Qualifications to Be President and the Role of the House and Senate in the Electoral Vote Count

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Abstract: *When electoral votes for President and Vice President are counted pursuant to the Twelfth Amendment, qualifications to be President should not be considered. That conclusion follows from the Twentieth Amendment, which contemplates that a person who is not qualified to become President can nevertheless become President-elect if that person receives a majority of electoral votes, as required by the Twelfth Amendment.*

Under the Twentieth Amendment, if "the President elect shall have failed to qualify" when the presidential term begins, "the Vice President elect shall act as President until a President shall have qualified."[1] *The Twentieth Amendment allows a non-qualified person to become President-elect so that the running-mate of the winning presidential candidate, and not the losing presidential candidate, will substitute if the person chosen by the electors is not qualified.*

Whoever counts electoral votes under the Twelfth Amendment must respect its rules and count electoral votes without regard to the qualifications of the person voted for. The electoral count is not a process in which qualifications to be President are to be addressed. Although the Constitution prescribes qualifications to be President and addresses the contingency in which a majority of electoral votes goes to someone who is not qualified, the Constitution does not set out any process by which to decide on the qualifications of the President-elect.

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[1] U.S. Const. amend. XX, § 3.

INTRODUCTION

As events too recent to be called history show, presidential electors sometimes cast votes for an individual whose legal qualifications to hold the office are disputed. If a majority of electors cast votes for President for a person whose qualifications for that office are doubtful, two questions arise. First, what happens if the candidate is not qualified? Second, who decides the question of qualification?

The Twentieth Amendment answers the first question: the nonqualified person becomes President-elect, and the Vice President acts as President until a President has qualified (for example, by attaining the age of thirty-five).[2] Nothing in the Constitution, however, authorizes either house of Congress, the two houses acting together, or any other officer or institution conclusively to resolve a dispute about qualifications to be President.

Section I of this essay first describes recent issues and developments concerning qualifications to be President and the electoral count.

Section II then explains how the Twentieth Amendment deals with the possibility that a person who is not qualified to be President might receive a majority of electors' votes. The amendment's solution to that problem is that the nonqualified person becomes President-elect, but not President, as long as the disqualifying conditions persist. Instead, during that period, the Vice President acts as President. Because electoral votes that are cast for a nonqualified person can have a legal effect—they can make that person President-elect—whoever counts electoral votes is obliged to disregard questions of qualification and count every vote.

Section III discusses the question of whether the Electoral Count Act of 1887,[3] which purports to govern the process of counting electoral votes called for under the Twelfth Amendment, authorizes inquiries into candidates' qualifications during that process.[4] The statute does not authorize objections to electors' votes based on candidates' qualifications, so the question whether Congress has power to provide for an inquiry into qualifications does not arise.

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[2] Id.

[3] Ch. 90, 24 Stat. 373.

[4] I describe the Electoral Count Act as purporting to govern the electoral vote process because I doubt whether Congress, acting through a statute, has power to bind the House and Senate, acting separately through the tellers they appoint, in the electoral count process.

I. CURRENT ISSUES CONCERNING QUALIFICATIONS TO BE PRESIDENT AND THE ELECTORAL COUNT PROCESS

Qualifications to be President, and the process by which an individual's qualifications can be conclusively determined, are a perennial and timely topic. On January 6, 2025, a majority of the electoral votes for President were cast for an individual whose qualifications to hold the office are disputed.[5] On that day, when the tellers for the House and Senate counted electoral votes, no Senator or Representative raised an objection under the Electoral Count Act.[6] Between the electoral count of 2021 and 2025, the statute that governs the electoral count was revised and the Supreme Court decided *Trump v. Anderson*,[7] a case about qualifications for the office of President under Section 3 of the Fourteenth Amendment.[8] Although that case was mainly concerned with the ballot in a presidential primary election in Colorado, the issue of the electoral count was in the background.[9]

The Constitution establishes qualifications for serving as President but does not explicitly provide a process to resolve disputes about qualifications.[10] This Article discusses the question whether the House and Senate, when they meet for the electoral vote count, have any role in

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[5] Donald Trump's qualifications to be President are disputed. See, e.g., William Baude & Michael Paulsen, The Sweep and Force of Section Three, 172 U. Pa. L. Rev. 605, 736–42 (2024) (arguing that Donald Trump is disqualified from the presidency under Section 3 of the Fourteenth Amendment). On January 6, 2025, Donald Trump received a majority of the electoral votes cast for President. See 171 Cong. Rec. H48 (daily ed. Jan. 6, 2025) (listing the electoral votes for President and Vice President as reported by the tellers and announced by the President of the Senate (the Vice President)).

[6] See id. at H46–H48 (reporting the opening and reading of the certificates of electoral votes).

[7] 601 U.S. 100 (2024).

[8] Procedures for counting electoral votes are codified at 3 U.S.C. § 1 *et seq*. Those procedures were amended by the Electoral Count Reform and Presidential Transition Improvement Act of 2022, which is Division P of the Consolidated Appropriations Act of 2022, Pub. L. No. 117-328, div. P, 136 Stat. 4459, 5233.

[9] In *Trump v. Anderson*, 601 U.S. at 117, the Supreme Court decided that States have no role in enforcing Section 3 of the Fourteenth Amendment when they place names on official ballots in primary elections for the presidency.

[10] Qualifications to serve as President appear in Article II. U.S. Const. art. II, § 1 (setting out qualifications based on citizenship, age, and residency). Section 3 of the Fourteenth Amendment contains another qualification for many state and federal government positions. U.S. Const. amend. XIV, § 3 (setting out disqualifications for listed positions based on participation in insurrection or rebellion or giving aid and comfort to enemies of the United States for persons who previously had taken an oath to support the Constitution as holder of listed positions). Whether the office of President is one of the positions to which the Section 3 disqualification applies is disputed. See, e.g., Brief for Petitioner at 20, *Trump v. Anderson*, 601 U.S. 100 (arguing that the President is not an officer within the meaning of section 3); Brief for Respondent at 34, *Trump v. Anderson*, 601 U.S. 100 (arguing that the presidency is an office within the meaning of section 3). This article addresses qualifications to be President. Qualifications to be Vice President also appear in the Constitution and are largely the same as qualifications to be President. See U.S. Const. amend. XII (providing that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States").

deciding whether candidates for President meet the Constitution's qualifications for those offices. I argue that the two houses' function in the electoral count gives them no role in resolving disputes about qualifications for the presidency.

Trump v. Anderson involved the disqualification from office standard imposed by Section 3 of the Fourteenth Amendment. Whether that disqualification applies to the presidency was an issue in the case, but the Court did not resolve it and no opinion addressed it. Counsel for the respondent mentioned the electoral count during the argument.[11] Justices Sotomayor, Kagan, and Jackson, in an opinion concurring in the judgment, criticized the per curiam opinion for foreclosing federal enforcement of Section 3 of the Fourteenth Amendment other than by statute.[12] The concurring Justices may have had the electoral count in mind.

Whether the Court's opinion is best read as addressing the electoral count is not clear, but whether it is best so read is irrelevant. The Constitution does not make the two chambers of Congress judges of qualifications to be President. If the House and Senate have any official role in presidential elections, that role is confined to the process of counting electoral votes (and to contingent elections if the electors do not produce a majority vote). As this essay explains, counting electoral votes does not entail deciding whether any candidate voted for is qualified. Electoral votes for nonqualified individuals count.

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[11] The possibility that the two chambers of Congress might decide not to count electoral votes for a candidate they believe to be nonqualified was discussed twice by counsel for Anderson at argument in *Trump v. Anderson*. Transcript of Oral Argument at 104–05, 122, *Trump v. Anderson*, 601 U.S. 100 (argument of Jason Murray). Counsel pointed to an amicus brief by Edward Foley, Benjamin Ginsberg, and Richard Hasen. Id. at 105 (referring to Brief of Edward B. Foley et al. as Amicus Curiae in Support of Neither Party at 14–17, *Trump v. Anderson*, 601 U.S. 100 (No. 23-719)) [hereinafter Brief of Edward B. Foley et al.]. That brief discusses a scenario in which the chambers decide not to count electoral votes because they find that the candidate electors voted for is not qualified. If the nonqualified candidate otherwise would have had a majority, not counting votes for that candidate could result in a contingent election by the House with the candidate who lost the electoral vote as the only person eligible to be chosen by the House. Brief of Edward B. Foley et al. at 16. The brief states that that scenario "would appear to place the [Electoral Count Reform Act] and the Twelfth Amendment in conflict with the Twentieth Amendment." Id. at 16. I argue that were the houses to refuse to count electoral votes on the grounds that the person voted for is not qualified to serve as President, their action would conflict with the Twentieth Amendment, the Twelfth Amendment, and the Electoral Count Act.

[12] According to the concurring opinion, the per curiam opinion "announces novel rules" for how federal enforcement of Section 3 of the Fourteenth Amendment must operate, and "reaches out to decide Section 3 questions not before us, and to foreclose future efforts to disqualify a Presidential candidate under that provision." *Trump v. Anderson*, 601 U.S. at 123 (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment). The concurring opinion does not mention the electoral count specifically, and the electoral count is not the only possible mode of federal enforcement, as the opinion recognizes. According to the concurring opinion, the majority opinion "forecloses judicial enforcement of that provision, such as might occur when a party is prosecuted by an insurrectionist and raises a defense on that score." Id. at 122.

II. QUALIFICATIONS, THE ELECTORAL COUNT, AND THE TWELFTH AND TWENTIETH AMENDMENTS

The Twelfth Amendment provides that the electors are to vote by ballot for President and Vice President and send certificates of their votes to the seat of government, addressed to the President of the Senate (usually the Vice President).[13] The President of the Senate "shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[14] Speaking in the passive voice, the Constitution does not explicitly direct anyone to count the votes, including the two houses. Nor does the Constitution explicitly make anyone the arbiter of the election or qualifications of the President, the way Article I, Section 5 makes each chamber of Congress the judge of the "elections, returns and qualifications of its own members."[15]

Although the Constitution does not make the two houses the judge of qualifications for the Presidency, it does provide that they are to be present at the electoral count. At least since the 1797 electoral count, the chambers have been more than spectators and have taken an active part in the process. The House and Senate appoint tellers who count the votes after the President of the Senate opens the electors' ballots and who report their count.[16]

Tellers appointed by the House and Senate have counted votes at least since 1797, although the Constitution does not explicitly assign the two houses any role in the electoral count. Nor does the Constitution explicitly address disputes about the outcome of a State's selection process and a resulting dispute about the identity of a State's electors. In 1877, when the 1876 presidential election produced serious disputes about the outcome in enough States to decide the election, Congress created an ad hoc Electoral

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[13] U.S. Const. amend. XII.

[14] Id.

[15] U.S. Const. art. I, § 5.

[16] In 1797, after the presidential election of 1796, the House and Senate met in the House chamber "to attend the opening and examining the votes of the electors for President and Vice President of the United States, as the constitution provides." S. Journal, 4th Cong., 2d Sess. 320 (1797). According to the Senate Journal, the two houses met "and the certificates of the electors of sixteen states were, by the Vice President, opened and delivered to the tellers appointed for the purpose." Id. The tellers, "having examined and ascertained the number of votes, presented a list thereof to the Vice President, which was read." Id. The House Journal names the tellers (Sitgreaves and Parker for the House, Sedgwick for the Senate), and states that the President of the Senate opened the certificates and that as the certificates "were read, the tellers, on the part of each House, counted and took lists of the same; which, being compared, were delivered to the President of the Senate, and are as follow." H. Journal, 4th Cong., 2d Sess. 685 (1797). The House Journal does not say who read the certificates, or whether they were read aloud. The House Journal does note that the tellers acted on the part of the house that appointed them.

Commission to resolve those disputes and guide the electoral count.[17] Congress created the Electoral Commission of 1877 without any explicit authority under the Constitution. Ten years later, Congress enacted the Electoral Count Act of 1887, the predecessor of today's statute.[18] Whether Congress by statute, the President of the Senate, or tellers appointed by the houses have any power conclusively to resolve disputes about presidential elections remains a matter of debate today.

Whatever Congress' (or anyone else's) constitutional role in the electoral count may be, that role does not include resolving disputes concerning qualifications to hold the presidency. That conclusion follows from Section 3 of the Twentieth Amendment, which separates the result of the electors' vote from questions of qualification to hold the office of President. Under that provision, "[i]f a President shall not have been chosen" when the presidential term begins, or if at that time "the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." Section 3 contemplates that someone who is not qualified to serve as President can become President-elect. For example, someone who will not turn thirty-five until after the term begins can become President-elect. Thus, the electors' votes determine who is President-elect, but not necessarily who becomes President, because the electors might elect someone who is not qualified to hold the office.

The possibility that a nonqualified person can become President-elect may seem bizarre, but it implements an important choice the Twentieth Amendment's drafters made. Suppose that electoral votes for a nonqualified person had no legal effect at all. Under that assumption, a majority of the electors might give votes for President that did not count. The Twelfth Amendment provides for the contingency in which no candidate receives a majority of the votes of the electors chosen. In those circumstances, as in 1825 after the 1824 presidential election, the House of Representatives elects the President, choosing from among the three (or fewer) highest electoral vote-getters.[19] The House votes by States.[20] In an ordinary two-party election, either the Democrat or the Republican receives a majority of

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[17] Act of Jan. 29, 1877, ch. 37, 19 Stat. 227. A comprehensive account of the creation and operation of the Electoral Commission is Charles Fairman, Five Justices and the Electoral Commission of 1877 (1988).

[18] Act of Feb. 3, 1887, ch. 90, 24 Stat. 373.

[19] U.S. Const. amend. XII (providing that if no person has a majority of the electoral votes cast for President, the House of Representatives "shall choose immediately, by ballot" the President from among the persons having the most votes, "not exceeding three").

[20] Id. (providing that when the House chooses the President, "the votes shall be taken by states, the representation from each state having one vote").

electoral votes, and the losing Republican or Democrat is the only other vote-getter. In ordinary elections, if the electoral votes for the candidate who receives a majority were legal nullities, no candidate would receive a majority of the votes of the electors chosen. Electors count in the denominator for the majority even if their votes for President are nullities.[21] Under those circumstances, but for Section 3 of the Twentieth Amendment, the House would elect the President and would have only one candidate for whom States could vote: the candidate who lost the election.[22]

Faced with that possibility, the drafters of the Twentieth Amendment decided that if a nonqualified candidate receives a majority of the electoral votes, the nonqualified but winning candidate's running mate—the Vice President-elect—should act as President. The losing presidential candidate should not become President when the winning presidential candidate is not qualified.[23] The Twentieth Amendment gives Congress power to provide for the situation in which neither the President-elect nor the Vice President-elect has qualified when the term begins.[24] Congress has done so in the Presidential Succession Act, which applies the same rule to dual vacancies

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[21] Id. (providing that after the electors' votes are counted, "[t]he person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed").

[22] Removing electors from the denominator would also give the presidency to the losing candidate, without the contingent election in the House.

[23] Participants in the drafting of the Twentieth Amendment were aware of the possibility that the person who received a majority of the electoral votes might not be qualified. At a 1932 House hearing on possible constitutional amendments to address the presidential election process, Representative Clarence Lea, a Democrat of California, discussed contingencies that could produce a vacancy in the presidency, including failure to qualify: "It might develop that the President elect was not a native born citizen and therefore not legally qualified to be President." Proposed Constitutional Amendment: Hearing on S.J. Res. 14 Before the H. Comm. on the Election of President, Vice President & Reps. in Cong., 72d Cong. 9 (1932) (statement of Rep. Clarence Lea). Representative Lea also was concerned about the possibility that the candidate of a losing party might become President and sought to avoid that result. If the Electoral College fails to elect a President, "or the man they elect fails to qualify, you have this problem of selecting a substitute." Id. at 10. When that happens, "[i]t becomes a question of how to select a new man. It would be important, of course, to give succession to the party which had succeeded at the preceding election." Id. Expressing similar worries, Representative Ralph Lozier, a Democrat of Missouri and member of the committee (as Representative Lea was not), brought up the scenario in which the Electoral College produces no majority, the President is then to be chosen by the House, and one of the candidates who received electoral votes dies. Under those circumstances, "the party represented by that candidate would be disenfranchised and the members of his party in the House would have no chance to vote for a member of their party for President." Id. (The Twentieth Amendment addresses that possibility by empowering Congress to provide for "the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them." U.S. Const. amend. XX, § 4.) Both Representatives Lea and Lozier wanted to design the system for dealing with contingencies so that it would not defeat the people's choice, as reflected in the party ticket for which they voted.

[24] U.S. Const. amend. XX, § 3.

created by failure to qualify that it applies to dual vacancies caused by death, resignation, and removal.[25]

In order to prefer the winning vice-presidential candidate to the losing presidential candidate, the drafters of the Twentieth Amendment provided that a nonqualified person could become President-elect.[26] They thereby separated the result of the electoral count from the question of qualifications. Any role either chamber has under the Twelfth Amendment concerns the electoral count.[27] Perhaps the two houses have authority to do what they did in 1877—decide which of two competing state electoral slates is genuine. But deciding who the states' electors are, and deciding what the electors' votes are, does not involve deciding on qualifications for the presidency, just as the President of the Senate's task of opening electoral votes does not involve deciding on qualifications. Once the two houses know from the electoral votes whether there is a President-elect and Vice President-elect, the job of counting electoral votes is done. Whether the President-elect is qualified and will become President does not affect the electoral count. Nor

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[25] 3 U.S.C. § 19.

[26] U.S. Const. amend. XX, § 3. See also supra note 23.

[27] According to Professor Derek Muller, reading the Twentieth Amendment as providing that a nonqualified candidate who receives a majority of the electoral votes becomes President-elect but not President seems "strained" because the amendment "does not appear to strip Congress of its counting power but to fill in the gaps in a scenario where Congress *does* count votes for an unqualified candidate." Derek T. Muller, Administering Presidential Elections and Counting Electoral Votes After *Trump v. Anderson*, 60 Wake Forest L. Rev. 327, 355 n.153 (2025). Professor Muller is correct that the Twentieth Amendment does not say anything about who counts electoral votes. But the amendment does provide that votes for a nonqualified candidate have legal effect and thereby implies that whoever counts electoral votes is obliged to count votes for a nonqualified person. Professor Muller appears to assume not only that Congress has power to count electoral votes, but that it has power to treat votes for a nonqualified candidate as legally ineffective, contrary to the Twentieth Amendment. That conclusion may rest on the further assumption that the process of counting electoral votes, whoever conducts that process, includes making a decision regarding qualifications to be President. As he recognizes, however, the assumption that votes for nonqualified persons can or must be disregarded in the process of counting electoral votes leads to an unacceptable conclusion if a nonqualified person receives a majority of electoral votes in a two-candidate election: the losing candidate becomes President because the House of Representatives must conduct a contingent election in which only the losing candidate is eligible to be elected. See id. at 364–65 (describing the scenario in which a majority of electors vote for a nonqualified person and those votes are not counted, resulting in a contingent election by the House). Professor Muller's proposed solution is that electors who would have voted for the nonqualified person (and who usually will have run on a pledge to do so) vote instead for some other member of that candidate's party, and that that party's Members of the House also vote for that person. Id. at 365–66. The Twentieth Amendment provides a different solution: votes for the nonqualified candidate count and make that person President-elect, while the Vice President acts as President until a President qualifies. Under the Twentieth Amendment, the backup for a nonqualified presidential candidate is the candidate's party's nominee for Vice President. Under Professor Muller's approach, the backup is chosen by a group of electors and Members of the House who decide for whom to vote, with the former disregarding any pledge they may have made.

does the selection of a nonqualified person as President-elect require that the House elect the President.

From today's perspective, the Twentieth Amendment might seem maddeningly incomplete. It deals with the contingency in which a nonqualified person becomes President-elect but does not provide a process to determine whether that contingency has arisen. Nor does any other constitutional provision set out that process.

The Twentieth Amendment's drafters faced a formidable task. They had to address many technical and controversial issues—the amendment is mainly about the constitutional calendar, not about presidential qualifications—and had to devise solutions that could command supermajority support in Congress and the States.[28] That they did as much as they did was an achievement. The drafters also left important questions unaddressed, as did the Federal Convention and the drafters of the Twelfth Amendment. One of those unaddressed questions from 1787 to 2025 concerns possible disputes about qualifications to be President. The Constitution does not say how to resolve those disputes, and neither the Twelfth nor the Twentieth Amendment empowers the two houses to do so during the electoral count.

[28] Section 1 of the amendment deals with the days on which congressional and presidential terms begin. It provides that the terms of Senators and Representatives begin at noon on January 3, and that the terms of President and Vice President begin at noon on January 20. U.S. Const. amend. XX, § 1. Section 2 of the amendment provides that Congress shall assemble at least once each year and sets noon on January 3 as the default starting point, subject to change by statute. Id. at § 2. Presidential, vice-presidential, and congressional terms began on March 4 before the Amendment, and the default starting day for sessions of Congress was the first Monday in December. U.S. Const. art. I, § 4, cl. 2. Under the old calendar, elections for Congress were held in November of even-numbered years, and that Congress first met in December of the following year, producing a substantial lag between congressional elections and change in personnel and policy. Every even-numbered year, a so-called lame-duck session of Congress would convene in December, after the November election. Lame-duck sessions often included Senators and Representatives who had lost bids for reelection. Those sessions had to end on March 4 of the following year, and that hard end point often produced a rush at the end of the session. Because Congress and the presidency (and vice presidency) turned over on the same date, if the House of Representatives had to choose the President, the choice went to the lame-duck House. In 1801, the choice between Thomas Jefferson and Aaron Burr was made by the House that had been elected in 1798 that was dominated by the Federalist Party, which Jefferson and his party had defeated in the 1800 elections. See Fixing the Commencement of the Terms of the President and Vice President and Members of Congress, S. Rep. No. 72-26, at 2–5 (1931) (Senate Judiciary Committee Report on the Twentieth Amendment, describing problems with the constitutional calendar before the Twentieth Amendment).

III. THE ELECTORAL COUNT ACT AND STATE LAW THAT LOOKS TO QUALIFICATIONS TO BE PRESIDENT

Because of the Twentieth Amendment, an elector can cast a valid vote for a nonqualified candidate and thereby contribute to making the candidate President-elect. Federal law therefore does not invalidate an elector's vote for a nonqualified candidate, nor does federal law invalidate a state's appointment of an elector pledged to vote for a nonqualified candidate. Whoever counts electoral votes has no reason to look directly to federal law concerning qualifications to be President or Vice President.

This section considers the possibility that, under state law, an individual pledged to vote for a nonqualified candidate may not be an elector. (That was not the possibility raised by *Trump v. Anderson*, which involved candidates' access to the official ballot, not qualifications to be an elector.[29]) State law might also forbid an elector from voting for a nonqualified candidate. Perhaps at the electoral count, the two houses can decide an objection to an individual's status as an elector based on state law or can decide that an elector's vote was unlawful under state law, even though that individual has been certified as an elector through the state's process and the elector's vote is not invalid under federal law. Qualifications might be relevant for the electoral count because state law makes them relevant, not because they are relevant of their own force.

Neither the Constitution nor the Electoral Count Act, however, calls on the two houses to decide whether a candidate's qualifications are relevant under state law.[30] First, the Constitution implies that the two chambers are not granted the authority to decide whether a state's certification of its electors is correct under state law.[31] The Constitution also implies that the two houses do not have the power to decide whether the vote of a properly certified elector is consistent with state law. Second, the Electoral Count Act implements those constitutional principles. As such, the possibility that state

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[29] See Trump v. Anderson, 601 U.S. 100, 110 (2024) (holding that Colorado could not restrict its ballot in a presidential primary election on the basis of Section 3 of the Fourteenth Amendment).

[30] Both the appointment of presidential electors by the states and the process by which electors vote and report their votes to the national government are governed by 3 U.S.C. §§ 1–13. The electoral-count process is governed by 3 U.S.C. §§ 15–18. The latter provisions of Title 3 are derived from the Electoral Count Act of 1887, ch. 90, 24 Stat. 373, and were substantially amended by the Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, div. P, 136 Stat. 4459, 5233.

[31] See U.S. Const. art. II, § 1, cl. 2 (vesting power in the states to appoint their respective electors); see also U.S. Const. amend. XII ("[I]n the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.").

law might purport to bar an elector's vote for a nonqualified candidate is not relevant during the electoral count.

As for the Constitution, Article II provides that each state shall appoint electors, and the Twelfth Amendment governs the electors' ballots and calls for a vote count with the House and Senate present. Neither creates a dispute resolution process designed to inquire into the state decisions and state law that lie behind a state's electoral vote.[32] That combination of constitutional rules implies that the vote count is to be based on the outcome of each state's choice as presented by that state's officials. Pathological situations, like the 1877 dispute as to which slate of electors a state had lawfully chosen and certified, might call for extraordinary and possibly extra-constitutional solutions such as the Electoral Commission of that year.[33] But when a state has certified its electors and electors have delivered their votes as called for by the Electoral Count Act, the possibility that the certification is mistaken under state law, or that electors have voted contrary to state law, does not arise at the electoral count.

As for the Electoral Count Act, that statute, as amended by the Electoral Count Reform Act of 2022, more directly codifies the principle that the electoral count is not a proceeding in which the participants may reconsider state officials' conclusions about the identity of the state's electors, nor a forum in which to decide whether electors voted in accordance with state law.

The electoral count process is not a forum for deciding the identity of the electors because States' certifications of the identity of their electors are final under the Electoral Count Act. State officials communicate their state's choice of electors to the seat of government through a "certificate of ascertainment of appointment of electors."[34] The Act prescribes the form of certificates of ascertainment and the mode of their transmission to the federal government.[35] Certificates of ascertainment that are issued as prescribed by the Act "shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State," except that certificates issued or revised pursuant to judicial order are to supersede any other

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[32] See John C. Harrison, Nobody for President, 16 J.L. & Pol. 699, 713–14 (2000) (arguing the Constitution does not authorize any official or institution, including the House and Senate in their role in the electoral vote count, conclusively to resolve questions concerning presidential elections, including questions concerning qualifications to be President).

[33] See generally Fairman, supra note 17 (describing the Electoral Commission's creation and operations).

[34] 3 U.S.C. § 5(a)(1).

[35] 3 U.S.C. § 5(a)(2), (b)(2).

certificates.[36] A state's certificate that was produced as called for by the Act is the last word as to the identity of the state's electors.[37]

Under the Electoral Count Act, once an elector has been identified as such by a state's certificate, the only other question that can be resolved is whether the elector's vote was "regularly given."[38] Like the question of certification, the question whether an elector's vote was regularly given goes to possible failure to comply with the Act's procedural rules governing electors' votes. The Act sets out the manner in which electors are to meet and vote, and to certify and transmit their votes.[39] For example, the Act prescribes the formalities electors are to use in certifying their votes.[40] An elector's vote that was not properly certified under the Act might not qualify as regularly given.

Extending "regularly given" beyond the procedures set out in the Constitution and the Act to questions of candidate's qualifications would stretch the words past their breaking point. Giving a vote is a process, whether the vote is given by a presidential elector or by a private citizen voter. Although a vote that is unlawful in its substance might be said to have been irregularly given in a broad sense, the natural way to refer to non-procedural defects is to refer to the vote itself, calling it unlawful or perhaps irregular. In the context of the Electoral Count Act, which regulates electoral voting procedures, a reference to giving a vote is a reference to process. Moreover, regularity and irregularity are frequently used to describe procedures.

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[36] 3 U.S.C. § 5(c)(1).

[37] The Act's procedures match its principle that state certifications are conclusive. Section 15(d)(1)(A) provides that the President of the Senate is to open "certificates and papers purporting to be certificates" transmitted by electors "appointed pursuant to a certificate of ascertainment of appointment of electors" issued by a state authority pursuant to the Act. 3 U.S.C. § 15(d)(1)(A). In addition to instructing the President of the Senate to look to state certificates to identify electors, the Act describes that official's role as "solely ministerial," and denies her any "power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors." 3 U.S.C. § 15(b)(1), (2). A ministerial officer can examine a document and decide whether it purports to be a certificate issued by a state authority designated by the Act, but deciding whether the elector's appointment actually complied with state law would require the President of the Senate to resolve a dispute.

[38] Section 15(e)(1)(A)(ii) provides that no vote by an elector who is properly certified by a State "which has been regularly given shall be rejected," so if a vote was regularly given, it must be counted. On that issue too, the Act's procedures match its substance. Section 15(e)(1)(B) provides, as an exception, that an elector's vote shall not be counted if it is rejected by both chambers through the procedure set out in the Act. Those procedures allow for objections only on the grounds that an elector was not properly certified by the State or that an elector's vote was not regularly given. 3 U.S.C. § 15(d)(2)(B)(ii).

[39] 3 U.S.C. §§ 7–11.

[40] 3 U.S.C. § 17.

If the two chambers of Congress entertain an objection that an elector's vote was not regularly given, the houses rule on the objection following procedures set out in the Act.[41] Those procedures confirm that the standards the houses are to apply concern voting mechanics and the conformity of documents with the Act's requirements. If an objection is made and the chambers go into separate meetings to rule on it, they use summary procedures. Each Senator or Representative is allowed to speak at most once for no more than five minutes, and the total time for debate may not exceed two hours.[42] Two hours of debate should be enough time to discuss whether papers are in order, with all the papers before the decision-makers. Two hours of congressional debate is not suited to finding facts or to unraveling thorny legal questions, including the conformity of an elector's vote with state law. In 1877, faced with legal and factual questions about the electoral votes of four states, Congress created the Electoral Commission, which included five Justices and conducted lengthy hearings.[43] The Electoral Count Act calls for proceedings that are far less thoroughgoing.[44]

The possibility that an elector's vote for a nonqualified candidate did not comply with state law is irrelevant to the question of whether to count the elector's vote under the Electoral Count Act.

CONCLUSION: RESOLVING DISPUTES ABOUT QUALIFICATIONS TO BE PRESIDENT

Mathematician Georg Cantor wrote of one of his own discoveries, "I see it, but I don't believe it."[45] Important features of the law of presidential

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[41] Id.

[42] Id. at § (2)–(3).

[43] See generally Fairman, supra note 17 (describing the Electoral Commission's creation and operations).

[44] Professor Muller, writing about the Electoral Count Act as it stood before the 2022 amendments, concluded that electoral votes regularly given are defined as those cast pursuant to law. Derek T. Muller, Electoral Votes Regularly Given, 55 Ga. L. Rev. 1529, 1534–35 (2021). Professor Muller argued that an electoral vote is not regularly given if the vote is cast for a candidate who is not eligible for the office, id. at 1537–38, a conclusion I do not embrace.

[45] In an 1872 letter to fellow mathematician Richard Dedekind that laid out a finding of Cantor's, a letter written in German, Cantor included the French phrase, "*Je le vois, mais je'n le crois pas*." The standard English translation is, "I see it, but I don't believe it." See David Foster Wallace, Everything and More 259 (2003) (quoting Cantor's letter to Dedekind). The truth of transfinite mathematics that Cantor saw was that the cardinality of the points of a line segment is the same as the cardinality of the points of a region of a plane. See Fernando Q. Gouvêa, Was Cantor Surprised?, 118 Am. Math. Monthly 198, 198 (2011) (describing Cantor's result). Although Cantor's play on the old saw that seeing is believing is memorable, his intended message remains a matter of doubt. Cantor may have meant to convey the message that he had confidence in the logic of his proof but was not subjectively certain about the result. See id. at 198 (describing the reading according to which Cantor meant to express the point

elections may be hard to believe but are there to be seen. The Constitution and laws do not make the electoral count an occasion for deciding about qualifications to serve as President. If the two houses of Congress have any authority to decide some of the issues that arise during the electoral count, that authority does not extend to deciding disputes about qualifications. Nor does the Constitution make the two houses, or anyone else, judge of the qualifications of the President independently of the electoral count.

The Constitution's failure to create a dispute-resolution process for presidential qualifications can present difficulties, as it does today, and can lead to a search for some substitute. Although the Constitution does not provide a dispute-resolution process for presidential qualifications, it does give Congress power to make all laws "necessary and proper" to carry into execution the powers of the President. Perhaps Congress can by statute establish a process to resolve disputes about qualifications. For example, Congress may have power by statute to provide for a quo warranto proceeding to test the qualifications of a President-elect whose qualifications are in dispute. Congress has not so legislated. Neither the Constitution nor federal statutes provide for a proceeding that will conclusively determine an individual's qualifications to be President.

Believe it.

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that his proof gave him "rational certainty" but not "intuitive certainty"). He may have also meant to convey that he had doubts about his proof's soundness, though not about his result's correctness. Id. at 207 (arguing that Cantor had confidence in his theorem but not in his proof of it). Perhaps the best response to this uncertainty is the principle that when the legend becomes fact, print the legend.