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Historical Antecedents of the 2020 Presidential Election

di Thomas H. Lee

Abstract: Antecedenti storici dell'elezione presidenziale del 2020 – Starting from former President Trump's speech that propelled the storm of Capitol Hill on January 6th, the article provides an historical account of the transition of powers between administrations in the past decades and centuries. The analysis, on the one hand, highlights the traditionally peaceful nature of such transitions, while, on the other, it points to the instances when disputes concerning the electoral outcome occurred.

Keywords: Presidential elections, transition of powers, electoral disputes.

At a speech delivered midday on January 6, 2021, President Donald Trump urged a crowd of thousands in Washington D.C. to go to the nearby Capitol to demonstrate their support for his allegations of election fraud to members of Congress scheduled to certify electoral-college vote results forwarded by the fifty states and D.C. that day. Trump refused to concede victory to President-Elect Joe Biden who had carried 306 votes of the electoral college to Trump's 226 votes and won approximately 81.2 million popular votes to Trump's 74.2 million. Trump's continued refusal to accept the results of a presidential election at this late date—two weeks before Biden's inauguration as the 46th President, is unprecedented in American politics. The energized crowd that heard Trump's speech "marched," as he implored them, to the Capitol where Congress was meeting. The mob used violence to overwhelm the Capitol police, rampaged through the Capitol in search of members of Congress, and ransacked parts of the building. Five human beings including a police officer lost their lives; many more, including fifty police officers, were injured.

The last time the U.S. Capitol was attacked was more than two centuries earlier by British expeditionary forces in the invasion of Washington DC in August 1814, during the War of 1812. But unlike in 1814, the ubiquity of smartphone cameras and the instantaneity of the internet ensured that millions across the country and the globe eye-witnessed or could replay the vivid images of the wanton sacking of the Capitol by an American mob and its symbolic assault on the core of American democracy.

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This chapter analyzes the past U.S. history of peaceful transitions of power and presidential election disputes. Among the key contributions of the United States to the history of modern political orders is the peaceful transfer of supreme political power by election. The United States did not invent this critical feature of modern political democracy. But more than any other country in the past three centuries, it has established peaceful transfer of presidential power by election as a part of its enduring political tradition[1] and a shining model for other nations around the world, seeking political stability and a better future.

It was President George Washington's voluntary decision not to seek a third term in 1796 that set a path-dependent pattern of U.S. presidents limiting themselves to two four-year terms. Engineering the first peaceful transfer of power is one of Washington's key contributions to the launch and success of the American national political system.[2] There was no explicit requirement for presidents not to seek reelection after two terms in the original written Constitution; Washington pioneered a new constitutional norm. That constitutional norm, so critical to the peaceful transfer of power in government, persisted for a century and a half, broken only by the exigency of world war in the 1940 election of Franklin Delano Roosevelt to a third term. In early 1951, the 22nd Amendment to the Constitution was ratified, limiting future Presidents to two elections and no more than ten total years in office.[3] This new constitutional rule codifying George Washington's old norm has never been broken. The oft-seen pattern in other countries of presidents or leaders who amend or write new constitutions to maintain or extend supreme power has not yet reared its head in the United States.

As important as Washington's two-term norm to the establishment of peaceful transfer of power in the United States and more relevant for present purposes was early acceptance by the losing candidate of alleged legal defects regarding states' electoral votes in the presidential elections of 1796 and 1800.[4]

[1] The unwritten constitution of the mother country, Great Britain, established the constitutional monarchy—the leading prior recipe for peaceful transfer of power, i.e., neuter the monarch by splitting the head-of-state and head-of-government functions.

[2] In fact, it probably ranks right below his generalship that led to victory in the War of Independence from Great Britain, his studied impartiality and aloofness, and his eye for picking and supporting able subordinates in the first U.S. national government, as among his greatest contributions to the early American republic.

[3] "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." U.S. Const. amend. xxii.

[4] The following discussion of the U.S. presidential elections of 1796, 1800, and 1876, draws from a Library of Congress website with primary sources and links relating to U.S. presidential elections from 1789 to 1920: Presidential Elections: Resource Guides (Library

The 1796 contest between John Adams, the Federalist Party candidate, and Thomas Jefferson, leader of the new Democratic-Republican Party that opposed the Federalist's concentration of power in the national government, was close and contested; the 1800 rematch between them was even closer and more contested. Adams won the 1796 election in a crowded field with 71 out of 139 possible presidential electoral votes—one more vote than the majority of 70 votes needed to win. Four of those electoral votes, enough to have broken Adams' majority, came from Vermont. Article II, Section 1, applicable at the time but since amended by the 12th Amendment, provided that Electors:

shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall be counted.[5]

Before Congress had received Vermont's transmittal, questions regarding the validity of Vermont's process for selecting its electors arose, such as whether its legislature had set out the process in a current enactment rather than an expired law or by nonbinding "resolve."[6] Article II, Section of the U.S Constitution also provided that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[7] If Vermont's process for choosing electors on December 7, 1796 did not constitute "direct[ion]" by its Legislature, then presumably it was invalid.

John Adams was in an exceedingly awkward position because as the current Vice President, he was the "President of the Senate"[8] responsible for opening the various states' certificates of electoral votes. He would win the Presidency by certifying Vermont's electoral votes, despite the allegations of procedural irregularities under Vermont law. And that is what Adams did, perhaps with some hesitation. He was surely encouraged in that course of action by a letter that Jefferson, the eventual loser, wrote to James Madison on January 16, 1797, between December 7, 1796, when the four Vermont electors had cast

of Congress, available at: https://www.loc.gov/rr/program/bib/elections/index.html). Statistics from those and subsequent elections are drawn from "The American Presidency Project" website curated by the University of California—Santa Barbara: Election Listing, The American Presidency Project (available at https://www.presidency.ucsb.edu/statistics/elections).

[5] U.S. Const. Art. II, §1, cl. 3.

[6] *See* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 Va. L. Rev. 551, 571-81 (2004).

[7] U.S. Const. Art. II, §1, cl. 2.

[8] "The Vice President of the United States shall be the President of the Senate, but shall have no Vote, unless they be equally divided." U.S. Const. Art. I, §3, cl. 4.

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their votes, and February 8, 1797, the date prescribed for Congress to count them. Jefferson wrote:

I observe doubts are still expressed as to the validity of the Vermont election. Surely in so great a case, substance & not form should prevail. I cannot suppose that the Vermont constitution has been strict in requiring particular forms of expressing the legislative will. As far as my disclaimer may have any effect, I pray you to declare it on every occasion foreseen or not foreseen by me, in favor of the choice of the people substantially expressed, and to prevent the phaenomenon of a Pseudo-president at so early a day.[9]

The precedent of Jefferson's acquiescence in the 1796 election is especially relevant to the November 2020 election because certain key allegations of fraud in the 2020 election involved the same Article II, Section 1 claim, to wit, that certain State electors (*e.g.*, in Pennsylvania) had not been selected "in such Manner as the Legislature thereof may direct."

In the 1800 rematch election, Jefferson ultimately won the electoral college vote by 73 votes to Adams' 65 votes, out of 138 available votes. Four of Jefferson's votes were delivered by electors in Georgia. Georgia's transmittal, however, exhibited a technical defect. It did not present a "List of all the Persons voted for, and of the Number of Votes for each" as Article II, Section 2 explicitly required. Instead, Georgia's letter had the names of the Democratic-Republican Party's presidential candidate Thomas Jefferson and its vice-presidential candidate Aaron Burr, side by side.[10] The names of the four electors were written below Jefferson's and Burr's names, and the electors did not "sign and certify" this ballot. This time, when the State's transmittals were opened and counted by Congress, it was Jefferson as Vice President and therefore the President of the Senate. He did not hesitate to proceed with counting Georgia's vote; nor did Adams and his Federalist Party object, although there was some rumbling about the irregularity in the contemporaneous press.

There are two conclusions to be drawn from the 1796 and 1800 elections in which key American founders—John Adams, Thomas Jefferson, and James Madison and other members of early Congresses—were key participants. These conclusions are especially important for U.S. jurists who privilege original meanings of constitutional provisions. First, it does not appear that the President of the Senate who opened the state's electoral vote transmittals and the Congress that counted them were understood to have a substantive review

[9]To James Madison from Thomas Jefferson, 16 January 1797," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/01-16-02-0329. [Original source: *The Papers of James Madison*, vol. 16, *27 April 1795–27 March 1797*, ed. J. C. A. Stagg, Thomas A. Mason, and Jeanne K. Sisson. Charlottesville: University Press of Virginia, 1989, 461.]

[10] Ackerman & Fontana, *supra* note 5, at 591.

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role with respect to state electoral votes. Congress's role appears to have been viewed as an accounting function. That perception is confirmed by the usage of the word "tellers" in the first and present electoral count statutes[11] to refer to two designated members of the two chambers of Congress designated to help the President of the Senate count votes. The states, then, were the ultimate arbiters of designing their rules for presidential electors and determining whether their rules for selecting electors had been followed. Today, all the states and the District of Columbia have legislative enactments directing presidential electors to cast their votes to conform to the winner of the popular vote in the state.[12] For the 1796 and 1800 elections, the state legislatures chose presidential electors.

Moreover, the electors whom state legislatures were to choose were not supposed to be stand-ins for the popular vote as an original matter, as they are today. Rather, as Alexander Hamilton described in Federalist 68, they were to be respected men selected by their state legislatures for their judgment.[13] The electors were to convene in their respective states to deliberate and select a president, like several colleges of cardinals electing the pope. In this sense, there is no single electoral college but several electoral colleges corresponding to the number of states. The electors could not hold current federal office, to prevent bias in favor of an incumbent president who gave them the office.[14] Also, to prevent bribery, the electors in each state were called together on a temporary basis, not a standing body. In such a system, it was naturally paramount that the will of the state legislatures prevail in the selection of electors. But that is no longer the case when the electors are ceremonial and directed to cast their votes to correspond to each state's popular vote.

Second, the Vice President, as President of the Senate, is the key national government figure in the certification process, with the explicit constitutional duty of opening state transmittals of electoral votes. But the role is fraught with conflict of interest, as we saw in the cases of both Adams in 1796 and Jefferson

[11] 3.U.S.C. § 15.
[12] Maine and Nebraska have state laws providing for electors to vote according to the winner of the popular vote in their respective U.S. congressional districts.
[13] The Federalist 68 (Hamilton). Hamilton wrote:
that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.
[14] "[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. Art. II. See Federalist 68 ("And they have excluded from eligibility to this trust, all those who from situation might be suspected of too great devotion to the President in office.").

in 1800.[15] Who would prevail if there were a difference of opinion between the Vice President and Congress about whether or how a state's electoral votes should be counted, even if it is no more than an accounting? What if a majority of the House of Representatives and of the Senate believe that a state's transmittal of electoral votes should be certified, but the Vice President disagrees? And, furthermore, what if there is a difference of opinion on certification between the House and the Senate?

The words of the Constitution give no clear answers to these questions. In the event of a tie of electoral votes, Article II does specify that the House of Representatives shall choose the President, but with each State's delegation assigned one vote.[16] This constitutional settlement for ties suggests that the House's preference may take precedence over the Senate's with respect to any tiebreakers regarding how to "count" presidential electoral votes. But the words of the Constitution offer no clue with respect to who should prevail in disagreements between Congress and the Vice President about whether to count certain state electoral votes—a fissure the 1796 and 1800 elections did not feature. Of course, more generally speaking, the 1796 and 1800 elections did not involve allegations of widespread fraud in the state processes for choosing electors, particularly since, as noted above, those processes involved state legislatures, not more numerous popular votes that could be subject to more diffuse fraud. The 12th Amendment (ratified in 1804) separated electoral votes for the President and Vice President to fix the impasse in the 1800 election when Jefferson and Burr received the same number of votes and the House had to decide between them, but it did not address these questions about potential disagreement within Congress about certifying state electoral votes.[17] A sub-constitutional enactment – the Electoral Count Act of 1887 did address them, in the aftermath of the 1876 presidential election to be discussed shortly.

Returning to the larger theme of the United States' strong historical record of peaceful transitions, Jefferson and both of his Virginia Democratic-Republican Party successors—James Madison and James Monroe—adhered to Washington's norm of a two-term Presidency. Their nineteenth-century successors also continued the important peaceful transfer of power tradition. The greatest possibility of breaking it arose in the run-up to the 1876 Election, which remains the most contentious U.S. presidential election ever, although

[15] Both Adams and Jefferson encountered situations in which disregarding technical defects operated in their favor. But vice presidents have also refrained from challenging electoral vote certifications in recent close presidential elections despite a strong personal interest in doing so, including Vice President Richard Nixon in 1960 when he lost to John F. Kennedy, Vice President Albert Gore when he lost to George W. Bush in 2000, or Vice President Joe Biden when Hilary Clinton lost to Donald Trump in 2016.
[16] U.S. Const. Art. I, §2; amend. xii.
[17] U.S. Const. amend. xii.

even then the U.S. Capitol was not physically attacked.[18] Ulysses S. Grant, the 18th President, had already served two terms but was contemplating running for a third term. He ultimately decided against it after the House of Representatives passed a resolution by a 233-18 vote declaring the two-term constitutional norm a safeguard against dictatorship, even if it were not codified in the Constitution.

Rutherford B. Hayes for the Republican Party and Samuel J. Tilden for the Democratic Party faced off in the 1876 Presidential Election, which, with Grant out of it and the Republicans facing a backlash because of corruption in his administration, promised to be hotly contested. Hayes, the Governor of Ohio, had been a compromise choice for the Republicans, while Tilden, the Governor of New York, was a commanding front-runner at the Democratic nominating convention. The Democrats had strong expectations of securing the Presidency for the first time since James Buchanan's election in 1856—perhaps only twenty years prior, but an altogether different, era, society, and country. The greatest national socio-political issue at the time was the continuation of the Republican-led Reconstruction in the South.

The high drama of the election came down to 20 contested electoral votes: Florida's 4 votes, Louisiana's 8, South Carolina's 7, and 1 contested vote out of Oregon's 3. Tilden had captured 184 votes to Hayes' 165, but the 20 votes in controversy would give Hayes 185 votes and the Presidency.[19] There were still small numbers of federal troops in South Carolina and Louisiana, and U.S.-recognized officials in those states and Florida certified electoral votes in favor of Hayes. The Democrats picked different electors, asserting that they had won the popular vote in the three states. This was in fact true but only because of rampant election fraud and violence against and suppression of Black voters despite the newly ratified (1870) 15th Amendment guaranteeing them the right to vote. It is likely that the majority-Black states of Louisiana and South

[18] President Grant, the former commanding general of the Union armies in the American Civil War, had pre-deployed troops to the national capital, a precaution that likely deterred any mob violence.

[19] Tilden also won 50.9% of the popular vote versus Hayes' 47.9%, although systemic suppression of Black voters in southern states indubitably inflated Tilden's margin of victory. The 1876 election is the subject of many books. The leading legal account is in Charles Fairman's Supplement to Volume VII of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, entitled Five Justices and the Electoral Commission of 1877 (1988). There are many other prominent accounts, including: Charles Calhoun, *Conceiving a New Republic: The Republican Party and the Southern Question, 1869-1900* (2006); Michael F. Holt, *By One Vote: The Disputed Election of 1876* (2017); Roy Morris, Jr., *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876* (2007); William H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876* (2007); C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877* (1991 edition) (1966); Paul L. Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876* (1907).

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Carolina would have gone for Hayes without Black voter intimidation, although majority-White Florida might have gone to Tilden. Voters in Oregon had voted overwhelmingly for Hayes, but the state's Democratic governor asserted that one of the Republican electors was disqualified by holding a federal office[20] and substituted an elector who voted for Tilden.

Such was the state of play when Congress took up the challenge of certifying the electoral vote, which was scheduled to happen on March 4, 1877. The Democrats controlled the House of Representatives, and the Republicans controlled the Senate. Because of the death of Vice President Henry Wilson in 1875, Republican Senator Thomas W. Ferry, who had been chosen as President pro tempore of the Senate took his role as President of the Senate in the opening and counting of the electoral votes. In counting the votes, the Democrats insisted on a practice that had prevailed since 1865 of not counting state votes that were objected to unless both Houses concurred in dismissing the objection.[21] The Republicans, who had originated the 1865 rule but conveniently abandoned it in 1875 in the run-up to the 1876 election, asserted that the President of the Senate had the deciding power. The country was apparently as divided as Congress. New York Congressman Abram S. Hewitt, who was Chairman of the Democratic National Committee at the time, asserted that he "knew of fifteen states in which Democratic forces composed largely of war veterans were organized and prepared to move on Washington to compel the inauguration of Tilden."[22]

The deadlocked Congress passed a statute on January 29, 1877, establishing a 15-member commission to decide which electoral votes ought to be counted.[23] The Commission consisted of 5 members from the House—3 Democrats (majority) and 2 Republicans; 5 members from the Senate—3 Republicans (majority) and 2 Democrats; and five Justices of Supreme Court – 2 Democrats and 2 Republicans, who chose the fifth – Joseph Bradley, a Republican. The Commission voted along party lines and awarded the 20 electoral votes to Hayes. While the Commission deliberated, Democratic and Republican leaders behind the scenes negotiated the so-called Compromise of 1877 whereby the Democrats agreed to accept Hayes' presidency, so long as it

[20] Article II, Section 1 provides that "no Senator of Representative or Person holding an Office of Trust or Profit under the United States shall be appointed an Elector." The Democratic Governor alleged that one of the Republican electors had been a postmaster at the time of appointment.
[21] 38th Congress, 22nd Joint Rule (Feb. 6, 1865), available at A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875: https://memory.loc.gov/cgi-bin/ampage. *See also* Kinvin L. Wroth, *Election Contests and the Electoral Vote*, 65 Dickinson L. Rev. 321 (1961).
[22] Woodward, Reunion and Reaction, at 7.
[23] See Fairman, at 53.

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withdrew federal troops from the last two occupied states of Louisiana and South Carolina and provided grants and subsidies for railroad construction and other improvements in the South.

It was the barely averted constitutional crisis of the 1876 Election, and tendentious elections in 1880 and 1884, that led Congress to enact the Electoral Count Act of 1887.[24] The basic aim of the Act was to resolve any future scenario like the 1876 Election where a state presented two slates of electoral votes and Congress was unable to resolve the controversy. It did this by creating a "safe harbor": if state officials comply with the statute's guidelines for setting out a process to resolve election disputes and resolve any such disputes under that process "at least six days before the time fixed for the meeting of the electors,", then the state's transmittal of a slate of electoral votes is entitled to a presumption of validity by Congress.[25] Article II, Section 1 provides that "Congress may 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." However, this constitutional provision does not explicitly say whether a state's electoral votes are "entitled to a presumption of validity" as the statue does. And under the statute's terms, Congress's discretion to review state electoral votes is limited to situations in which a state does not comply with the safe harbor guidelines, a governor certifies two or more slates of electors, electors are ineligible under the Constitution, there is a ministerial error, or the electoral votes were not "regularly given."

The Electoral Count Act, as presently enacted, further circumscribes the role of the Vice President and of Congress in certifying the states' presidential electoral votes. The House and the Senate are to meet in a joint session, presided over by the Vice President as President of the Senate. The statute designates two "tellers" for each chamber to read out state certifications (proceeding alphabetically) opened by the Vice President who asks for any objections. An objection must be submitted jointly by a member of the House and the Senate in written form, whereupon the two chambers withdraw separately to debate the merits of the objection for no more than two hours.[26] If there is only one slate of electoral votes transmitted by a state, then they are counted unless both the House and the Senate find that the votes were not "regularly given" by "lawfully certified" electors.

In summary, the Electoral Count Act diminishes the role that Congress and the Vice President play in the certification of electoral votes. The states are

[24] Pub. L. 49-90, 24 Stat. 373, available at: https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/24/STATUTE-24-Pg373.pdf. Codified at 3 U.S.C. §1 et seq.
[25] 3 U.S.C. § 5.
[26] 3 U.S.C. § 15.

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plainly the primary actors in the process of certifying their electoral votes for the President. The Act sets forth a scheme for deciding when a state presents more than one slate of electors, as was the case in 1876. But in cases where there a state only presents one slate of electors, it creates a safe harbor that the state may invoke to minimize congressional scrutiny and that also curtails the scope of review by Congress and the Vice President. Some have asserted that the statute goes too far in restricting the role of Congress and the Vice President in the presidential electoral certification process, contrary to Article II as amended by the Twelfth Amendment. Certainly the 1865 Congressional joint rule requiring that both Houses must assent to certification if an objection to a state's slate of electors is made, which the Republicans had originated but abandoned ten years later, suggests a more robust role for Congress in certifying the states' rules. The Electoral Count Act's new rule on objections requiring a Representative and a Senator both to join an objection, followed by deliberation by each Chamber, dramatically curtails federal governmental power over state electoral vote certification. But the Electoral Count Act has never been successfully challenged in federal court, nor is it likely to be viewed as justiciable by the courts if it were.

This historical context helps us to understand the legal bases for, and to assess the validity of, the challenges to Congressional certification of the state's electoral votes on January 6, 2021, made by certain Republican members of Congress led by Senators Rafael Edward ("Ted") Cruz of Texas and Joshua David ("Josh") Hawley of Missouri.[27] Ten other Republican Senators and more than a hundred Republican Members of the House of Representatives signaled support for Cruz's and Hawley's proposal before the January 6 certification vote.

Cruz and Hawley asserted two grounds for their challenges. First, despite the dismissals of election-fraud lawsuits in state and federal courts across the nation, Cruz and Hawley claimed that the widespread belief among American voters who had supported President Trump that there were election irregularities warranted the establishment of an electoral commission to investigate. There was, of course, a precedent for such a commission in the Electoral Commission of 1877. The Republican Senators requested that the commission be given "full investigatory and fact-finding authority, to conduct an emergency 10-day audit of the election returns in the disputed states. Once completed, individual states would evaluate the Commission's findings and could convene a special legislative session to certify a change in their vote, if needed."

[27] Joint Statement from Senators Cruz, Johnson, Lankford, Daines, Kennedy, Blackburn, Braun, Senators-Elect Lummis, Marshall, Hagerty, Tuberville, Ted Cruz, U.S. Senator for Texas, available at: https://www.cruz.senate.gov/?p=press_release&id=5541.

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Second, they alleged that the counting of popular votes—and hence the assignment of electoral votes—in certain states, most notably Pennsylvania, was not done "as the Legislature thereof may direct" as Article II required. This was the same type of argument that had been raised with respect to Vermont's ballots in the 1796 presidential election. The specific claim was that the Pennsylvania Supreme Court had allowed, as a covid-19 accommodation, for mail-in ballots to be counted if they were postmarked by Election Day, November 3, 2020, and received by November 6, despite the Pennsylvania legislature's designation of 8pm on November 3 as the deadline for valid ballots. Similar allegations were raised regarding non-legislative covid-19-related accommodations for mail-in ballots in other states that Biden had carried including Wisconsin.[28] Unlike the 1796 and 1800 elections, however, there seemed no plausible basis for claiming that disqualification of the challenged popular mail-in ballots would have been large enough to have changed the electoral-vote results in any of the relevant states, including Pennsylvania. Of course, in 1796 and 1800, the presidential electors were to deliberate and assign their votes, not follow popular vote results. Nor, unlike the 2000 election to be discussed in Part II, would reversing the electoral-vote outcome in one state have suffice the outcome of the 2020 presidential election. Finally, by contrast to the 1876 election, there were no instances of states proposing two contested slates of electors, despite efforts by Trump supporters to encourage presidential electors in states that Biden had won to defect.

Nevertheless, these and other public pronouncements of election fraud by Trump, Cruz, Hawley, and other Republican Members of Congress, supplied legitimation and apparent legal, constitutional justification for millions of Americans who supported Trump, including the thousands who stormed the Capitol to stop the January 6, 2021 certification. Because of that attack, some of the Republican members of Congress who had earlier expressed support not to object to certification once order was restored and certification was continued later that night. Ultimately, only 8 Republican Senators and 139 Representatives voted in favor of one or both objections to certification: 1) the request for a commission was made as an objection to certification of Arizona's electoral votes (the first close state in alphabetical order that Biden won), and 2) the Article II challenge was made as an objection to certification of Pennsylvania's electoral votes. And Vice President Michael Pence, as President of the Senate, certified the electoral votes and declared President-Elect Biden the winner of the 2020 Presidential election.

[28] A federal district court had granted a request by the Wisconsin Democratic Party for a six-day extension to state law requiring absentee ballots to be returned by election night, which the Seventh Circuit reversed. The Supreme Court, in a 5-3 vote, affirmed the appellate court in denying the extension. 20a66_new_m6io.pdf (supremecourt.gov)

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This chapter has recounted the U.S. history of peaceful presidential transition of power, disputes about presidential electoral votes, and how such disputes were resolved in the past. It is useful to understand these antecedents to understand the legal claims which, regardless of how well they were understood by the supporters of Donald Trump who assaulted the U.S. Capitol on January 6, 2021, ultimately justified that unprecedented event. How the United States and its people will fare in the years to follow, whether they will learn and grow or whether January 6 is a harbinger of the decline of U.S. democracy, remains to be seen.

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