direct.”⁵ All states have chosen to conduct elections, and most appoint all electors to

¹ It may surprise many Americans to learn that the vice president is assigned any role in the process of the presidential and vice-presidential election, given that he or she is often a candidate. But as we explain later in the paper, the vice president does not have any substantive decision-making power over the counting of electoral votes.

² Although it has been in effect for more than 130 years, the validity and enforceability of the ECA have never actually been tested. See, e.g., Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J. L. & Pub. Pol’y 340, 353 (2016); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1811 (2002).

³ See Stephen A. Siegel, *The Conscientious Congressman’s Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541 (2004). Not all of Siegel’s conclusions are uniformly accepted among scholars and we have noted where there are points of substantive disagreement. But we have found his historical analysis to be particularly helpful in resolving ambiguities and disagreement about the statute.

⁴ The number of electors for each state is determined by adding the number of Senators and Representatives that the state has in Congress. See U.S. Const. art. II, § 1, cl. 2.

⁵ U.S. Const. art. II, § 1, cl. 2.

the winner of the statewide popular vote.⁶ Article II gives Congress the power to “determine the Time of chusing the Electors.”⁷ It further requires that all electors vote on the same day chosen by Congress.⁸

The Twelfth Amendment requires that the presidential electors “shall meet in their respective states, and vote by ballot for President and Vice-President,” and then transmit lists of all their votes to the President of the Senate (an office filled by the vice president, unless the vice presidency is vacant) for opening “in the presence of the Senate and House of Representatives.”⁹ The “votes shall then be counted.”¹⁰ The candidate having the greatest number of electoral votes for president shall become president, “if such number be a majority of the whole number of Electors appointed.”¹¹ (The same process applies to the election of the vice president.)

Finally, pursuant to the Twentieth Amendment, the terms of the president and vice president end at noon on the 20th day of January—at which point the newly elected or re-elected president and vice president are sworn in.¹²

HISTORY & PASSAGE OF THE ELECTORAL COUNT ACT

Congress enacted the Electoral Count Act of 1887, 3 U.S.C. § 1, *et seq.*, in the wake of the disputed Hayes-Tilden election of 1876.¹³ For the first time since the Civil War, a Democrat, Samuel Tilden, had won the popular vote.¹⁴ But the election ultimately came down to three Southern states—all under the fragile control of Reconstruction Republican governments—which had each sent to Congress multiple competing electoral returns.¹⁵ If those states went to Hayes, then Tilden would lose by a single electoral vote.¹⁶

Congress had no existing procedures to decide which of the disputed returns from each state should be counted, so it functionally delegated the decision to an ad-hoc Electoral Commission composed of five senators, five representatives, and five Supreme Court justices.¹⁷ The Commission was expected to split along partisan lines with the decisive fifteenth vote to come from independent Supreme Court Justice David Davis. But Justice Davis declined to serve on the Commission, leaving the fifteenth seat to a Republican justice, Joseph P. Bradley, widely

⁶ See Thomas H. Neale, *The Electoral College: How It Works in Contemporary Presidential Elections*, Congressional Research Service (May 15, 2017). All but two states use a winner-take-all method of apportioning electoral votes. Nebraska and Maine appoint electors by congressional district (the winner of the popular vote in each district gets that district’s electoral vote), with the remaining two electoral votes (one for each Senator) going to the winner of the statewide vote.

⁷ U.S. Const. art. II, § 1, cl. 4.

⁸ U.S. Const. art. II, § 1, cl. 4.

⁹ U.S. Const. amend XII. The Congress that meets to count electoral votes is the newly elected Congress that takes office on January 3rd. See U.S. Const. amend. XX, § 1.

¹⁰ U.S. Const. amend XII.

¹¹ *Id.*

¹² U.S. Const. amend XX.

¹³ See *Bush v. Gore*, 531 U.S. 98, 153-57 (2000) (Breyer, J., dissenting).

¹⁴ *Id.*; Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 Va. L. Rev. 551, 634–35 (2004).

¹⁵ *Id.*; see also Edward B. Foley, *Ballot Battles: The History of Disputed Elections in the United States* (2016).

¹⁶ 531 U.S. at 156.

¹⁷ *Id.*; see also Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 Fordham L. Rev. 1043, 1047 (2010). Congress retained the ability to override the Commission, but because of a partisan split between the chambers, they were expected to—and did—deadlock.

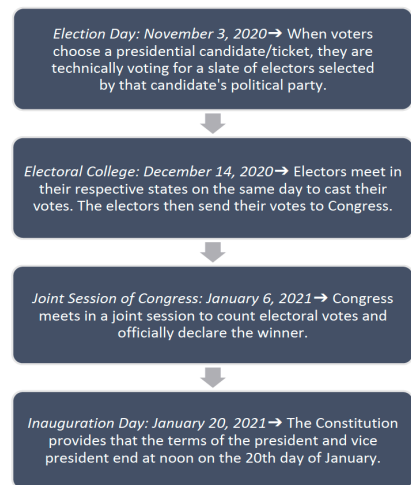
regarded as partisan.¹⁸ And indeed the Commission voted along partisan lines to grant the disputed electoral votes to Hayes, securing his victory amid Democrats’ raucous accusations of partisan bias.¹⁹ Democrats accepted the result only after Republicans agreed to a series of demands, including withdrawal of federal troops from the former Confederate states and an effective end to Reconstruction, in a deal known as the Compromise of 1877.²⁰

Congress later enacted the ECA to prevent another Hayes-Tilden debacle and to avoid partisan paralysis in presidential elections. To that end, the ECA set a timeline for the electoral vote process and established, *ex ante*, the default rules and dispute-resolution procedures that Congress would use in the event it ever again received contested or inconclusive electoral returns.²¹ It also delineated the limited role the vice president, serving as the President of the Senate and presiding officer, plays in the process.²²

TIMELINE FOR SELECTING ELECTORS & TRANSMITTING ELECTORAL VOTES TO CONGRESS

The first fourteen sections of the ECA set out various dates and deadlines for appointing electors, casting electoral votes, and transmitting them to Congress. These provisions also impose certain affirmative duties on state governors, electors, and others to ensure timely delivery of electoral votes. The following is a summary of these deadlines and duties:

- **Election Day (Tuesday, November 3, 2020).** The ECA requires all states to appoint electors—i.e., to hold their presidential elections—on “the Tuesday next after the first Monday in November.”²³
- **Safe Harbor Deadline (Tuesday, December 8, 2020).** A slate of presidential electors qualifies for “safe harbor” status if, at least six days before the electors meet to cast their votes, the state makes a “final determination” of any dispute by “judicial or other methods or procedures” pursuant to state law enacted prior to Election Day. A state’s appointment of a slate of electors that qualifies for safe harbor status must be treated as “conclusive” by Congress and governs in the counting of electoral votes as regulated by later provisions of the ECA.²⁴



¹⁸ 531 U.S. at 156; Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 287–93 (2002).

¹⁹ 531 U.S. at 156-57; *see also* Land & Schultz, *supra* note 2, at 353 (“Democrats caused ‘wild disorder’ during the count on March 1, 1877, successfully disrupting floor proceedings and blocking consideration of the Electoral Commission report—even to the extent that, ‘for hours Speaker Randall could not even make himself heard.’”).

²⁰ *See generally* Foley, *supra* note 15; John C. Fortier, *After the People Vote: A Guide to the Electoral College*, The AEI Press (3d ed. 2004).

²¹ *See* Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. Contemp. Legal Issues 717, 737 (2005); Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 Tex. L. Rev. 1985, 2004–05 (2003).

²² Siegel, *supra* note 3, at 639-40 (“The ECA’s goal was to reduce the Senate President’s discretionary power as gatekeeper to the absolute minimum . . .”).

²³ 3 U.S.C. § 1.

²⁴ 3 U.S.C. § 5.

- Governor’s Certificate of Ascertainment. As soon as practicable after the election, the “executive of each State” (usually the governor)²⁵ must “ascertain” and certify his or her state’s election results and its chosen slate of electors. The state’s executive must send this “certificate” under state seal to the Archivist of the United States and six “duplicate-originals” to the electors themselves no later than December 14, when the electors meet to cast their votes.²⁶ Each executive must also deliver any final determination of election disputes to the Archivist “as soon as practicable after such determination.”²⁷ The Archivist must then send copies of all certificates to the two houses of Congress.²⁸
- Meetings of the Presidential Electors (Monday, December 14, 2020). Electors meet in their respective states on the same day (“the first Monday after the second Wednesday in December”) to cast their votes in a place determined by the state legislatures.²⁹ A state may fill any vacancies in its slate of electors (due to an elector’s sickness or death, for example) on this day.³⁰ At the meeting, electors must tally their votes for president and vice president separately.³¹ They must make, sign, seal, and certify six copies of their votes and attach to each the certified list of electors provided by the state’s executive.³²

Electors must then mail one of these returns to the President of the Senate; two to the state’s secretary of state, one of which the secretary must preserve for one year as a public record; two to the Archivist, one of which must be held as a public record; and one to the nearest federal district court.³³ If a state’s return fails to reach the President of the Senate by December 23, 2020, then the President of the Senate or Archivist can request a return from the secretary of state or the applicable federal district court.³⁴

COUNTING ELECTORAL VOTES & RESOLVING DISPUTES IN CONGRESS

On Wednesday, January 6, 2021, at 1:00 p.m., the two chambers of Congress will meet in a special joint session to count electoral votes as directed by the ECA.³⁵ Although electoral vote certificates are opened and votes are officially counted at this joint session in the presence of both chambers, the ECA directs the two chambers to divide and meet *separately* when objections are raised to any particular electoral votes. After the two chambers consider such disputes, they reconvene in the joint session to resume counting.

²⁵ For this purpose, the ECA defines “State” to include the District of Columbia and its “executive” as the Board of Commissioners, which Congress has since dissolved and replaced with a single executive mayor. See 3 U.S.C. § 21. Thus, D.C.’s executive under the ECA is the Mayor.

²⁶ 3 U.S.C. § 6.

²⁷ *Id.*

²⁸ *Id.*

²⁹ U.S. Const. art. II, § 1; 3 U.S.C. § 7.

³⁰ 3 U.S.C. § 4.

³¹ U.S. Const. amend. XII; 3 U.S.C. §§ 8-9.

³² 3 U.S.C. §§ 9-10.

³³ 3 U.S.C. § 11.

³⁴ 3 U.S.C. §§ 12-13.

³⁵ 3 U.S.C. § 15.

Ultimately, through this process, the ECA requires that:³⁶

- *If there is only one submission of electoral votes from a state*, Congress must count those votes unless both chambers agree to reject them for reasons specified in the statute (and discussed below).
- *If there is more than one submission of electoral votes from a state*, the question ultimately is whether the chambers agree on which slate to accept. If the chambers agree to accept a particular slate, those electoral votes count. If the chambers agree to reject a particular slate, then those electoral votes do not count. If the chambers *disagree* as to which slate to accept, then the prevailing votes are those that were cast by electors certified by “the executive of the State.”³⁷ This provision, known colloquially as the governor’s tiebreaker, operates as a “fail-safe to prevent state disenfranchisement.”³⁸

This section begins by summarizing the procedures that govern in the joint session, and then explains the rules that apply when the two chambers meet separately to consider disputes before reconvening in the joint session.

Joint Session

The vice president presides over the joint session, which means he or she sits in the Speaker of the House’s chair and has the “power to preserve order.”³⁹ This power is not substantive: it is the standard obligation of a presiding officer in a chamber of Congress to preserve order and decorum among lawmakers and in the galleries.⁴⁰

During the joint session, the vice president is required to open, in alphabetical order by state, “all the certificates and papers purporting to be certificates of the electoral votes.”⁴¹ After opening all such returns from a state, the vice president hands them to four “tellers” who read the results and record the votes. The vice president then calls

³⁶ See Siegel, *supra* note 3.

³⁷ *Id.*

³⁸ Thus, when the chambers disagree, a state will only be disenfranchised (i.e., have no electoral votes counted) if there is no certificate signed by the governor. Siegel, *supra* note 3, at 633-34 & Appendix II. If two conflicting submissions of electoral votes are signed by a lawful governor, as was the case with respect to Hawaii following the 1960 election, the statute does not provide explicitly how to resolve this conflict. Hawaii’s situation, which did not affect the determination of an Electoral College majority, was resolved by unanimous consent (upon Vice President Nixon’s suggestion) without intending to create a precedent. See, e.g., Foley, *supra* note 15, at 158-59.

³⁹ 3 U.S.C. §§ 15, 16, 18.

⁴⁰ See Standing Rules of the Senate XIX.4, XIX.6, S. Doc. 113-18 (Jan. 24, 2013); Rules of the House of Representatives I.2, 116 Cong.

⁴¹ 3 U.S.C. § 15. The ECA’s requirement that the vice president open “all certificates and papers *purporting to be*” electoral votes (emphasis added)—together with historical electoral count precedent—indicate that the vice president may not refuse to present Congress with all electoral returns from a state. Siegel, *supra* note 3, p. 639-40 (“[T]he ECA’s procedural rules seem designed to drain as much power as possible away from the [presiding officer] and give it to the two houses.”) and 554 n.70 (citing legislative history); see also Kesavan *supra* note 2, at 1702-03 n.220. But the ECA’s text is arguably ambiguous on this point, and some may argue that the vice president can attempt to limit the number of returns that Congress considers in the first instance. Even if that were the case, however, the chambers can agree to require the vice president to present all returns. *Id.* Similarly, there is an argument that the vice president may attempt to constrain the chambers’ consideration of one or more returns by opining as to the nature of the return(s) (including which return satisfies the safe harbor requirements of 3 U.S.C. § 5) in the first instance. Again, even if that were the case, members of Congress can object under 3 U.S.C. § 15 (or, perhaps, invoke another procedural mechanism), *id.* at 646-49, at which point the separate chambers—not the vice president—determine whether they agree with the vice president’s safer harbor determination and which of multiple slates should otherwise be counted, as described below. *Id.* at 649-51; see also 3 U.S.C. § 17 (recognizing that the chambers may separate to consider “an objection that may have been made to the counting of any electoral vote, or other question arising in the matter”) (emphasis added).

for objections.⁴² Members of Congress may object to a state’s electoral votes only in writing. The objection must “state clearly and concisely, and without argument, the ground [for the objection]” and “be signed by at least one Senator and one member of the House of Representatives.”⁴³

After all objections pertaining to a state’s returns have been received and read,⁴⁴ the House and Senate meet separately to consider the objections pursuant to the ECA and each chamber’s own procedural rules.⁴⁵ The ECA specifically provides that in the joint session, “no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.”⁴⁶ In other words, the ECA does not permit the debate or resolution of disputes during the joint session itself; rather all disputes must be referred to the chambers to debate and decide in separate meetings. Congress may not move on to the next state until all objections have been “finally disposed of” in the manner required.⁴⁷

Separate Meetings of the Chambers

Congress considers objections and evaluates electoral returns in concurrent meetings of each chamber in accordance with each chamber’s own procedural rules (within the outer limits set forth in the ECA).⁴⁸ In three long, convoluted sentences, section 15 of the ECA anticipates certain dispute scenarios and establishes default rules as to how the chambers of Congress should resolve them.

If a state submits only one electoral return, the chambers may reject the votes of electors whose appointments were “lawfully certified” by the state’s executive only if they agree that those votes were not “regularly given.”⁴⁹ When the return satisfies the safe harbor requirements of 3 U.S.C. § 5, it is presumed to be lawfully certified. Importantly, the ECA creates a presumption in favor of counting a state’s single submitted return.⁵⁰

The ECA does not explicitly define what it means for an elector’s appointment to be “lawfully” certified or for an electoral vote to be “regularly given,” but these grounds for rejection should be narrowly construed in light of the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ There is also a closely related textual ambiguity in ECA with respect to the procedure by which the vice president calls for (and the chambers then consider) objections when there are multiple returns—namely, whether the objections are considered in some sequence determined by the vice president based on his presentation of certificates to Congress, or whether all objections to all certificates must be made and considered together. But, considered together, the text and both pre- and post-ECA precedent indicate that the vice president should present all returns from a state before calling for objections to any return. Siegel, *supra* note 3, at 640 n.613 (“The text is ambiguous, but precedent is clear that all papers from a state are presented before objections are in order. . . . Thus the Senate President cannot influence the process by controlling the order in which returns are considered.”)

⁴⁵ See U.S. Const. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings.”).

⁴⁶ 3 U.S.C. § 18

⁴⁷ 3 U.S.C. § 15.

⁴⁸ When the Senate meets as a standalone body for this purpose, the vice president, as the presiding officer, is required to call a vote on the objections after a statutorily limited period of debate. 3 U.S.C. § 17. In that instance, the vice president may break a tie but otherwise has no vote. U.S. Const. art. I, § 3, cl. 4.

⁴⁹ 3 U.S.C. § 15.

⁵⁰ See Jack Maskell & Elizabeth Rybicki, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress*, Congressional Research Service, at 5 (Nov. 15, 2016); Siegel, *supra* note 3, at 615; Eric Schickler, Terri Bimes, & Robert W. Mickey, *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, 16 J. L. & Pol. 717 (Fall 2000); Colvin & Foley, *supra* note 17, at 1085.

presumption of regularity when a state submits a single return.⁵¹ Each chamber should consider an elector's appointment to be lawfully certified if it is supported by a valid certificate of ascertainment from the state's executive pursuant to 3 U.S.C. § 6, which requires that the ascertainment be made in accordance with state law.⁵² Each chamber should consider an electoral vote to be "regularly given" if it is (i) the actual vote cast (i.e., not a forgery), (ii) without corruption, (iii) by a qualified elector, (iv) voting on the correct day, (v) for a qualified candidate, and (vi) in compliance with any state law binding that state's electors or otherwise requiring them to cast their votes in a particular manner.⁵³ Again, no vote may be rejected on these grounds unless *both* chambers independently decide to do so.⁵⁴

When Congress receives more than one electoral return from a state, the ECA contemplates three different scenarios that each chamber may need to consider.⁵⁵

If one of the competing returns meets the requirements of the ECA's safe-harbor provision (3 U.S.C. § 5), then the chambers should accept that return unless the votes therein were not "regularly given," as defined above. Thus, the ECA directs the chambers to defer to a state's speedy resolution of its own election disputes according to its own pre-established standards and procedures.⁵⁶

If multiple competing returns from the same state purport to be within the safe harbor, then the chambers should accept the slate of electors that is "supported by a decision of such State so authorized by its law."⁵⁷ In other words, the prevailing slate is the one the chambers find to be supported by a final determination of "the lawful tribunal of such state" (i.e., the proper state decision-maker).⁵⁸ The chambers accept that prevailing slate, excepting any votes therein that it determines were not "regularly given."

⁵¹ See, e.g., Maskell & Rybicki, *supra* note 50, at 7-8; Siegel, *supra* note 3, at 607-608 (suggesting that safe harbor accounts for problems with electors' appointment while rejection based on votes not "regularly given" refers only to problems with electors' eligibility and voting, such as when electors are from a territory not entitled to participate in the Electoral College, are not qualified to be electors, or voted in violation of constitutional requirements or otherwise corruptly); Kesavan, *supra* note 2, at 181 (suggesting that "regularly given" should be "narrowly construed only to include problems of the electoral certificate and to exclude problems of the electoral vote, clarifying that the joint convention may judge the authenticity of the electors' acts, but not the electors' acts themselves").

⁵² 3 U.S.C. §§ 6, 15. See Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loyola U. Chi. L.J. 309, 352-53 (2019).

⁵³ Cf. Siegel, *supra* note 3, at 619 n.474. It is unclear whether, in the absence of a state statute binding that state's electors to vote for the presidential candidate who won that state's popular vote, Congress may disregard an electoral vote from a state solely on the grounds that the elector voted for the candidate who lost that state's popular vote, or someone who did not even run in the election.

⁵⁴ Foley, *supra* note 52, at 353.

⁵⁵ As noted above, there is some textual ambiguity in the ECA as to whether the safe-harbor determination is made in the first instance by the vice president during the joint session (subject to being overruled by the chambers when they meet separately) or whether that determination is made in the separate meetings of the chambers in the first instance. The legislative history of the ECA, and the prior experience of Congress in handling issues concerning electoral votes (including the 1876 election), make clear that there was no congressional intent to give the vice president what would in essence be a tie-breaking role in the event of bicameral disagreement. See generally Siegel, *supra* note 3. Rather, as the history of the decade-long debate over its provisions indicates, the Congress that adopted the ECA preferred a state-based tiebreaker. Given the "state's rights" philosophy underlying that decision, it would be anomalous to give the vice president this tie-breaking role. *Id.*

⁵⁶ 3 U.S.C. § 15. Indeed, one of the main purposes of the safe-harbor provision was to encourage states to enact their own post-election contest procedures for presidential elections. See, e.g., Siegel, *supra* note 3, at 585 (citing legislative history).

⁵⁷ 3 U.S.C. §§ 5, 15.

⁵⁸ 3 U.S.C. § 15.

*If neither (or none) of the competing returns submitted by the same state is within the safe harbor, then the chambers accept the “lawful votes” of the slate of electors composed of “lawful electors appointed in accordance with the laws of the State.”*⁵⁹

Reconvening in the Joint Session

After the proceedings in the separate chambers over any disputes as to a state’s electoral returns, the chambers reconvene in the joint session and the vice president “shall then announce the decision of the questions submitted.”⁶⁰ As explained above, no further debate occurs in the joint session. If the chambers return to the joint session having reached different conclusions as to which electoral return to accept, the governor’s tiebreaker prevails, and Congress counts those electoral votes.⁶¹

If deliberation and counting pursuant to these procedures do not conclude on January 6, 2021, either chamber may recess until 10:00 am the next day, but no more recesses are allowed if the counting is not completed by Monday, January 11, 2021.⁶²

When the process is completed, the vice president shall “announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any elected President and Vice President.”⁶³

THE VICE PRESIDENT’S MINISTERIAL ROLE

As explained above, the ECA specifically assigns the President of the Senate—usually the vice president—specific duties as the presiding officer in the joint session of Congress: preserving order and decorum; opening and handing electoral vote certificates to the tellers; calling for objections; and announcing the results of votes on objections. (And in the separate meeting of the Senate, he or she calls a vote on objections after a statutorily limited period of debate, and may break a tie, but otherwise has no vote.⁶⁴) The ECA also provides that the vice president shall announce the result of the overall electoral vote count at the end of the vote-counting process—meaning he or she announces the winning candidates for president and vice president.⁶⁵ None of these duties include the power to decide controversies that might arise over counting electoral votes or to otherwise decide the outcome of the election.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Siegel, *supra* note 3, at 633 & Appendix II. The governor’s tiebreaker does, however, present some ambiguities. For example, as noted earlier, it does not address what to do when there is more than one return certified by a lawful governor. *See id.* at 631 n.543. There is also perhaps some ambiguity as to whether “executive of the State” could include independently elected or appointed members of a state’s executive branch other than a governor, such as a Secretary of State. *See Ackerman & Fontana, supra* note 14, at 641. In addition, although we think the better view is the one expressed herein, there is also some disagreement among scholars as to whether the tiebreaker applies in all scenarios involving multiple returns (as we suggest) or whether it applies only to certain scenarios. *Compare id.* at 633 & Appendix II with Maskell & Rybicki, *supra* note 50, at 8; *see also* Foley, *supra* note 15, at 157-58.

⁶² 3 U.S.C. § 16.

⁶³ 3 U.S.C. § 15.

⁶⁴ U.S. Const. art. I, § 3, cl. 4.

⁶⁵ 3 U.S.C. § 15.

IF NO CANDIDATE HAS A MAJORITY OF ELECTORAL VOTES, CONGRESS DECIDES THE WINNER

The Twelfth Amendment provides that if no presidential or vice presidential candidate has a majority of electoral votes, then Congress will decide among the top candidates.⁶⁶ The House of Representatives chooses the president from among the three candidates who received the most electoral votes (or two in the case of a tie). The Senate chooses the vice president from among the two candidates who received the most electoral votes for that position. Importantly, although each Senator has one vote in the vice-presidential election, in the House the “votes shall be taken by states, the representation from each state having one vote.”⁶⁷ An absolute majority of House congressional delegations from each state (26) is needed to elect a president. Likewise, an absolute majority of Senators (51) is needed to elect a vice president.⁶⁸

IF CONGRESS HAS NOT CHOSEN A PRESIDENT BY NOON ON JANUARY 20TH, THE LAW PROVIDES FOR AN ACTING PRESIDENT

If the procedures established by the Twelfth Amendment and the ECA have not yielded a president-elect or vice-president-elect by noon January 20th, federal law provides that the vacancy shall be filled by an “acting president” (with the Speaker of the House first in line, followed by the president pro tempore of the Senate).⁶⁹ Accordingly, in the event of an incomplete election, the incumbent president does not stay in office. Rather, pursuant to the Constitutional and statutory order of succession, an incomplete election results in an acting president holding office until the results of the presidential election are resolved.

CONCLUSION

The ECA sets forth the mechanics, timeline, and dispute-resolution procedures for general presidential elections in accordance with the framework set forth in the Constitution. Although the dispute-resolution procedures of the ECA are far from a model of statutory drafting—and the validity and enforceability of the ECA have never been tested⁷⁰—these procedures have been used for more than 130 years, and many of its key statutory commands speak clearly. The ECA expresses unambiguous intent that Congress should count every state’s lawfully cast electoral votes. Its safe-harbor provision establishes a preference for a state’s timely determination of disputes regarding the appointment of its electors. If a state’s safe-harbor procedures fail to provide a definitive slate of electoral votes, the ECA preserves Congress’ discretion to decide, by separate action of both chambers, which electoral votes to count (including from among competing returns). The ECA also provides a tiebreaker in the

⁶⁶ U.S. Const. amend. XII (“The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed . . .”). The Twelfth Amendment does not explicitly address how to calculate a majority if one or more states fail to appoint electors at all, or if Congress rejects a state’s electoral votes. See Foley, *supra* note 52, at 333 & n.54, 359. If states fail to appoint electors, the Twelfth Amendment’s clear command to use the “whole number of Electors appointed” as the denominator would control, and the state’s allocated electoral votes would be subtracted from the total in calculating a majority. The Twelfth Amendment is unclear, however, about how to deal with votes rejected by Congress as a result of some sort of objection or other dispute. In that circumstance, Congress will have rejected votes claimed to be by “appointed” electors. The question, in essence, is whether the rejected electors are still considered appointed even though Congress has not recognized them as such (in which case, they would *not* be subtracted from the denominator), or whether the rejection by Congress effectively nullifies the appointment (in which case they would be subtracted from the denominator). Both views were raised during the debates over the ECA when it was being drafted, but the question was ultimately left unresolved.

⁶⁷ U.S. Const. amend. XII.

⁶⁸ *Id.*

⁶⁹ See 3 U.S.C. § 19; U.S. Const. amend. XX, § 3.

⁷⁰ See, e.g., Kesavan, *supra* note 2; Land & Schultz, *supra* note 2.

event the chambers disagree. Finally, if no candidate has a majority of electoral votes, then pursuant to the Twelfth Amendment, the House of Representatives chooses the president and the Senate chooses the vice president.

About the National Task Force on Election Crises

The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The mission of the nonpartisan National Task Force on Election Crises is to ensure a free and fair 2020 presidential election by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except an election that is free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member's point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>.