What if the 2020 Presidential Election is Disputed?

STEVEN F. HUEFNER*

Twenty years ago, the country watched uncomfortably as the presidential election between George W. Bush and Al Gore headed into "overtime." For five weeks after Election Day, the razor-thin results in Florida remained in dispute, until the U.S. Supreme Court invalidated the Florida recount efforts. That experience catalyzed the growth of the fields of election law and election administration, as political scientists, public administrators, and legal scholars immersed ourselves in the study of the mechanics of our elections and how to reduce the likelihood of errors and other problems.

The big tests come every four years, when presidential elections exert the maximum pressure on our electoral systems. This year, even before the appearance of COVID-19, the presidential election was already threatening to put even more strain on these systems than we have seen in other presidential elections since 2000. Now, with a global pandemic raging out of control and the country struggling to deal with it, the November election is likely to test our election processes in significant new ways.

Will this year's challenges test the system to the breaking point? Will problems in key states lead to disputes akin to those we witnessed in Florida in 2000? Will disputes arise in Congress as it counts the Electoral College votes? If disputes do occur, are our systems capable of resolving these disputes satisfactorily? Or might we be even more vulnerable today than we were in 2000, despite two decades of attention and reform?

These and related questions were recently the focus of an important colloquium, hosted by the Election Law Program at The Ohio State University Moritz College of Law. The May 4 event, held online (though originally planned, pre-COVID, to occur in person), brought together approximately thirty of the country's leading election law scholars and other experts for a wide-ranging discussion of the most worrisome potential problems that could occur in this year's election. In this edition of *The Ohio State Law Journal Online*, we are fortunate to be able to present essays from six of the participants, sharing their reflections on several of the key issues of the colloquium.

The May 4 discussion unfolded in three segments, each conducted as a virtual "roundtable," and organized by the stage of the presidential election in which distinct kinds of problems or disputes might arise: (1) the period from Election Day (November 3 this year) through the date of the so-called "meeting" of the Electoral College (December 14 this year), when the presidential electors cast their votes in their respective states; (2) the period between the meeting of the Electoral College and January 6, when the new Congress, in Joint Session, officially counts – or, in the case of a dispute, *begins* to count—the votes cast by the members of the Electoral College; and (3) the period from January 6 through Inauguration Day, January 20. Difficult problems could arise in any one of these periods.

For each of the three time periods, the colloquium organizers prepared three hypothetical problems, all nine of which are available here, for the participants to contemplate in advance of the May 4 event. For the period from Election Day through December 14, the three problems asked (in much greater detail than summarized here) how a federal court should respond to: (1) a Due Process challenge to a hypothetical Pennsylvania state court injunction that allowed emergency voting by voters whose absentee ballots had not arrived in time (a variation on the actual problem Wisconsin experienced in its April 2020 primary election); (2) a Due Process challenge to the Michigan legislature's hypothetical appointment of its own slate of electors contrary to the state's official election results, on the basis that absentee ballots arriving after Election Day, which determined the outcome, could not be trusted; and (3) a claim that it violated the fundamental right to vote for the Florida legislature to cancel the state's presidential election in the face of a massive hurricane, and instead to appoint the state's presidential electors directly on the basis of public opinion polling.

Two of the essays that follow derive from the discussion of the problems that might occur in this first time period, when what is at issue are judicial, legislative, and administrative processes occurring within each state to determine who will be the state's presidential electors. In one essay, Rebecca Green, Professor and Co-director of the Election Law Program at William & Mary Law School, considers the question of "How many voters is too few?" That is, if an emergency—hurricane, pandemic, power failure, cyberattack—prevents some portion of registered voters from participating in an election, should the election be invalid? Building on a New York statute that allows for an additional day of voting whenever fewer than twenty-five percent of the registered voters have been able to vote "as a direct consequence of" a disaster, she wrestles with the question of whether courts in some exigent circumstances in which voting is clearly incomplete might therefore invalidate the outcome, either under their state constitution or under the U.S. Constitution. This, she acknowledges, is a thorny problem, which could depend in part on an assessment of the relationship between the margin of victory and the number of voters unable to vote. But precisely because the problem is so thorny, Professor Green urges that every possible step be taken to prevent exigencies from depriving registered voters of the opportunity to vote.

A second essay, by Ned Foley, Professor and Director of the Election Law Program at the Moritz College of Law, considers in detail the constitutional issues surrounding the Pennsylvania hypothetical above: a state court orders that voters be allowed to use an emergency ballot if their requested absentee ballots have not arrived by the day before Election Day. Of course this judicial relief represents the state court's attempt to mitigate the very disenfranchisement that Professor Green worries could undermine the validity of an election. But Professor Foley's essay recognizes that the court order is sure to generate a challenge to its legality, just as occurred in the Wisconsin primary election, when a federal district court, until reversed by the U.S. Supreme Court in *Republican National Committee v. Democratic National Committee*, sought to

extend the voting period by a week. Using the vehicle of a hypothetical Supreme Court opinion to address the legal issues, Professor Foley draws an interesting contrast with how the Supreme Court in *RNC v. DNC* resolved the analogous problem in the Wisconsin primary, and how he hopes the Court would view differently the remedy of allowing the use of an emergency ballot, instead of extending the voting period.

From the time of the meeting of the Electoral College to the Joint Session of Congress, the next three hypothetical problems on the colloquium agenda were what should Congress, rather than the federal courts, do if: (1) Pennsylvania sends Congress two sets of Electoral College votes, one predicated on the state court order allowing absentee voters to use an emergency ballot, and another predicated on a federal district court ruling that the order permitting use of emergency ballots violated the Due Process Clause; (2) Michigan sends Congress two sets of Electoral College votes, one predicated on the official canvass of the election, and another predicated on the state legislature's rejection of the official canvass and direct appointment of its own slate; and (3) Florida fails to hold an election on November 3, and the state legislature instead appoints a slate of electors.

The hypotheticals in this second time period all implicate provisions of the Electoral Count Act of 1887, an antiquated and complicated statutory scheme intended (but potentially inadequate to its task) to forestall disputations in Congress about the results of a state's selection of its presidential electors. Derek Muller, Professor at the University of Iowa College of Law and an expert on the Electoral College, has contributed an essay clarifying a critical aspect of this Act, the so-called "safe harbor" provision. This provision deems a state's certification of its presidential electors to be "conclusive" on Congress if the state has completed the process by at least six days before the date for the meeting of the Electoral College. Beginning with a thorough and careful explanation of the role that this safe harbor provision played in the 2000 Florida recount, Professor Muller then goes on to identify subsequent occasions when lower courts have misunderstood or misapplied the safe harbor provision as though it is a mandate that states must meet. As he recognizes, an accurate understanding of the safe harbor provision could be critical to the Electoral Count Act's impact on Congress's determination of a state's Electoral College vote.

Joshua Douglas, Professor at the University of Kentucky College of Law and a voting rights expert, takes on another dimension of the Electoral Count Act. The Act permits Congress, in the Joint Session at which the Electoral College votes are counted, to "reject the vote or votes [of any state] when they [both Houses] agree that such vote or votes have not been so regularly given." But what amounts to "regularly given"? Might any of the controversies described in the three hypotheticals confronting Congress provide sufficient reason for Congress simply to ignore the votes of a particular state? Professor Douglas is dubious, as a matter of both democratic theory and of constitutional principle. Except in the narrowest of exceptions, he argues that Congress must include every state in the count of presidential electors, even if it means

choosing between competing slates of electors that both may have complied with the safe harbor provision.

Yet the reality is that Congress, in its Joint Session on January 6, might be of two minds, with the House viewing a dispute differently from the Senate. The Electoral Count Act attempts to forestall difficulties here as well, specifying circumstances that should determine which of two competing slates to accept, as well as when to reject a slate as not "regularly given," even if there is no competing slate. But as Professor Foley, among others, has written elsewhere [pp. 329-335], the Act is in fact wholly inadequate to the task of preventing Congress from deadlocking in some circumstances.

Hence the final three hypotheticals, arising in the time period from the convening of the Joint Session on January 6 through Inauguration Day. These hypotheticals all involve problems related to a divided Congress, in a close election, under an inadequately specified process. They include: (1) What happens if the Senate and the House disagree about which of two competing slates of electors to count? (2) If Congress does decide to reject the votes of a given state, notwithstanding Professor Douglas's argument that it should not, how does that rejection affect the Electoral College math? In other words, does the number of votes necessary to constitute a majority of the electors change? (3) And finally, what is the role of the Vice President, as President of the Senate and therefore, under the terms of the Electoral Count Act, the presiding officer at the Joint Session, if the Vice President is at that moment also a candidate in a disputed election before the Joint Session?

With respect to this final hypothetical, Joel Goldstein, Professor Emeritus at the Saint Louis University School of Law and perhaps the foremost legal expert on the office of the Vice President, has contributed an essay arguing that the role of the President of the Senate at the Joint Session is entirely ministerial. His reflections include a number of historical examples, dating back to Thomas Jefferson and including Richard Nixon in the election of 1960 and Al Gore in the 2000 election. Of course, each of these elections were no longer seriously contested at the time of the Joint Session, while in contrast the May 4 colloquium pointedly raised the question of how much sway a determined Senate President could exert at the Joint Session if serious disagreement about the outcome persisted as of January 6. Professor Goldstein's answer, notwithstanding the possibility of a contrary reading [pp. 321-323] of the Electoral Count Act, still is "not much."

Addressing a distinct but related issue, Lisa Manheim, an experienced election lawyer as well as a Professor at the University of Washington School of Law, has written an essay on the ways in which the President, who has no formal role in any of the mechanics of the electoral process, nonetheless could exert some degree of influence or even control over the presidential election. Her conclusion is that in the event of a disputed election, the President can exercise no legal powers but only political powers, for instance to urge a state legislature to override a state election, as some of our hypotheticals contemplated, or to influence how members of Congress act in the Joint Session.

But she concludes with the observation that a President might also attempt the unlawful use of other presidential powers, including command of the military, to influence the resolution of an election dispute, and that the most likely check on that abuse is political pushback from the electorate or other political actors.

The colloquium itself, an archived video of which can be viewed here, also considered a number of additional perspectives and issues from many other equally thoughtful and expert analysts. Two main take-aways from the event were: (1) a sense that the legal issues of the first session (concerning how a state should resolve a controversy over who will be its presidential electors), are potentially without obviously correct answers, and that we therefore ought to accept leaving these legal issues to the Supreme Court, even if the Court is closely divided; and (2) a widespread view that the second session's issues concerning how Congress should treat competing slates of electors from a single state were not readily amenable to judicial resolution, but that Congress could more easily resolve these disputes if the Electoral Count Act were clearly understood to call for recognizing whichever slate was certified by the state's governor. Among its long and labored provisions, the Act already has language, in 3 U.S.C. § 15, that at least in some circumstances privileges a slate certified by the state's chief executive, but how that provision relates to a number of other contingent provisions is murky at best. Ideally an amendment to the Act would be most helpful, but in the meantime many participants agreed that some additional scholarly attention to the strength of this governor-as-tiebreaker reading across all circumstances would be valuable.

As you read the six essays that follow, we hope that you will sense the care and concern that all the participants in the colloquium brought to the dialogue. Notwithstanding the deeply problematic nature of some of the potential legal and procedural uncertainties that could arise in a contested presidential election, the earnest and collaborative engagement of this group of scholars and experts is itself something to celebrate.

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* C. William O'Neill Professor in Law and Judicial Administration; Director of Clinical Programs; Legislation Clinic Director; Senior Fellow, Election Law @ Moritz.