



The Case for Reforming the Electoral Count Act

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[00:00:59] It's a great opportunity to show your support of constitutional education, and we're so grateful to all of you for your support, engagement, and passion for lifelong learning. Please go to constitutioncenter.org/wethepeople that's all one word, all lower case constitutioncenter.org/wethepeople. Now, on today's show.

[00:01:24] Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to, We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. Today we're talking about the Electoral Count Act of 1887. That's the law that sets out the congressional procedure for certifying Electoral College results in a presidential election.

[00:01:47] There's an emerging bipartisan consensus among election law scholars and public officials that the law needs to be reformed. Today on, We The People, we're doing a deep dive into the Electoral Count Act and the proposals for fixing it. And our guests today are two of the leading scholars of the act in the country, and two of four co-authors of a recent op-ed in the Washington Post called, How Congress can fix the Electoral Count Act.

[00:02:24] Ned Foley, holds the Ebersold chair in Constitutional Law at the Ohio State University, where he directs the election law program. He serves on the National Constitution Center's guardrails of democracy initiative and is a great friend of We The People. Ned, welcome back to the show.

[00:02:41] Ned Foley: Jeff, great to be with you. Thanks.

[00:02:43] Jeffrey Rosen: Brad Smith is the Josiah H. Blackmore II/ Shirley M. Nult professor of law at Capital University Law School. He served on the Federal Election Commission from 2000 to 2005 and has written for the interactive constitution and is another great friend of, We The People. Brad, it's a pleasure to welcome you back to the show.

[00:03:03] Brad Smith: Morning, Jeff. Good to see you again.

[00:03:05] Jeffrey Rosen: Ned, tell, We The People listeners about the central argument in your recent piece with Brad, How Congress can fix the Electoral Count Act. What is the Electoral Count Act? And what are the ways in which you both think it needs to be fixed?

[00:03:19] Ned Foley: Yeah, thanks. Um, well you mentioned it was, uh, adopted in 1887. We may come back to that history. And you mentioned that its purpose is to create a procedure by which Congress receives the electoral votes sent from the states and then opens them in, in a special session of Congress and then counts the electoral votes and declares a winner of the presidential election.

[00:03:41] And the reason why it needs updating is its language is unfortunately antiquated and ambiguous. Um, because it was adopted in 1887, it's just written in the English language vernacular that is sort of far into our 21st century years. And even just trying to rewrite what it says and then was meant to do in terminology, that makes more sense for modern audiences that would in and of itself I think be a great service by Congress.

[00:04:13] Um, I think the process of trying to do that though, would expose the fact that it papers over some compromises and ambiguities that were necessary to get the statute adopted in the first place, and, and those are dangerous. And, and the reason why they're dangerous is there are no higher stakes than a presidential election. And the statute is most important for when there's a dispute over who won the election and, and whatever you think of the claims, whether they have merit or a base list, I mean the two parties are, are disagreeing or at least the two candidates are disagreeing.

[00:04:45] And the most important value in, in my judgment and I think was reflected in our, our joint op-ed is, you know, clarity, clarity, clarity. You just need to know what the rules and procedures are because ambiguity invites partisanship.

[00:05:01] Jeffrey Rosen: Thank you so much for that. Brad, in your op-ed with Ned, uh, which was also written with Michael McConnell and Rick Pildes, you argued that Congress should revise the Electoral Count Act to make clear that Congress is not a national recount board. It's not the role of Congress to revisit a state's popular vote tally. And whenever there's just one submission of electoral votes from a state, in other words, no competing sets of electors, Congress should disavow any power to question those electoral votes on the grounds that there was something wrong with the popular vote on which those electors were appointed.

[00:05:37] Tell us about that central point that you think Congress should make clear. It has no role to when there's not a competing slate of electors.

[00:05:45] Brad Smith: Sure. And, and I would note that within the four of us who signed that editorial, there are, are nuances of opinion and, and some disagreements about how much is constitutionally required, how much is just good policy. But I will say from, from my point of view, at the constitutional convention, the authors specifically discussed and rejected the idea of having Congress select the president.

[00:06:07] And if Congress is in a position where it can go back over state election results, state, uh, certifications of electors and say, "Well, we think you certified the wrong people." Essentially, you're putting Congress right in that seat of making the initial selection of the president, uh, which I think is, is erroneous. I think our system was intended to be a system based on the states. And the idea is that the states will run their elections, uh, in accordance with state law. Congress's role is merely to make sure that nobody is, uh, we might say playing with the count at the end.

[00:06:43] Think about it in when the constitution is adopted. And, and when the 12th amendment is adopted a couple decades later, state legislatures are selecting the electors. There's no popular vote in these states. So there would've been no reason to really contest it. You would know what a state legislature did. Uh, the, the votes would be there. Every single person can count. And the idea is they send those votes in to Congress and those are counted publicly. And the reason they're counted publicly is again, just to make sure somebody doesn't lie and somebody doesn't, you know, say, "Oh, well, the vote was different than it actually was."

[00:07:17] There's no real role for Congress to do anything other than sit there and witness that so that nobody does lie. And I think when you get into this position of people beginning to think that, that Congress can, can second guess state counts, that's when you get the kind of chaos that we've had. And it's been building over several elections.

[00:07:34] Uh, you know, some Democrats, uh, objected in 2000 and 2004, and in 2016, and it was never viewed as that serious. But then by 2020, the precedent was set and, uh, a great many more Republicans chose to object and it began to be a serious issue. And many people also think it contributed to an, an atmosphere in which people who rioted at the Capitol on January 6th, felt that there was a legitimate role for Congress to play in second guessing those state results.

[00:08:02] So, you know, my take is that this is a state process and Congress is just there to watch the votes get open, and every person in America can count. Congress doesn't even need to certify the vote, so to speak. Now, it becomes more complex when you get two different sets of electors. Uh, but I'll pause here and I'm sure we'll, we'll take that up.

[00:08:22] Jeffrey Rosen: Thanks so much for that. Ned, Brad, argues that Congress has no power under the constitution to choose the president. That's also a point that was made recently by, Judge Jay Michael Luttig and David Rivkin in The Wall Street Journal, where they said that the 12th Amendment gives Congress no power to enact legislation, to enforce its provisions and the necessary and proper clause doesn't support that legislation either.

[00:08:48] Take us back to the world before the Electoral Count Act, if there were no legislation on the books, what would the constitution say about Congress's role, if any, in choosing the president?

[00:09:00] **Ned Foley:** Brad and I, agree on this point. As he said, there is some dispute among election scholars about exactly the relationship of the constitution to the Electoral Count Act. I, I think it's possible for Brad and, and I to agree with the premise that it's not Congress's role to recount the popular vote and that that's antithetical to the 12th Amendment and the constitutional structure.

[00:09:24] And at the same time, believe that Congress does have power under the necessary and proper clause to enact a statute that legitimately constrains Congress within its appropriate lane and make sure that the 12th Amendment joint session of Congress goes the way, you know, Brad envisioned it.

[00:09:43] In other words, I, I think The Wall Street Journal piece has a leap that isn't necessarily correct. Uh, you know, limiting Congress to its properly constitutional role is not inconsistent with a statute that facilitates that limited role. Um, uh, and we could explore more, you know, some of those technical points about an act of Congress and the, and the 12th Amendment itself.

[00:10:05] But thank you for asking about, you know, what, what if we didn't... what would happen if we didn't have this statute? And unfortunately, we saw the disaster, or not we, living today, but our country saw in 1876, this was during reconstruction. And I know Jeff, you and I have talked about this on other occasions, um, just how much of a constitutional crisis the dispute over Hayes the Republican, Tilden the Democrat, was.

[00:10:34] Um, you know, and as, and as awful and ugly as the riot of January 6th, you know, that we all witnessed over the 2020 election was, um, you know, March 1st, 1877 was a similarly fraught moment at the Capitol, uh, over that dispute where revolvers were pulled by members of Congress, not just [laughs]... you know, it did it... no, there was no bloodshed that day, but, um, our January 6th insurrection wasn't the first time there was a sense of lawlessness.

[00:11:06] In fact, uh, the speaker of the House at the time, uh, Samuel Randall, had to call out the Sergeant of Arms in the House chamber against members of his own party because of the lawless, in effect riot that occurred within the, the chamber itself. And why is that related to your question?

[00:11:23] For reasons that I think Brad, is correct to say that I think the authors of the 12th Amendment envisioned almost zero role for Congress to play here. And in a world where electors were appointed by state legislatures directly, at least in many states, there wasn't any popular vote to recount. And so the only really question for Congress under the 12th Amendment is, do we have, um, authentic documents from what the state government has sent us?

[00:11:51] Again, in the 19th century, in an era of horse and buggies or even railroads, there was genuine, uh, questions about whether or not forged documents would go from Louisiana to Congress. And, and that's not a problem we have in the modern world. Um, and so Congress's

job really is just to make sure they have the electoral votes that the states have sent pursuant to state law that's allowed under the constitution. And then to, to count those votes accordingly.

[00:12:19] And so the 12th Amendment authors didn't really think they needed to say very much, but as the country grew and Joseph's story, Joseph, Joseph's story of a very famous Supreme Court justice of the early American histories pointed out in his commentaries in the 1830 that, "Oops! The framers missed the fact that there could be a genuine dispute, particularly as the movement to have popular votes as the basis for appointing elect-, uh, electors arose."

[00:12:45] And so 1876 was the situation that Brad, referred to where you had rival submissions from multiple states, so different documents were claiming to speak for the state of Florida, speak for Louisiana, South Carolina, Oregon. And so even under Congress's limited role, it's like which document is the real document from Florida? We've got two that claim that.

[00:13:07] It wasn't just 10 citizens self asserting that they were electors, you know, it was different institutions of state government. You know, the Attorney General of Florida certified the Tilden electors as the valid electors of Florida, while the Secretary of State of Florida certified the Hayes electors as valid. So you had some official imprimatur on behalf of, of both submissions and, and as Congress... you know, should Congress go with the Attorney General of Florida or the Secretary of State?

[00:13:36] In, in fact, it's, it's ironic that it was Florida do the, doing this in 1876, because we had the same dispute between the Attorney General of Florida and the Secretary of State of Florida, [laughs] in, in 2000, it just didn't get all the way to Congress because of course, acceptance of the Supreme Court's decision.

[00:13:51] So, so as Congress saw that dispute in 1876 arriving, they realized they had no rules for this. They had adopted a, a kind of, um, easy practice prior to the... relatively easy practice, prior to that time, its something called joint rules or concurrent resolutions, meaning that the Senate and the House in its own chamber would adopt by rule making, not by legislation, a set of procedures for its participation in this special joint session under the 12th Amendment.

[00:14:19] And as long as, you know, those joint rules that each chamber adopted were compatible, then the Senate and the House would show up on the appointed day under the 12th Amendment and, and have a procedure to follow. But for 1876, the House was controlled by Democrats, the Senate was controlled by Republicans and what rules were adopted in this concurrent resolution or joint rule would make a difference on whether the Hayes, uh, submissions would be accepted or the Tilden submissions would be accepted. And it was absolute deadlock given a bicameral Congress. And the threat of complete chaos and constitutional crisis with members of the US military anticipating whether they were going to, uh, side with President Hayes or a President Tilden. I mean, it was really, really, really dangerous.

[00:15:01] And so, um, they created a special commission that we could go into just for that one only, that was kind of an ugly, uh, a process because it split eight to seven on party lines. And then there was the compromise that ended reconstruction. I mean, it's a pivotal moment in

American history. But in the aftermath of all that, Congress said, "We ought to have a statute, not just these joint rules to try to help us avoid partisanship in the heat of the moment because we need a procedure."

[00:15:28] And what's interesting and I think important to realize is, is there was a 10 year decade long gap between that acute crisis and the 1887 statute that we now live under. It's not that Congress ignored that issue for 10 years. It's just a really, really difficult issue. They worked really, really hard on it, and what they didn't want was to go into the election of 1888, which they knew would be close.

[00:15:52] And by the way, after 1876, the next two elections were also quite close and, and, and a bit scary, you know, 1880 and 1884 and they didn't have any procedure. So they dodged some bullets and they said, "Look, we got to do something." So the something is what we have now, but again, it has those ambiguities in it to paper over some compromises. And, and as the, you know, the time is worn on, those ambiguities become more and more problematic for us living in the modern world. And I do think Brad, is correct that the January 6th riot is in some sense, a product of the possibility to make mischief with this statute.

[00:16:32] Jeffrey Rosen: Thank you so much for that fascinating history. Let's focus on some of those ambiguities that you mentioned. One of the central procedures in the Electoral Count Act says that whenever a member of the Senate says that a vote is not regularly given, he or she can object. And under proposals to reform the Electoral Count Act, a new bill would require a larger block of members in each chamber to initiate an objection.

[00:17:04] Some drafters, uh, in a bill proposed by, Senator King, and others would set the bar at a third and it would also require a super majority in each chamber to sustain the objection such as three-fifths, um, as opposed to the current baseline, which says that a majority in each chamber can sustain the objection to ensure the electors don't get counted.

[00:17:26] Brad, um, tell us about this question about how many members should be able to object in order to trigger a consideration by the whole chamber and, and what the threshold should be for sustaining the objection.

[00:17:38] Brad Smith: What Ned and I, have been talking about is changing, uh, or sort of specifying what would be the, the grounds for objection. But another reform as you've just pointed out would be simply to, to make it a little bit harder to object. As we think about it now, one Senator and one House member triggers an entire, uh, debate here.

[00:17:55] And, and so essentially that means if, you know, if you're a Democrat, pick who you think are the two wackiest Republicans. Or if you're a Republican, think of who you think are the two most partisan crazy Democrats, those two people can start this whole process rolling and, and create the sort of chaos again that we, that we've seen in, in, in some recent elections, obviously most negatively in 2020.

[00:18:15] So one obvious solution would be to simply say, you've got to have a little more than one person in each house. Uh, and I've seen some proposals suggesting it should be a majority even to object. My personal preference would be for a relatively low number, say about 10%,

which we realize would be 50 house members and, and 10 senators to get an objection going. Uh, I don't think you should have to have a majority if that's part of the whole reason for having the debate is if a lot of people think this is a problem, maybe you should, should do it. But, but I, I, I do think the numbers should be higher. I think that's open to compromise. Again to me though, ultimately the bigger question is going to be, what are the proper grounds, uh, of an objection?

[00:18:54] Jeffrey Rosen: Ned, tell us your views about what the procedure for an objection should be, how many members you need and, and what the threshold for sustaining the objection should be. And then tell us about the nature of the debate about the grounds for the objection. Right now, members have to say that the slate wasn't regularly chosen, which is extremely ambiguous, how could that be clarified to ensure that there's no inconsistency with the constitutional design?

[00:19:18] Ned Foley: I agree al-, I, I think almost completely with Brad, although I might set the threshold a little bit higher than he does, but I also agree that ultimately that's a number that you ought to be able to find some meaningful compromise. But, but my point of agreement, which I think is the most important point is, ultimately what matters is what's a permissible basis for objection, not the number of, of members you need to make an objection.

[00:19:41] Um, and, and what I think is so disturbing and agree with Brad, on this is, how wrong and cavalier these various congressional have been starting in 2000, building 2004, 2016, and then unfortunately, you know, leading to 2020. And I think part of the problem is, you know, the one provision of the existing statute is clear is that number. [Laughs] We... it is very simply to gravitate to the fact you only need one Senator and you only need one representative. And changing the number that would still be the one clear thing and sort of would invite the sense that, as long as we have the right number, we can make whatever injection we want.

[00:20:20] And then, you know, to the point about what sustains an objection. I, I'm quite concerned about imposing a super majority requirement on an objection being sustained, uh, for reasons that have to do with that constitutional question about, can Congress bind itself by statute in this way?

[00:20:39] I mean, you know, at a, at a time where we're talking about the possibility of changing filibuster rules by a simple majority vote, even though the filibuster itself requires 60 votes, you know, what if the concurrent resolutions that the houses, the two chambers adopt, uh, in, on January 3rd of any given presidential cycle, you know, to, to say that, "Yes, they're going to follow the ECA." Say, "You know what? We don't want the, a three-fifths, uh, rule by, by chamber. We're going to, to put that down to a simple majority rule." Then you'd have a, an acute question about which governs the statute or the, or the concurrent resolution.

[00:21:19] So I, I think some sensitivity needs to be played about the interrelationship of what technically each chamber is operating under in the January 6th process. But any event, the numbers while important are less important in my judgment than what's a, a permissible, um, basis for objection, both under the constitution, which is the supreme law of our land, as we

know, and then the, a, a well written ECA should also be able to explain what's a valid objection and what's not.

[00:21:50] And the irony here I think is that I think the 1887 statute that we have now tried to do this and has an answer if you spend enough time with it, it's just so convoluted, the verbiage it uses, it's really hard to tell. You know, just to be real quick on what, you know, the people who followed Bush versus Gore back in 2000, remember something called the safe harbor concept or the safe harbor provision, which is an element of the Electoral Count Act. It's codified in, uh, title three of the US code section five, but it is originally section two of the 1887 statute.

[00:22:28] And it inner relates with that phrase regularly given which it was in section four of the act, and now it's codified in three USC section 15. And it's a complicated relationship with these provisions that I think has been lost in time. I think the legislative history of the 1887 act is pretty clear on that, but then, you know, we're supposed to be governed by the statute, not legislative history as some justices keep reminding us.

[00:22:55] And the idea of the safe harbor just in principle is, again, it goes to Brad's point it, this is not an issue for Congress to litigate. This is an issue for the states to resolve themselves because under article two of the constitution, they get to choose the manner of appointing their electors. And if they choose a popular vote as the method for appointing electors, state law is entitled to choose the vote counting procedures.

[00:23:23] Um, you know, is that going to be a state canvassing board? Or, you know, how does state law does recounts? Um, what judicial role is there for the state judiciary to correct a mistake by the state canvassing board? All that is state law. And the 1887 statute says that if a state uses laws in existence prior to the appointment of the electors itself, so no changing of the rules after the fact, um, there's been an appointment pursuant to a popular vote and their methods for counting the popular vote.

[00:23:56] If the state uses those procedures and reaches a result by the proper deadline, then Congress will treat that as conclusive. That's the word in the Electoral Count Act, conclusive. It's in section five though, and people sometimes miss the fact that it relates to section 15 of three.

[00:24:18] In other words, there's a kind of a complicated relationship that I think got completely lost in all of these congressional objections, whether in 2000, 2004, 2016, or 2020, all of these, the first issue for Congress should have been is, is the submission sent to us one that has this safe harbor status? If so it's conclusive and no objection is cognizable whether one person signs it or 50 people sign it, or 100 people sign it. Conclusive means conclusive, end of story. And I think that's been lost unfortunately.

[00:24:50] Jeffrey Rosen: Brad, do you agree with Ned, that when a state submits a single slate of electors in time for the safe harbor, that should be treated as conclusively valid?

[00:25:02] Brad Smith: Yes, I'm in agreement. And as I said, if you think about, you know, what the drafters or the 12th Amendment were thinking at the time, they were expecting these votes to come from the state legislature. And it would be pretty clear that they came from the state legislature if they didn't.

[00:25:19] So there, so there wouldn't normally be any reason to dispute the validity of the voting process. It would merely be as Ned said, were these actually the votes that were transmitted or are they forgeries? And ultimately is the person who's counting them lying? Which is why we make them do it in public and not come out of a back room and announce, "Oh, yeah, this person won. I've counted up the ballots and destroyed them." Um, so you, you wouldn't have that kind of evidence going on.

[00:25:45] It's worth thinking about, what are the current sources of these objections we've seen in recent elections? I think there's two points. One is that the constitution provides that electors are chosen in a manner directed by the state legislatures. And then the other is this language, uh, that you cited Jeff, in, in the act and the Electoral Count Act about votes regularly given.

[00:26:06] And what has been going on in Congress is that some people, at, at least in 2020 for sure went on, is that many people said, "Well, I don't think me as a congressman from a different state that a particular state actually followed its laws. I think some local ex-, uh, election official or statewide election official or court ordered them to do something that's not really following the laws, and thus this violates the constitution, which says that the electors have to be chosen as the legislature decides." And then the second thing that has come up is then they say, "Therefore, the votes given by that state are not regularly given."

[00:26:47] I think both of those are incorrect. I, I mean, I think on the first part, it's up to the s-, you know, the state legislature, uh, yes, decides, but ultimately Congress is not the judge of whether they've decided, it's the state courts, state officials and the state legislatures themselves that decide whether or not state law has been followed.

[00:27:09] You know, if you think about that normally, for example, uh, in, in totally other, you know, different matters, if a, like a lawsuit is decided on the grounds of state law, the US Supreme Court can't come in and just change it and say, "No, we think state law should be something else." Right? We use the state law processes that decide what state law is.

[00:27:30] And then the second question of regularly given. I think it was intended to mean, i.e., were these electors the ones actually correctly chosen? By correct, I just mean in accordance with the state legal procedure. Were these the, the actual people? You know, if, if Brad Smith, was elected a... was chosen as an elector, was it Ned Foley, who showed up and cast the vote? You know, that would be the, the sort of question. And were these votes given in accordance with the, with the constitution in terms of transmitting them to Washington? Those kinds of technical, uh, responsibilities.

[00:28:03] So I think on both ends, uh, members of Congress have stretched the meaning and, and their role in what is going on and we should try to, to cabin that back in remembering that this was intended to be. And for better or worse, you know, some people want to abolish the Electoral College and so on, but this was intended to be a process driven by the states selecting their own electors.

[00:28:29] **Jeffrey Rosen:** The National Constitution Center relies on support from listeners like you to provide nonpartisan constitutional education to Americans of all ages. Every dollar you

give to support, We The People will be doubled with a generous one to one match up to a total of \$234,000 made possible of the John Templeton Foundation.

[00:28:46] This week, we're seeking especially donations from Kansas, South Dakota, Oklahoma, and Wyoming. That's Kansas, South Dakota, Oklahoma, and Wyoming. But of course, We The People friends from all around this great union, uh, please consider supporting our, We The People crowdfunding campaign. Go to constitutioncenter.org/wethepeople, that's all one word, all lower case. Now back to the show.

[00:29:18] Ned, you and Brad have agreed that when there's a single slate of electors submitted by a state, then Congress should, uh, presumptively accept that. Now let's talk about the possibility that there are two slates of electors. You've argued that once a popular vote has been held for the purpose of appointing electors, state legislatures are constitutionally powerless to choose a different manner of appointing electors for that year's presidential elections.

[00:29:44] Uh, but some disagree with you. Uh, during the last election, some argued that because state legislatures have plenary authority to choose electors, then the Pennsylvania legislature, for example, could be able to certify a slate for Donald Trump after the people of the State of Pennsylvania have voted for Joe Biden. How should the reformed Electoral Count Act deal with the possibility that a future state legislature might certify someone who didn't win the popular vote? And what do you think the constitution has to say about this?

[00:30:16] Ned Foley: This is a little bit tricky, because it involves putting together two different parts of article two of the constitution. So it is absolutely true as, as we've been saying that, um, in the first instance, state legislatures have the authority to choose the manner for appointing electors. Um, and they don't have to choose a popular vote if they don't want to, as many legislatures didn't do originally.

[00:30:40] We might not like that for philosophical reasons and might want to get rid of the Electoral College. But, you know, that is our law, that's our constitutional law and we should follow it until we change it. And as Brad, you know, correctly said it, I 100% want to embrace his point. The part of the process of choosing the manner of appointing electors when a state legislature has decided it to use a popular vote to do that is building on the adjudicatory and vote counting procedures to complete the process for identifying the winner of the popular vote.

[00:31:11] But that power that belongs to state legislatures also exists in the same article two, that gives Congress the constitutional power to choose the time for the appointment of the electors. And then the date on which the electors cast their vote, which date must be uniform throughout the United States. And so Congress has specified what we colloquially call Election Day. This is the first Tuesday after the first Monday in November. That is the date by which electors must be appointed.

[00:31:40] Now, in the modern world of elections, we have early vote voting, we have absentee voting, but as a legal matter, electors are appointed on Election Day by means of the popular vote. And the counting of that ballots is what the statute of the Electoral Count Act refers to as the ascertainment of the appointment that occurs by means of the popular vote ballot.

[00:32:00] So when state legislatures make that choice of method, they are bound to have that method effectuated on Election Day. They cannot subsequently say, "Oops! We actually don't want to use the method we initially designated and would prefer, uh, to do a direct appointment of electors by means of, of just the state legislator's appointment." If they want to make that choice, they got to make that ahead of time. And, and once electors are appointed pursuant to the method that the legislature itself chosen, that's locked in.

[00:32:36] Now there's a separate provision, um, in title three US code section two, which talks about what happens if you've got a failure of that appointment to occur? That we could get into. Um, it, it's, it's hurricanes and earthquakes and so forth? It's not valid for, uh, a state legislature to say, "Oh, we don't like the outcome of the popular vote that was capable of being counted and was counted by our own state institutions and judicial review. But you know what? We want to take it all back and do a direct appointment by, uh, the legislature itself." That's not... that doesn't qualify as a failed election, and so it would be, uh, an incorrect use of, of article two. Article two would lock the state into its previously chosen method.

[00:33:16] Last point on this and how the ECA I think was intended to work in what a revision to clarify would mean. There's actually a provision. This is section six of title three, sort of midway down in a long passage. It says that when states have litigation over counting ballots or a recount administrative process, whatever process they use, if there's been a question about who won the popular vote, when they reach what's known as a final determination of their state law procedures, it's that final determination that's entitled to safe harbor status under section five, but there's supposed to be a second certification sent by the state to Congress of the existence of that final determination.

[00:34:02] And that obligation to provide that second certification of final determination seems to be completely lost by everybody involved in how the process works. But it's really important for thinking about what's supposed to happen in the joint session on January 6th, because the first... if there is a rival submission scenario, the first thing the president of the Senate should be looking for before you consider any objections is to identify, is there a documentation that reports to be the final determination of that kind of adjudication?

[00:34:33] Because it's, it's not like the Congress is supposed to be guessing on whether or not a submission has safe harbor status. It's to be identifying the documentation from the state itself, which asserts that safe harbor status and that's been lost, and I think it's, it's really critical to resurrect that concept because then the joint session can follow relatively smoothly.

[00:34:55] If it's clear, if Congress has put the states on notice, "Look, it's your job to signal what it is that gives you safe harbor status. You got to tell us that. You tell us what institution of state government gets the last word under state law that gives the state legislature its authority under article two, to do whatever it wants in this context."

[00:35:14] So identify your institution that does that and then send the documentation that gives its submission that safe harbor status. If that's done properly, there really shouldn't be anything to do in terms of permissible objections, even in the rival submission scenario.

[00:35:35] Jeffrey Rosen: Brad, do you agree with Ned, or not that a state legislature can't after it's designated a popular vote, decide that the popular vote wasn't properly held and then submit a rival slate? Or do you think that the state legislature could do that and should a revised Electoral Count Act take account of this possibility of two slates?

[00:35:57] Brad Smith: I agree with, Ned. I, I don't think the legislature can, can change the process. Now, now I know that that's a function of the Electoral Count Act, which is itself authorized as Ned says by Congress, which gives Congress the, the power to choose the, the time, uh, uh, for selecting electors. So I do think that you can bind the state and say, you know, "The- these are the people."

[00:36:18] Note, the state could change that right up, the legislature, I suppose, right up until the day before the election. They could say, "Hey, it looks really bad for our party, but we control the majorities in the legislature. Let's change it." You'd have a, you know, a big popular pushback, a big political pushback, I think, but that's okay. You know, having, having a, a role for politics there is fine. But I do agree, once they've selected the means, that, that's the means that they live with.

[00:36:41] The other exception would be, and you, and you ran the danger of this in Florida in 2000 where an election contest is not concluded prior to the safe harbor. And then I think there might be some room to say that a legislature could step in and essentially say, "At this point we've got a failed election. We don't have any conclusive result here." Uh, but I think those cases would be extremely rare. And of course in the end, it didn't even happen in, in Florida in 2000.

[00:37:06] Jeffrey Rosen: Ned, do you agree with Brad or not? And maybe at this point you could sum up for We The People listeners, what reforms in particular of the Electoral Count Act would clarify how Congress should deal with the situation when there's one slate of electors, and when there's two slates of electors?

[00:37:22] Ned Foley: I do agree with, Brad. I, I, I do think Florida 2000 showed at least the possibility, unfortunately, of a genuine failed election circumstance. And I think part of the clarification of the Electoral Count Act should be to pin that down. What is a legitimate failed election situation that would allow a state legislature to revert back to its, you know, article two authority to choose a new manner of appointing electors, including direct appointment by the legislature itself?

[00:37:52] But as Brad also said, that ought to be an extraordinarily rare situation and not be a valid, uh, use of that power simply because it doesn't like a count of the popular vote that is capable of being achieved through normal, um, uh, counting process, including any litigation associated with that. So, so, so that's a key point.

[00:38:13] Um, but to try to, to, to sum up, I, I think, uh, what Brad and I in our piece, and, and today I've been trying to say, is that in the single submission situation, there's really nothing but for Congress to do, but to identify that it's got what the state has sent. What some official branch of state government has said, "These are our electoral votes from electors that we appointed according to our state law methods, and whatever you think about how we went about

implementing our own state law methods, we did that and reached a resolution." So the state itself is speaking with one voice. And so Congress doesn't have any right to repudiate the one voice that the state is speaking with.

[00:38:54] For the rival submission scenario, where the state government is unfortunately speaking in two voices, I think that the key point is for Congress to be able to identify which voice is the voice of the state itself, not which submission is accurate in terms of, again, Congress doesn't say, "Okay, well there's a disagreement, so we'll adjudicate which count of the popular vote is the correct count of the popular vote."

[00:39:22] That's not Congress's role in the constitution. It's instead to say, um, "Who gets to speak for the state in this context?" And I think a revised statute should put both the opportunity, but the burden on the state to, to try to clarify which institution gets to speak for the state. Um, so that once the Congress gets a submission from the institution that the state itself has identified, then Congress picks that submission through a safe harbor type, type concept.

[00:39:53] The only wrinkle on that and which we haven't discussed, but, and may not have time to get deep into is that because of Bush versus Gore, and just the general principle of the 14th Amendment, and the fact that states have to act consistently with constitutional law, as much as the state should be in control and, and are entitled to be in control of counting the popular vote to their own procedures, there is some defined limited room, whether it's the US Supreme Court or another article three court to just say, "If you've got a 14th Amendment challenge during the vote counting process to the way the states are counting votes, that that is somehow integrated into the state's own process."

[00:40:36] But that's not... that does not allow Congress itself to become a national recount board as Brad said. It simply means that part of the state's resolution of its own procedures has to be compliant with federal law.

[00:40:49] Jeffrey Rosen: Brad, do you agree or disagree with Ned's two proposed reforms? First, he said that when there's just one slate submitted by a state Congress, its only role is to accept what the state has sent. And second, he says, when there are rival slates, then Congress's only role is to decide which voice is the voice of the state itself not to adjudicate, which is the accurate count.

[00:41:10] Brad Smith: I agree. I think it's, um, exactly correct. And I think that, uh, there are many ways in which you could do that. And again, as I say, like the four of us who authored the piece that, that we open with in the Post have some, some differing views about what would be perfect. I think the key thing is that a lot of those little details don't matter a whole lot in the sense that it's than the current system.

[00:41:31] We need to get back to that idea that, you know, we can all take what each one of us might think is a second or third or even fourth best solution, if it's better than, than the, uh, current setup. And I think it could help to alleviate some misunderstanding about the Electoral College, about the electoral system, and, uh, certainly prevent the, the notion, uh, from seeping into the public that you sort of get a second bite at the apple, if you lose on Election Day, you

can go start pressuring and then, and, and lobby in Congress or something like that to get them to ask them to step in and, and take over the vote.

[00:42:05] So I do think, you know, that's really the key point here, and I do hope that Congress would act on it. Now would be a good time to act simply because it's unclear who's going to control Congress. Uh, most people seem to think Republicans will take over the, the House, but the Senate certainly much less sure. It's unclear who would be, you know, the winning party on Election Day and, or apparently in 2024. So you want to make these changes at a time like now when nobody really knows who's going to benefit.

[00:42:34] And I would add a final point here which is, that sometimes what I hear, and I hear this from both sides is, "Well, yeah, but what if some state goes rogue? Or what if somebody goes... you know, Congress then goes rogue or something?" Ultimately, somebody has to make the final call. And I, you know, I think what Ned and I agree on is that that's a final call that's made in the different states as you go along.

[00:42:57] At some point, we simply have to have confidence that people are going to do their duty, that officials are going to do what they're required to do, and the law can guide them. It can set parameters for how they act. It can be helpful. And I think we should aim for amendments that would, that would do that.

[00:43:15] But we do have to recognize that there's no... you know, ultimately at some point, if people don't want to accept the results of elections, well, then we're going to have a very different country and, and, and we'll have to proceed from that standpoint. Uh, and, and that's the cold reality. So we're trying to make improvements here. We recognize that nothing is going to handle every single contingency that could possibly come along.

[00:43:36] **Jeffrey Rosen:** Well, the clarifications that both of you have proposed are part of the bill that is being proposed by, Senator Angus King of Maine, the independent. Uh, that bill would, uh, create a procedure for judicial review when a state government fails to follow its own lawful preexisting procedures in appointing electors and directs Congress to count the electors validated by the court, not those appointed by a state legislature or governor in that situation. The key points as King, echoing your points is that the state can't change the rules after the election.

[00:44:08] There's a final part of the King bill, which would clarify the vice president's role to unequivocally remove any power of the vice president to make any substantive decisions about whether electors will be counted. That of course, was an issue in the election of 2020 when Vice President Pence, ultimately decided he had no such power to make that substantive election. Ned, do you think it's important to clarify that the vice president's role is purely ceremonial in any reform of the Electoral Count Act?

[00:44:35] **Ned Foley:** Yes, I do. I, I think and hope that there is widespread agreement that the vice president's role is simply to preside over the session and to not make any substantive decisions. But, uh, I guess, I, I'd add one point that I think is the, the basic idea that Brad and I, have been sharing today. That I think the vice president's role is limited for the same reason that

Congress's role is limited. The conjunction of thinking that the vice president is limited is because the states, again, under the Electoral College system have the right to make this decision.

[00:45:06] Now, as I think we've all been saying, and you've quoted, Senator King, you know, they can't change after they made their decision, and that's crucial too. Um, but so the vice president gets to preside over the process that ought to be guided by these constitutional principles.

[00:45:24] **Jeffrey Rosen:** Brad, do you agree that the vice president's role is purely ceremonial, then the reforms to the Electoral Count Act should clarify that? And are there any other reforms to the Electoral Count Act that you think would be a good idea?

[00:45:36] **Brad Smith:** I do think that role is ceremonial. And I do think it's good to clarify... again, I mean, ultimately at some level you can't... you know, some, some people would argue, for example, the, uh, uh, it, it's been argued that, uh, you couldn't limit his role because it's constitutional. And some people actually argue that he's constitutionally entitled to make those substantive decisions.

[00:45:56] I think that's a very bad reading of the constitution. I'm pretty sure Ned, agrees with me. And I think that the significant majority of legal scholars agree that that's a bad interpretation. And I was glad to see that Mike Pence, agreed that it was a bad interpretation.

[00:46:12] Nonetheless, uh, some people are going to argue that, but even then, you know, having the statute there gives some sense of what Congress thought and it, and it helps to, um, uh, again, guide people's actions. Uh, it helps to, to set expectations. And so I, I think that it, it's worth doing.

[00:46:29] Again, one of the objections I often hear is sort of like, "Yeah, but what if? You know, what if some state Supreme Court goes off and issues some totally rogue decision and that decides the election?" You can't adjust for every what if, so the, the check on that would be Congress, but then what if Congress goes rogue? And I think we're trying to get back to the original idea that it is a state matter.

[00:46:49] I think there's much less danger by the way, uh, if, if the, the possibility of a rogue decision is kept within the states, because you would need to have potentially several states have that kind of decision in order to change the election results, as opposed to one Congress that comes in and then changes it nationally. So we, you know, you can't get every single contingency, but we can, uh... we should count on people to follow the law. We can try to guide them to make sure that they do.

[00:47:16] And in the end, you know, one of the things Americans have to start conceding a bit more is that sometimes you lose elections. And if you do the, the really great thing about living in this country is there's going to be more elections and you'll get, you'll get a chance to come back. And despite what people say, uh, you know, American democracy is, is probably not going to end because your candidate lost this presidential election.

[00:47:39] Jeffrey Rosen: Ned, you are chairing one of the teams on the National Constitution Center's guardrails of democracy initiative. Do you imagine that your team and the other teams might converge on reforms of the Electoral Count Act along the lines we've been discussing? And, and, and might Congress do so as well? Uh, Senator McConnell, is among the Republicans who've expressed interest in these sort of reforms along with Democrats, but is it possible that, that Congress could actually reform the Electoral Count Act along the lines you've been discussing?

[00:48:10] Ned Foley: I surely hope so. I'm cautiously optimistic. I do think there are challenges here as history shows, but, um, I do think this is an essential guardrail of democracy. I mean, I, I, I do think again, even if there's nothing perfect, the idea that Congress would try to act in a rule of law oriented way when it plays this role under the constitution, the 12th Amendment, I think we ought to try to build on that instinct as much as possible, um, as a both law point and a norm point about how to do democracy properly for the sake of self-government.

[00:48:47] And I think that there, you know... I'm again, cautiously optimistic there that there's enough interest, you know, on both sides of the aisle in Congress, that this ought to get done, that this gives us a real opportunity. And as Brad says, it's essential to do this now, when there's as much, much so-called veil of ignorance, meaning on the politics of this. We don't know who's going to be sitting in the Senate and in the House on January 6, 2025. Um, yes, we do know who's going to be the vice president, but still, we don't quite know who the status quo advantages without knowing the Senate and the House.

[00:49:23] And so now is the moment for the two parties in the spirit of putting country first, to avoid another crisis, whether it's the riot of, you know, 2021, or it's the danger of 1877, you know, this is playing with fire, unfortunately. And so if, if members of Congress really want to be patriotic and act on behalf of the nation as a whole, clarification of the Electoral Count Act, I think is at the top of the list of things to do.

[00:49:53] Jeffrey Rosen: Brad, do you agree that there's a possibility of bipartisan reform in Congress? And if you were making an appeal to Republican members about why it's important to reform the Electoral Count Act now, as you say, uh, what would that appeal be?

[00:50:08] Brad Smith: I do think it's possible. And, and it's possible in part, because we've heard positive statements, both from Republicans and, and from Democrats, particularly in the Senate where it would be perhaps harder to, to, uh, get anything done because of the filibuster rule. In fact, I even think that if something passes here, it may pass on what we... I, I like to call an old-fashioned bipartisan coalition. That is not something where you get, you know, 50 plus one person from the other side, but where you might actually have something like, you know, 35 Democrats and 31 Republicans or something support it and, and a bunch of Democrats and Republicans also oppose.

[00:50:42] Um, so I think it's, it's definitely a, a, a possibility to get done. Obviously, it's going to be tough, but again, uh, the, the time to do it is now.

[00:50:52] Jeffrey Rosen: Ned, I think our final question is what's the nightmare scenario? Concretely, what are some real possibilities that could happen in the election of 2024 that could create constitutional chaos in, uh, counting the electoral votes and then make it all the more important to reform the Electoral Count Act?

[00:51:11] Ned Foley: Oh, Jeff, I was hoping we would, uh, end on an optimistic note about the possibility of, uh, of success in Congress, as opposed on, on nightmares. Um, you know, again, if, if, if you go back to what happened in 1876, and you saw that on the brink of Inauguration Day, the two sides were still competing at the point where President Ulysses Grant was, had plans for martial law, because he was worried about two simultaneous inauguration ceremonies. Tilden saying he won, Hayes saying he won, and the US army figuring out which, you know, commander-in-chief, they were going to start to obey.

[00:51:51] That, that's really the ultimate nightmare. The fact that, um, kind of a lack of clarity in the process of declaring the winner of a presidential election could break down given bicameralism. I mean the real da-... and we don't know, you know, which party is going to control the Senate on January 6, 2025 or the House. And if there is that split control of Congress.

[00:52:13] It's one thing to deadlock over a budget bill, you know, and there's the danger of, uh, you know, the debt ceiling, and things like that. But being deadlocked over who gets the nuclear codes at noon on January 20th is I think the ultimate nightmare.

[00:52:28] Jeffrey Rosen: And Brad, what do you think the nightmare situation is? Uh, is its partisan balance necessarily obvious? And why is it important to avoid it?

[00:52:38] Brad Smith: Well, I, I, I think it is as, as Ned says, uh, something where you're actually threatened with, with major violence, uh, major, uh, uh, opposition to, to accepting, uh, defeat in the elections. And, you know, again, at some point the Electoral Count Act itself, uh, is not going to stop every possibility of that by any, any means, but you make what, what changes one can in.

[00:53:02] Uh, you'd asked earlier, and I didn't really address by the way is, is, you know, what would be a pitch that, that one might make to Republican legislators on this? And, and I think from the Republican side, uh, uh, the key element really is this idea that Congress is not a national recount board. This should appeal to Republican notions of federalism, of, uh, state prerogatives, which I think are important, that that is how the system was designed. And I think that kind of decentralization can, can serve us very well.

[00:53:30] Um, you know, it's worth noting in, in 1877, of course, reminding folks that this was just, you know, less than 12 years after the end of the Civil War. And there were congressmen vowing to raise armies and march on Washington, if, if their candidate, uh, was, was not selected. Um, one would hope that we're not going to get there. I think Electoral Count Act reform would be a very small step, but nonetheless, an important step in trying to, uh, prevent that kind of scenario.

[00:54:01] Jeffrey Rosen: Thank you so much, Ned Foley and Brad Smith, for a rigorous, uh, civil and a, and a bipartisan discussion of reform of the Electoral Count Act. And we'll much

look forward to reconvening to discuss other reforms in the coming year. Ned, Brad, thank you so much for joining.

[00:54:21] Ned Foley: Thank you, Jeff.

[00:54:22] Brad Smith: Thank you, Jeff.

[00:54:26] Jeffrey Rosen: Today's show was produced by Melody [inaudible 00:54:29] and engineered by, Dave Stocks. Research was provided by Michael Esposito, Chase Hanson, Sam Desai, and Lana Orrick. Please rate, review, and subscribe to We The People on Apple, and recommend the show to friends, colleagues, or anyone anywhere whose eager for a weekly dose of constitutional illumination and debate.

[00:54:48] And remember that the National Constitution Center is in the middle of a crowdfunding campaign, generously matched by the John Templeton Foundation. Every dollar you give to support, We The People will be doubled, uh, up to a total of \$234,000. We'd love to see support from all 50 states and have nearly reached our goal, but are not quite there. So if you are a listener in Kansas, South Dakota, Oklahoma, or Wyoming. Kansas, South Dakota, Oklahoma, or Wyoming, please send in a donation of any amount, five dollars or \$10 or more, so we can meet our goal of spreading light in all 50 of the United States of America.

[00:55:27] Thank you so much for listening and for supporting the mission of the National Constitution Center and for being part of our community of lifelong learners. On behalf of the national constitution center on of, Jeffrey Rosen.