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# AN UNSAFE HARBOR: RECOUNTS, CONTESTS, AND THE ELECTORAL COLLEGE

Daniel P. Tokaji\* †

## INTRODUCTION

Although recent proposals for modifying the Electoral College process have focused mainly on how electoral votes are assigned, another problem with the current system has received less attention: the timetable for resolving post-election disputes over electors. Under 3 U.S.C. § 5, the so-called “safe harbor” provision of federal law, a state can be assured of having its chosen slate of electors recognized only if post-election disputes are resolved within thirty-five days of Election Day. As a practical matter, this provision doesn’t provide states enough time to complete recount and contest proceedings in the event of a close, contested election.

This problem surfaced in Florida’s 2000 presidential election and might well have resulted in Congress deciding the election, if not for the Supreme Court’s intervention in *Bush v. Gore*. The opinion in that case was issued on the safe harbor date, December 12, 2000. The Court’s disposition of *Bush v. Gore*, which effectively ended the recount process, was partly predicated on Florida’s intent to avail itself of the safe harbor date. Four years later, a replay of this crisis nearly occurred in Ohio. If the vote had been a bit closer and Senator Kerry had challenged the result, Ohio would have been hard pressed to complete its canvass, recount, and contest process in time.

This Commentary addresses the tension between the federally prescribed Electoral College dates and state procedures for resolving close elections. I first discuss the federal timetable for selecting electors and counting their votes. I then move to a discussion of the difficulties in fitting state post-election proceedings into the federal timetable. Finally, I propose changes to federal law designed to give states more time to resolve post-election disputes.

## I. THE FEDERAL FRAMEWORK

The Electoral College timetable is a creature of both constitutional and statutory rules. States have the power to determine the manner of appointing their electors, while Congress has the authority, under Article II, Section

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1 of the U.S. Constitution, to “determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” Acting on this authority, Congress enacted 3 U.S.C. § 1, setting the date for appointing presidential electors—Election Day—on the Tuesday following the first Monday in November. Under 3 U.S.C. § 7, electors are to meet and vote in their respective states forty-one days after Election Day, on the first Monday after the second Wednesday in December. Congress then meets in a joint session to count the votes on January 6, pursuant to 3 U.S.C. § 15.

Title 3 of the U.S. Code also sets forth the process to be followed in the event that there is a dispute over electoral vote counting. Section 15 provides that, if at least one senator and at least one member of the House join in a written objection to the counting of electoral votes, the two houses are to separate and to withdraw to their respective chambers for decisions.

In the event of a dispute over which electors’ votes should be counted, Congress is required to accept a final determination made under state law, if made at least six days before the date that electors meet in the states—that is, within thirty-five days of Election Day. This so-called “safe harbor,” enacted as part of the Electoral Count Act of 1887 and codified at 3 U.S.C. § 5, provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

The “safe harbor” provision would come into play in the event of a disagreement over which slate of electors should be recognized in Congress. Suppose, for example, that a state’s chief election official certified the result of an election three weeks after Election Day, but that certification was challenged in court pursuant to state law. To make the example more concrete, imagine that, in the decisive state of Ohio, Democratic Secretary of State Jennifer Brunner certifies the election for Democratic presidential candidate Hillary Clinton, ahead by a few hundred votes, with Republican candidate Rudy Giuliani arguing that thousands of votes in rural areas were mistakenly left out of the initial count. Suppose further that Giuliani’s case winds up before the all-Republican Ohio Supreme Court, which interprets state law as requiring that the outcome be reversed and the election certified in Giuliani’s favor. Assuming a final determination by the safe harbor date, Congress would (with one significant caveat, discussed below) be bound to count the Giuliani slate of electoral votes, as ordered by the Ohio Supreme Court.

If a state does not reach a final determination by the safe harbor date, Congress has considerably greater latitude in deciding which slate of electoral votes to count. To concretize this, imagine dueling slates of electors coming from a state such as Arizona, in which Governor Janet Napolitano is of one party (Democratic) and Secretary of State Jan Brewer is of another (Republican). If the Secretary of State certifies the election for her party's candidate while the Governor sends in a certification for her party's, and there is no conclusive resolution under state law by the safe harbor date, it would be up to Congress to decide which slate should be recognized. In a disputed election, party-line votes in Congress are likely. Should the two houses disagree, the "tie" is broken by the state's chief executive—a procedure that may violate the Constitution, as Professor Abner Greene observed in his book, *Understanding the 2000 Election*.

## II. STATE POST-ELECTION PROCEDURES

The federally prescribed Electoral College procedures put a premium on states resolving post-election disputes by the safe harbor date. Looking at both recent history and plausible scenarios for the 2008 election casts doubt on whether this can fairly be accomplished under the existing timetable in the event of a close and disputed election.

Key swing states would be hard-pressed to complete their post-election processes on the timetable contemplated by federal law. The most notorious example in recent history is Florida's 2000 election. On Friday, December 8, 2000—four days before the "safe harbor" date—the Florida Supreme Court issued an opinion holding that the lower court could order recounts in all counties that had not yet conducted them. The next day, December 9, the Supreme Court stayed this order and, on the safe harbor date of December 12, issued its *Bush v. Gore* opinion that effectively ended Florida's recounts. Even without the December 9 stay, it is hard to imagine that all the recounts would have been accurately completed by the safe harbor date.

One might protest that, if Gore had sought a statewide recount sooner, it would have been possible to reach a "final determination" by the safe harbor date. But Ohio's 2004 election calls into question how reasonable such an expectation is. Election Day fell on November 2, 2004, the safe harbor date on December 7, and the date for the electors meeting in the states on December 13. Section 3515.02 of the Ohio Revised Code prescribed that a recount application could be filed within five days after the Secretary of State declared the result. Furthermore, Ohio Revised Code § 3515.09 prescribed that a contest could be filed within fifteen days of the result being announced. Then-Secretary of State Ken Blackwell did not actually declare the result of the election until December 6, making it effectively impossible to reach a final determination of recount or contest proceedings by December 7. As I have explained on my blog, [Equal Vote](#), this would likely have created a crisis if Kerry had challenged the result.

Ohio is likely to be a swing state again in 2008. In preparation for this election, the Ohio state legislature adopted two amendments to state election

laws in 2006 that are germane to the federal timetable. Unfortunately, neither of these changes satisfactorily resolves the time crunch created by current federal law.

The first, § 3515.041 of the Ohio Revised Code, requires that “any recount of votes . . . for the election of presidential electors shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors.” This provides only a nominal resolution of the problem, since it remains unclear how Ohio could possibly finish its canvass and recount by this time, as I previously discussed in a May 2005 comment on [Election Law @ Moritz](#).

Especially problematic is the state’s continuing reliance on a large number of provisional ballots. As detailed in a recent book that Steve Huefner, Ned Foley, and I wrote entitled *From Registration to Recounts: The Election Ecosystems of Five Midwestern States*, 2.77% of Ohio voters cast provisional ballots in the 2004 election for a total of 158,641—a higher number than in any other state except California or New York. In the 2006 general election, an even higher percentage of Ohio voters cast provisional ballots than in 2004. One of the major steps before a final vote total can be ascertained is determining which provisional ballots should be counted, a process that would almost surely become heated in a tight election. It is difficult to see how the process of verification of ballots, let alone any judicial proceedings that might take place over the canvassing and recounting of ballots, could be completed by the safe harbor date.

The second significant change in Ohio law was to eliminate state contest proceedings in federal races, including presidential elections. Under the new § 3515.08 of the Ohio Revised Code, as amended in 2006, contests of elections to federal office are to be “conducted in accordance with the applicable provisions of federal law.”

The problem is that there are no federal laws allowing judicial contest proceedings over disputed federal elections. Nor is it clear that Congress would have the constitutional power to impose such a procedure for presidential elections, even if it so desired. Instead, federal law refers back to the “final determination” made under state law pursuant to 3 U.S.C. § 5. In other words, we have circular references—with federal law referring to state contest procedures and state law back to federal procedures. The effect of Ohio’s law thus appears to be the elimination of *any* judicial contest proceedings in any federal election taking place in that state.

Notwithstanding the Ohio legislature’s obvious *intent* to avail itself of federal law’s safe harbor, one could even argue that it has actually *failed* to provide for a “final determination of any controversy or contest” concerning its electors by this date. By eliminating contests in federal elections, the Ohio legislature has arguably deprived the state’s voters of the only procedure that could really provide a “final determination” of all controversies or contests. Accordingly, members of Congress could plausibly argue that they aren’t required to treat Ohio’s selection of electors as “conclusive,” even if all post-election proceedings are concluded by the safe harbor date.

While Ohio's elimination of contests may be anomalous, the unrealistic time pressures borne out in the above example are not unique to Ohio. Other states would also have problems resolving disputes on the timetable that federal law contemplates. Take Wisconsin, in which the margin of victory was actually much closer than in Ohio in 2004. Although Wisconsin has a relatively well-functioning election system on the whole, that state would also have trouble resolving a post-election dispute on the federal timetable, for reasons discussed at greater length in *From Registration to Recounts*. Compliance with the federal timetable isn't just a problem for Florida and Ohio, but for any state on which the outcome of the presidential election might turn.

### III. FIXING THE FEDERAL TIMETABLE

As it is doubtful that *any* state could fairly complete its procedures on this timetable, congressional attention to the timetable for resolving Electoral College disputes is badly needed. What can be done? Fortunately, it is possible to amend the calendar for resolving close presidential elections without amending the Constitution. It is also fortunate that there have been some changes since Congress enacted the Electoral Count Act that would allow compression of the back end of the process.

Under current law, the safe harbor date will fall some time between December 7 and December 13, the electors will meet some time between December 13 and December 19, and Congress will meet to count electoral votes on January 6. The length of time between these dates may have been necessary in days when communication and transportation were slow, but there is little good reason for them now. As Professor Huefner noted in a November 2004 comment on *Election Law @ Moritz*, it is clearly desirable for disputes over the outcome of a presidential election to be settled promptly—so as to allow a smooth transition—but the necessity for public confidence in the result should trump the desire for speed.

Accordingly, as Professor Huefner suggests, Congress should amend the process to afford more time at the front end of the process for state post-election proceedings. This could be accomplished by compressing the time at the back end of the process. The minimum time that should be allowed for post-election proceedings is seven weeks: two weeks for canvassing returns, two weeks for recounts, and another three weeks for contests and related judicial proceedings. Allowing seven weeks after the election would push the safe harbor date back to late December (forty-nine days from Election Day would fall between December 21 and 27). There should, in my view, be a time cushion left between the date that Congress counts electoral votes and the date the President takes office, to allow for the resolution of disputes that might arise. For this reason, I do not propose changing the date when Congress meets to count votes.

The following table includes both the current dates and the new ones that I propose, as they would apply to the 2008 election. It also shows the source of these dates under current law.

Event—2008 Election Calendar	Current	Proposed
Election Day (3 U.S.C. § 1)—unchanged	Nov. 4	Nov. 4
Safe Harbor Date (3 U.S.C. § 5)—move from 35 days to 49 days after Election Day	Dec. 9	Dec. 23
Electors Meet in States (3 U.S.C. § 7)—move from 41 days after Election Day to Dec. 30	Dec. 15	Dec. 30
Congress Meets to Count Votes (3 U.S.C. § 15)—unchanged	Jan. 6	Jan. 6
President Takes Office (U.S. Const. amend. XX)—unchanged	Jan. 20	Jan. 20

This timetable should create sufficient time for states to complete their post-election processes, while allowing plenty of time for the events that must take place before the President takes office.

#### CONCLUSION

While some tinkering with this proposal might be appropriate, it is clear that Congress should address the timetable for resolving disputes over presidential electors. Providing more time to the states is necessary not only to promote a fair process but also to affirm the Constitution's respect for states in defining the procedure for resolving disputes over their presidential electors. Thus, a change is justified on both fairness and federalism grounds.

Cynics might argue that Congress has simply been protecting its own power to settle disputes over presidential electors that remain unresolved as of the current safe harbor date. But given that the Twentieth Amendment provides for new members of Congress to be sworn in on January 3—before the counting of electoral votes—we cannot be certain which party will control each house of Congress if such a dispute were to arise over the presidential election in 2008. Should the two houses disagree, the constitutionally dubious “tie-goes-to-the-Governor” rule would come into play, and it is anyone's guess who the Governor of the pivotal state in 2008 will be.

Accordingly, now is the perfect time for Congress to reform the Electoral College timetable. While we are all behind a “veil of ignorance” as to who will hold the various levers of power if a dispute emerges, those on both sides of the aisle have an incentive to create a more fair and orderly process, one that respects the constitutional role of the states' processes for resolving post-election disputes.