ELECTION 2016 AND THE ELECTORAL COLLEGE: THE NUMBER IS 270

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I. PRESIDENTIAL ELECTIONS IN PERSPECTIVE

On the face of it, election day seems pretty straightforward. One person, one vote. However, when you go into a voting booth and pull the lever, touch the screen, punch the chad, or fill in the bubble with a No. 2 pencil, you don't cast a vote for your candidate. You don't really vote for the president. Instead, you vote for someone you have probably never met, never seen, never heard from on a robo-call. You voted for a person who *promised* to vote for the candidate in December. You voted for the electors of the electoral college.

Presidential elections are a unique phenomenon. They combine law, politics, and history. In the deliberations of the founders over the constitution, the method and mechanics of electing the president consumed more time and effort than most other issues. Yet, of all constitutional and legal issues, Americans appear to know the least about the constitutional issues involved in presidential elections. The primary reason is that, although elections can be tumultuous and chaotic, they have followed a consistent pattern since at least 1916. The candidate who received the majority count of the electoral vote on election night became president even in those elections where the candidate did not receive a majority of the popular vote.

To some extent, this pattern was broken in the Bush - Gore Election of 2000. But even this election did not involve the electoral college. The issue was whether or not the

manner by which the electoral votes of Florida would be counted was constitutional. The little known Electoral Count Act of 1887 (ECA), which is still the law, (see Section III Electoral Count Act) could have been implicated. However, the ECA did not become an issue because Congress and the electorate generally accepted the decision of the Supreme Court in *Bush v. Gore,* 531 US 98 (2000).

The debates, the obsequious surrogates, the self-important interviews, allegedly scientific predictions, electioneering, and confusing polls will intensify as we approach November 8, 2016. Out of all of this, however, the only vote that matters is the vote of the electoral college. The only number that counts is 270 – the number of electoral votes necessary to elect a president.

If no candidate receives 270 electoral votes out of the total of 538 electoral votes, the U.S. House of Representatives elects the president and the Senate elects the vice president. The popular vote is meaningless except to historians and biographers. There have been four elections in which the candidate who received 270 electoral votes, and thus became president, received less than a majority of the national popular vote.

II. THE ELECTORAL COLLEGE AND ITS OPERATION

The function and operation of the electoral college are set forth in the U.S. Constitution as supplemented by federal law.[1] The method by which a president is elected was one of the most vigorously debated issues at the Constitutional Convention of 1787.[2] The proposals ranged from popular vote to vote by the state legislatures to vote by the governors of the states.

Leaving aside jokes about the electoral college not having a football team, the electoral vote is the single most significant event in presidential elections. In seventh

grade civics we learn that the electors from each state elect the president. We might even learn that if no candidate receives a majority of 270 electoral votes out of a total of 538 votes, the House of Representatives elects the president. Our education on this matter usually stops here.

The term "electoral college" does not appear in the Constitution. It probably derives from the English Parliaments of the mid-1600s during the British Civil War. Members were organized into "colleges", similar to the commitee system in Congress, to conduct the business of Parliament. The term appears in the U.S. Code to describe the electors as a group. [3] The Electoral College is not an organization or entity. It does not have an address or a staff. Each state has a number of electors which is equal to its representation in Congress—two senators and the number of representatives the state has in the House. [4] The District of Columbia is allotted three electors.[5]

A. Selection of Electors

The Constitution leaves it to the state legislatures to decide the method by which they choose the persons to be their electors.[6] The only constitutional requirement is that an elector cannot be a person who holds an "Office of Trust or Profit under the United States," nor can an elector be a person who has "engaged in insurrection or rebellion against the [United States], or given aid and comfort to the enemies thereof."[7]

The states use one of three methods to select electors:

1. The political parties select the persons to be electors based on the vote of the party members,

2. The executive committees of the political parties select the persons to be electors, or

3. The party conventions choose the electors.

In the District of Columbia, the executive committee of each party selects the persons to be electors. In Maryland, the selection of electors is left up to the parties. In Virginia, electors are chosen at each convention of each party.

The profiles of the persons who are selected to be electors vary widely. Usually these persons have demonstrated loyalty to the party such as state or local elected officials, state and local appointees, and persons who are otherwise connected to the party.

B. Election of Slate of Electors

On Election Day the voters elect the persons to be electors. In some states the persons to be electors are listed on the ballot underneath the names of the presidential and vice presidential candidates of the party. In other states, only the names of the presidential and vice presidential candidates appear on the ballot. Even though it may appear that the voter is voting for the president and vice president, he or she is actually voting for a slate of persons to be electors, each of whom is pledged to vote for the president and vice president the voter has chosen. Whichever ballot is used, the voter must vote for only one slate of elector nominees. The voter is not able to vote for some electors but not other electors on the slate. In 48 of the 50 states and the District of Columbia, the slate of electors that receives the most votes out of the state popular vote is the electoral slate of the state.

Both Maine and Nebraska use the congressional district method of distributing their electoral votes. The candidate who wins the most votes in a congressional district is allotted one electoral vote. The candidate who receives the most votes of the state popular vote is allotted the remaining two electoral votes.

Before 1804, the voters voted only for a slate of electors. The name of the presidential candidate was not on the ballot. When the winning slate of electors voted, they cast two votes, one for their preferred candidate and one for their second preferred candidate. The candidate who received a majority of the electoral votes was elected president, and the candidate who received the next highest vote total was elected vice president.[8] The disputed election between Thomas Jefferson and Aaron Burr in 1800 demonstrated a flaw in this system. The flaw was that the electors cast their two votes for individual candidates rather than one vote for president and one vote for vice president. The drafters of the Constitution did not anticipate that political parties would rapidly develop. Instead of certifying one neutral slate, some of the states were certifying slates on which the electors were selected based on their preference for a name candidate to be president and their preference for a named candidate to be vice president.[9] Consequently, a conflict arose between the voting method of the electors under the Constitution and the voting method in practice.

The Twelfth Amendment, which took effect in 1804, resolved this conflict. It eliminated the method in the Constitution and replaced it with a method whereby the states certify to Congress one slate of electors who are selected to vote for a named candidate to be president and another slate of electors who are selected to vote for a named candidate to be vice president. The Twelfth Amendment also addressed the method by which the House of Representatives would resolve an election in which no candidate received a majority of the electoral votes, referred to as a 'contingent election'. However, it left certain basic issues unresolved, (See Section IV Contingent Elections).

Once the national election is over, the public usually ignores the electoral college.

Nevertheless, the election process continues under the Electoral Count Act of 1887 (see Section III Electoral Count Act of 1887). The only significance of the election results on November 8 are that, based on the popular vote of each state, each presidential and vice presidential candidate is allocated a certain number of electoral votes. No president or vice president is elected until the electors chosen on election night have voted.

III. THE ELECTORAL COUNT ACT OF 1887

The Constitution mandates that the candidate who receives a majority of the electoral votes becomes president. The Constitution is silent on the procedure for counting the electoral votes as well as who decides which electoral slate to count if a state submits more than one slate or an uncertain slate of electors. It states only that the electoral votes "shall be counted" but does not state who conducts the count. [10] Before the 1876 election between Republican Rutherford B. Hayes and Democrat Samuel Tilden, Congress was able to resolve the issue of how to count the electoral votes. When the issue of disputed slates of electors arose, Congress settled this issue on an *ad hoc* basis without a constitutional crisis. This changed with the Hayes-Tilden Election of 1876.

A. Hayes - Tilden Election of 1876

The Hayes - Tilden Election of 1876 occurred only ten years after the end of the the Civil War. Tension and passions stemming from the Civil War and Reconstruction were reflected in the election campaign. On election night, the Democrat, Tilden had received a solid majority of the national popular vote including the state popular vote in each of the former Confederate states. However, he received only 184 electoral votes out of a total of 369 electoral votes which was one vote less than the 185 which was required

for a majority of the electoral vote. Hayes received 165 electoral votes, 20 votes less than a majority. Tilden needed only one more electoral vote to reach the majority of 185.

A total of 19 electoral votes in Florida (4), Louisiana(8), and South Carolina (7) was disputed as was one vote in Oregon. Tilden received the majority of the state popular vote in each of these states which should have entitled him to the electoral vote of each state and therefore a majority of the electoral votes. However, in each of these states, the Republicans controlled the state election administration boards in each state. These boards determined the validity of each popular vote that was cast. They were able to disallow just enough state popular votes to deny Tilden the highest number of votes in each of those states. The electoral votes of those states went to Hayes. They disallowed the votes by alleging that the votes had been obtained by force and intimidation to prevent newly enfranchised blacks from voting Republican.

None of those states had a law that mandated that the state submit only one slate of electors. Both Louisiana and South Carolina declared that the Democratic candidate for governor had been elected and each governor submitted an electoral vote for Tilden. The Republican candidates for governor in each state maintained that they were lawfully elected and submitted an electoral vote for Hayes. In Florida, the state supreme court, in a contradictory opinion, allowed the Hayes vote to stand. But the newly elected Democratic governor appointed a Democratic election administration board which determined that Tilden had received the most state popular votes, thereby alloting the electoral vote to him. There was no process to resolve the difference between the determination of the state supreme court and the election administration board.

Consequently, each of Florida, Louisiana and South Carolina submitted rival electoral slates to Congress.

Hayes had received the popular vote in Oregon so that its three electoral votes were allocated to him. The Democrats, however, challenged one of the electors on the grounds that he was a federal employee and barred by the Constitution from being an elector. The Democratic governor of Oregon replaced him with a Democratic elector. The Republican electors refused to recognize the Democratic elector and recognized the replaced Republican elector. The Republican electors submitted three electoral votes for Hayes to Congress. The Democratic elector submitted two votes for Hayes and one vote for Tilden.

In this election, none of the *ad hoc* solutions of previous elections worked. After much political wrangling, Congress created an electoral commission to decide the issue. After more political wrangling, the commission ultimately selected the Republican slates, and Hayes became president.[11]

The constitutional crisis created by this election traumatized Congress and the nation. Because a majority of the nation had voted for Tilden, a substantial portion of the electorate considered Hayes to be illegitimate. Also, some historians believe that the political bargains reached to elect Hayes attenuated the objectives of the Reconstruction and led to the "Jim Crow" era and its prolonged aftermath. Even though politics in the late 19th century were somewhat less civilized than they are today, the name calling was almost quaint by comparison. Hayes was called "His Fraudulency" or "His Accidency". Almost immediately after Hayes took office, Congress began debating bills that would avoid a similar constitutional crisis in the future. While it took another ten years,

Congress finally passed the Electoral Count Act of 1887 (the ECA) and it was enacted. The ECA is the law today. It addressed two issues, one, the procedure by which the electoral votes are counted and two, the method by which competing or uncertain slates of electors are resolved.

B. Vote of the Electors and Tally by Congress under the ECA

As soon as possible after November 8, the governor of each state certifies to the Archivist of the United States the names of the electors who were elected and the number of votes cast for each elector.[12] On or before December 19, 2016 the governors of each state also deliver the same certificate to each elector.[13] The electors listed in the certificate are the electors who are credentialed to vote for president and vice president.

On December 19, 2016 the slates of electors named in the certificates meet, usually in their state capitals, and cast one for each of president and vice president.[14] The results of this vote are placed in a certificate and six duplicates are made. [15] Each elector receives a set of the six duplicates and distributes the certificates as follows:

1. One certificate to the president of the Senate who is also the sitting vice president;

2. Two certificates to the state official designated by the governor, usually the secretary of state of each state;

3. Two certificates to the Archivist of the United States; and

4. One certificate to the judge of the district in which the electors meet to vote.[16]

If the foregoing officials have not received the certificates from one or more states by December 28, 2016, the president of the Senate (or in his or her stead, the Archivist) is authorized to obtain the certificates from the aforementioned district judge by special

messenger.

On or about January 6, 2017, Congress, which had been elected in November, meet in a joint session to tally the electoral votes.[17] There is an elaborate procedure for counting the electoral votes.[18] After Congress has tallied the electoral votes and declared the results, the presidential and vice presidential candidates who have received a majority of the electoral votes are elected. They become president and vice president after they are inaugurated on January 20, 2017.

C. Disputed or Uncertain Slates of Electors

The ECA effectively puts Congress in the place of the electoral commission which resolved the Hayes -Tilden Election of 1876. It mandates that:

1. If a state submits one slate, then Congress must count that slate as long as:

    (a) the state appointed its electors under state laws that were enacted before the November election, and

    (b) the slate was certified no later than six days before the day on which the electors vote.

2. If a state submits more than one certified slate of electors, the House of Representatives and the Senate must agree on which slate of electors to count.

3. If the House of Representatives and Senate do not agree, then only the slate certified by the state governor is counted.

4. If the state governor does not certify a slate, or certifies more than one slate, none of the electoral votes from that state is counted.

D. Unresolved Issues under the ECA

The ECA is a political compromise. While it is an improvement on the electoral commission used in the Hayes-Tilden Election of 1876, it leaves crucial issues

unresolved. The primary issue is whether the ECA is even constitutional. During the ten - year debate over the ECA, opponents argued that a process for counting electoral votes can only be made by an amendment to the Constitution. Supporters of the ECA argued that the right of Congress to establish an electoral vote process was incident to its power to count electoral votes so that an amendment was not necessary. [19] Other unresolved issues are:

1. Where the state submits one certified slate, whether Congress can review the state law under which the slate was selected to determine if the law is legally proper.

2. The means and margins by which the Senate and the House of Representatives must decide which slate to count when a state certifies more than one slate of electors.

3. Whether Congress can reject a certified slate on the grounds that the election of the slate was fraudulent or corrupt even though the state law was legally valid.

The only elections in which the ECA has figured prominently were the Harrison - Cleveland Election of 1892 and the Bush - Gore Election of 2000. Ultimately, in each of these elections, a majority of the electoral votes was allocated to each of Harrison and Bush. Each of them became president without having to address any of the unresolved issues in the ECA.

IV. CONTINGENT ELECTIONS

The president and vice president must be elected by a definite number of electoral votes. The drafters of the Constitution had to provide a process for electing a president and vice-president if no candidate receives a majority of the electoral votes. The solution was to have the House elect the president and the Senate elect the vice president. An election that is decided by the House is referred to as a contingent election. Except for

the 1824 election between John Quincy Adams and Andrew Jackson, one candidate has always received a majority of the electoral votes so that a contingent election has not been necessary. However, commentators have analyzed elections that were closely contested. Many of them believe that slight changes in the events or different interpretations of the law could have reversed the results of those elections.[20]

A. The Faithless Elector

Neither the Constitution nor any federal law requires that an elector vote for the presidential and vice presidential candidate on whose slate the elector appears.[21] An elector may even vote for a person who is not on the ballot. The "faithless elector", which is a somewhat inaccurate term, is an elector who does not vote for the presidential and vice presidential candidate on whose slate the elector was selected to vote.

Twenty nine states and the District of Columbia attempt to prevent the faithless elector by making each elector take a pledge, by imposing fines, or by nullifying the vote of the faithless elector. Twenty one states do not have any penalties so the elector can vote however he or she so chooses without regard to the slate to which he or she was pledged. The District of Columbia and Maryland require an elector to pledge to a candidate and impose fines if they do not vote for that candidate. Virginia law addresses the issue but it is ambiguous. Most likely, none of these measures is constitutional. The number of faithless electors over history has been reported to be 157. No election result has ever been changed because of the vote of a faithless elector. [22]

B. The Twelfth Amendment

Under the Twelfth Amendment, if no candidate receives a majority of the votes of the electors or there is a tie vote, the House elects the president from the list of the three candidates who received the most electoral votes.[23] Each state has one vote. The method by which the representatives of each state determine for whom the state will vote is up to the states to decide. To this day the Twelfth Amendment is the highest and only legal authority on how a contingent election is conducted. The only presidential election that was a contingent election was the Adams - Jackson Election of 1824. A contingent election for vice president was conducted by the Senate in the Van Buren – Harrison election of 1836.

The Twelfth Amendment does not address all of the issues that could arise in a contingent election, but it does address the following:[24]

1. The House must immediately choose the president.
2. The election must be conducted by ballot.
3. Each state casts one vote.
4. There must be a quorum of two-thirds of the states present, which is 34. A state is present as long as at least one representative is present.
5. A candidate must receive a majority of the votes of the states, which is 26.
6. If the House does not elect a president before the date on which the term of the incumbent president expires, which is noon EST on January 20, 2017, the vice president elected by the Senate serves as acting president until the House elects a president.

The Twenty-Third Amendment enables citizens of the District of Columbia to vote in presidential elections and it has three electoral votes. However, because the

District of Columbia is not a state, it does not have a vote in a contingent election.

C. House Precedents for a Contingent Election

The House makes its own rules of procedure.[25] The current rules of the House do not set forth the procedures it would use in a contingent election.[26] Most likely, the House would consider the procedures used in the Adams–Jackson Election of 1824 as persuasive but not binding precedents.[27] In that election, the House appointed a select committee with one representative from each state to draw up special rules for the contingent election. These rules were:

1. The House meets in closed session.

2. Motions to adjourn are not heard unless they are offered and seconded by the whole state delegation, *i.e*, motions by individual representatives are not heard. The House must conduct only the contingent election and no other business.

3. The vote is taken by secret ballot.

4. Each state delegation chooses a candidate. The candidate who receives a majority of the votes cast is the choice of the delegation. The state then casts its one vote for that candidate in the House election. This rule is silent on the role, if any, of the House where a state delegation is deadlocked or the rules by which the representatives decided on the state vote were ambiguous or the process of deciding on the state vote was improper.

D. Twentieth Amendment

The Twentieth Amendment is relevant to a contingent election. It changes the date on which the term of the incumbent president and vice president expires from March 4 to January 20. It sets January 3 as the date on which the term of the Congress elected in November begins. The Twentieth Amendment also sets forth the means and method of presidential succession.[28]

The electoral vote is official on January 6, 2017, which is the date on which Congress tallies the votes. Whether a contingent election is necessary will not be known for certain until that tally is complete. The new Congress is sworn in on January 3, 2017, which is before the tally occurs. This is the reason why the Congress elected in November would conduct a contingent election.

The new Congress has from January 6 to January 20, only 15 days, to conduct the contingent election. Presumably, the election process for president in the House will be more complicated than the election process for vice president in the Senate. It is possible, though unlikely, that the House will not elect a president but the Senate will elect a vice president. But if the Senate does elect a vice president, he or she becomes the acting president until the House elects a president.[29]

E. The Presidential Succession Act of 1947

If no president or vice president is elected by January 20, 2017, the Presidential Succession Act of 1947 (the Act) takes effect.[30] The Act sets forth a line of succession of persons who would serve as acting president. The only persons in the line of succession who can serve as acting president are those who meet the qualifications for president set forth in the Constitution. The person must be a natural born citizen over the age of 35 years and must vacate any office that he or she currently holds.

The first person in the line of succession is the Speaker of the House. The next in line is the President Pro Tempore of the Senate. After them, comes the Secretary of State. The line then goes down the list of cabinet secretaries according to the date on which the cabinet was established from the oldest to the newest. The last in line is Secretary of Homeland Security.

As a practical matter, it is most likely that, if the presidency and vice presidency are vacant on Janaury 20, the Speaker or possibly the President pro tempore of the Senate will suceed. It is unlikely that it would become necessary for the cabinet secretaries to succeed. However, this raises a constitutional question which arose during the deliberations on the Act. The Succession Clause of the Constitution states that only an "Officer" of the United States can succeed to the presidency.[31] Arguably, neither the Speaker nor the President Pro Tempore of the Senate are "Officers" within the meaning of the Succession Clause. However, the cabinet secretaries are without question "Officers" of the United States. Therefore, there is a constitutional issue as to whether the Speaker or the President Pro Tempore can even succeed to the Presidency.

F. Proposed Reforms to the Electoral College

The Electoral College was controversial even before the Constitution. The drafters argued over it even during the deliberations on the Articles of Confederation. Over the years, commentators have proposed that the Electoral College be reformed. Proposals have ranged from eliminating it altogether to allocating one electoral vote per congressional district like Maine and Nebraska to having a contingent election be decided by the vote of each representative rather than by the vote of each state.[32] Another proposal, which has been adopted in different forms by some states, is that each state enact a law that requires the governor to certify only the slate of electors for the presidential and vice presidential candidates who receive the highest number of votes of the state popular votes.

V. EVENTS CAUSING A CONTINGENT ELECTION

The only event which would cause a contingent election is if no candidate receives

at least 270 electoral votes. There two ways in which this can occur, one, by pure arithmetic and, two, a candidate receives the state popular vote in key states on election day but the results are challenged and subsequently changed in favor of the another candidate.

A. Arithmetic

Because of the way in which electoral votes are distributed among the states, it is possible that, in an election between two candidates, each candidate could receive 269 electoral votes. Considering the voting patterns of the states in the last few national elections, it is unlikely that neither candidate would receive at least 270 electoral votes.

The issue is more complicated when there is a credible third party candidate in the election. It is possible that a third party candidate could garner the popular vote in enough states and receive enough electoral votes to deny either of the other candidates the 270 electoral votes. No third party candidate has ever become president.

1. Former president Theodore Roosevelt was denied the nomination for president of the Republican Party in the election of 1912. He created the Bull Moose Party and ran as a third party candidate. He received 88 electoral votes, which was more than the number of electoral votes whic the Republican nominee, President William Howard Taft, received. Roosevelt still lost to the Democrat Woodrow Wilson.

2. In the Nixon - Humphrey Election of 1968, George C. Wallace ran for president as the nominee of the American Independent Party. He received 13.5 percent of the national popular vote, the popular vote of five southern states, and garnered 45 electoral votes and one faithless elector vote.

3. In the Clinton-Bush Election of 1992, third party candidate Ross Perot received about 19 percent of the national popular vote. But he did not receive the popular vote in any state so he did not receive any electoral votes.

In the 2016 election, the Libertarian Party has nominated former governors for president and vice president and claims to be on the ballot in each of the 50 states and the District of Columbia. The Green Party and Evan McMullin of Utah also claim to be viable in at least some states. None of these candidates will receive 270 electoral votes. It is possible, however, that some of them or all of them could prevail in just enough states to deny 270 electoral votes to each of the major party candidates.

They could also take enough state popular votes in a key state from a major party candidate who otherwise would have received those votes. Although the third party candidate does not win the electoral votes, he or she can deny enough state popular votes to one major party candidate so that the other major party candidate prevails. Many commentators believe this happened in the Bush - Gore Election of 2000. In that election, whichever candidate received the electoral votes of Florida would become president. Ralph Nader ran as a third party candidate. He reportedly received thousands of votes in Florida which otherwise would have gone to Gore. Gore would have easily received the state popular vote and the presidency.

B. Legal challenges to the state election

Even if one of the candidates has 270 electoral votes after the November election, the other candidate(s) can seek to challenge that result. State elections are conducted according to state law not any federal law. Many states reformed their election laws after the Bush - Gore Election of 2000. But the quality of state laws still varies from state to state. In some states election processes even differ from county to county.

A candidate(s) could challenge the result of the state popular vote on the following grounds:

1. The election laws in key states are unconstitutional in substance,

2. The election laws are vague or ambiguous,

3. The election was conducted in a corrupt or abusive manner or there was voter fraud, or

4. The election count was conducted in an unlawful manner.

In many states, any such challenge must be asserted in the administrative process of the state. After exhausting the administrative remedies, the aggrieved party would assert its challenge in the state courts and probably in federal courts as well. If the courts ultimately upheld the original state popular vote count then the candidate who received the highest vote total receives the state electoral votes. However, the governor or the legislature can refuse to certify the slate of electors that resulted from the court decision and certify another slate of electors. In this event, the dispute resolution procedures under the ECA would take effect with all of their uncertainties, (Part D of Section III The Electoral Count Act of 1887).

C. Constitutional challenge to the ECA

The primary challenge to the ECA is that it is unconstitutional. For the Congress that passed the ECA, whether it was constitutional was the most hotly debated issue. The Constitution states that "The President of the Senate shall in the Presence of the Senate and the House of Representatives, open all Certificates, and the Vote shall be counted."[33] But this clause does not state who counts the votes nor how the vote is counted. The ECA purports to resolve this issue, (Section III The Electoral Count Act of 1887, at C.) The opponents of the ECA argued that the means and methods of counting the electoral vote must be set forth in an amendment to the Constitution and not in a

statute passed by Congress.

VI. CONCLUSION

Several novels have been written setting forth scenarios which lead to a contingent election.[34] It is possible to conceive of scenarios that could lead to a contingent election but it is impossible to predict when and whether events will occur that cause a contingent election. The point is that unresolved issues with the Electoral College and the ECA are not issues until they become issues. An election which breaks the pattern of elections since 1916 will cause a constitutional crisis, the severity of which is impossible to predict.

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ENDNOTES

[1] U.S. Const. art. II, § 1; 3 U.S.C. §§ 1–17.

[2] Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 1 at 68 (rev. ed. 1966).

[3] 3 U.S.C. § 1.

[4] *Id.* § 3.

[5] U.S. Const. amend. XXIII; 3 U.S.C. § 21(a).

[6] U.S. Const. art. II, § 1.

[7] U.S. Const. art. II, § 1; U.S. Const. amend. XIV.

[8] U.S. Const. art. II, § 1.

[9] Political parties are not mentioned anywhere in the Constitution.

[10] U.S. Const. art.II, § 1

[11] Ari Hoogenboom, *Rutherford B. Hayes: Warrior & President,* University Press of Kansas (1995).

[12] U.S.C. § 6

[13] *Id.*

[14] 3 U.S.C. §§ 7, 8.

[15] *Id.*§ 9

[16] *Id.* § 11.

[17] *Id.* § 15.

[18] *Id.*

[19] Vasan Kesavan, *Is the Electoral Count Act Constitutional?,* 80 N.C. L. Rev. 1653 (2002)

[20] Edward B. Foley, *Ballot Battles: The History of Disputed Elections in the United States*, Oxford University Press (2016).

[21] *Ray v. Blair*, 343 US 214 (1952).

[22] Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President,* 100 NW U. L. Rev. 121 (2006).

[23] U.S. Const. art. II, § 1

[24] Nathan L. Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb,* 64 U. Miami L. Rev. 475 (2010).

[25] U.S. Const art. I, § 5.

[26] *Rules of the House of Representatives,* 114th Congress (January 6, 2015).

[27] U.S. Congress, *Hinds' Precedents of the House of Representatives*, vol. 3 ch. 58 (GPO 1907).

[28] U.S. Const. amend. XX, § 1.

[29] U.S. Const. amend. XX, § 3; 3 U.S.C. § 19.

[30] 3 U.S.C. § 19.

[31] U.S. Const. art. II, § 1.

[32] John C. Fortier, ed., *After the People Vote: A Guide to the Electoral College,* 3d ed., AEI Press (2004).

[33] U.S. Const. art. II, § 1.

[34] See *e.g.* Roy Neel, *The Electors,* Recount Press, 2016.