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Derek T. Muller

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Introduction

On January 6, 2021, the President of the Senate—Vice President Mike Pence—dutifully opened the electoral votes from the 2020 presidential election and read aloud the totals. He acted consistent with the direction of the Electoral Count Act of 1887,[1] consistent with the congressional joint resolution approved three days earlier,[2] and consistent with more than two centuries of congressional practice. Not everyone was convinced that the Constitution and laws of the United States obligated Pence to behave in this way—most notably, President Donald Trump, who had just lost the election and sought a way to turn defeat into victory.

On this, Professors Robert Delahunty and John Yoo agree with Pence. In their recent article here in the *Case Western Reserve Law Review* on the topic of the role of the Vice President in counting electoral votes, they conclude, "Pence was obliged to count the votes

† Professor of Law, University of Notre Dame Law School. Portions of this Essay originally appeared as blog posts on the Election Law Blog or in testimony before the United States Senate. Special thanks to William Jordan for his research.

1. Pub. L. No. 49–90, 24 Stat. 373 (1887) (codified at 3 U.S.C. § 5 *et seq.*).

2. S. Con. Res. 1, 117th Cong. (2021) (enacted).

as submitted by the states."[3] But they reach a different conclusion on who holds the legal power to count electoral votes and resolve disputes. They conclude, "Our theory leads to the conclusion that the best reading of the constitutional text, structure, and history assigns that role to the Vice President, not Congress or the judiciary."[4] In contrast, "Congress has no substantive role in the process."[5]

Congress has continually rejected this view for more than 200 years, and perhaps it is a reason Pence saw no such room for debate. Professors Delahunty and Yoo helpfully examine the history surrounding disputes over counting electoral votes and in places make appropriate conditions on the modesty of their claims. But this Essay explains why Congress, and not the President of the Senate, holds the power to count electoral votes and to resolve disputes over them.

Some details help frame the heart of the controversy. There are potentially three different responsibilities to consider when the House and the Senate join together before the President of the Senate for the counting of electoral votes. First, who presides over the joint session where counting takes place, and what is the role of that presiding officer? Second, who counts the electoral votes? Third, who resolves disputes about those electoral votes?

This Essay answers those questions. First, the presiding officer in the joint session is the President of the Senate, and she acts as any other presiding officer of a legislature. She initiates actions pursuant to precedent, parliamentary procedures, and the wishes of the chamber. And that means the chamber—here, the joint session—can constrain the President of the Senate as presiding officer. Congress did exactly that when it chose to further constrain the distraction of the President of the Senate in the Electoral Count Reform Act of 2022.[6] Second, Congress counts electoral votes. The evidence in the text and structure of the Constitution and congressional practice before the ratification of the Twelfth Amendment supports this interpretation. Third, the power to resolve disputes runs with the power to count. And that means Congress also has the power to resolve disputes about presidential electors.[7]

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3. Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RSRV. L. REV. 27, 34 (2022).

4. *Id.*

5. *Id.*

6. Pub. L. No. 117-328, § 15(b), 136 Stat. 4459, 5238 (2022).

7. For more on the arguments behind these claims, including a defense of Congress's role in counting, see, for example, Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 584–89 (2015); Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529 (2021).

Separating these responsibilities is crucial because it can be too easy to conflate some of these activities, which in turn elides over the distinctions in responsibilities. When the presiding officer acts, she does so not to count votes, but to preside over the joint session and help it proceed according to the rules and precedents set by Congress. The actions she takes may resemble the substantive act of counting. But close scrutiny of the record reflects that the President of the Senate does not count, and has never counted, votes. That is because the power to count resides in Congress, where the Twelfth Amendment lodges that power.

This Essay begins by examining the text of Article II, specifically its Counting Clause. It argues that a change in verb voice in the clause removes the President of the Senate from the role of counting electoral votes.

Part II then moves to the original public meaning of the Twelfth Amendment through an interpretation of congressional practices. Three important events illuminate this original public meaning. First, Congress's enactment of a law in 1792 relating to electoral votes demonstrates its power to enact rules relating to the counting of electoral votes. Second, Congress's appointment of "tellers," agents who acted on behalf of Congress, and Congress's recording of activities in its journals show that Congress, not the President of the Senate, did the counting. Third, majorities of both houses of Congress in 1800 believed Congress had the substantive power to resolve disputes over electoral votes. These details give an important gloss to the Twelfth Amendment, which was ratified in 1804. The Essay then refutes the notion that Vice President Thomas Jefferson "counted himself" into office in 1801: the background of Congress's practices between 1792 and 1800 dispels this interpretation of the counting in 1801.

Part III examines the structure of the Constitution. Crucially, the President of the Senate, not the Vice President, bears the responsibilities in the Twelfth Amendment. While these two terms are often used interchangeably, they are not interchangeable for purposes of understanding the separation of powers and the role of Congress. The President of the Senate is a legislative officer. And the President of the Senate is sometimes selected *by* the Senate. This structure means that Congress is not inferring when it counts or resolves disputes over electoral votes. The presiding officer of the meeting is a legislative official, who is sometimes chosen by Congress.

Part IV concludes with an examination of the newly enacted Electoral Count Reform Act. It identifies the major elements of the Act and it focuses on the Act's decision to expressly narrow the responsibilities of the President of the Senate in the joint session where Congress counts electoral votes. Congress's decision to define the role of the presiding officer is squarely within its constitutional authority.

I. THE TEXT OF THE COUNTING CLAUSE

The original text of the Counting Clause in Article II includes this crucial phrase: "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."[8] Identical language appears in the Twelfth Amendment.[9] Professors Delahunty and Yoo conclude that the "most natural reading of the Twelfth Amendment, consistent with practice at the time of its ratification, gives the Vice President the duty to resolve at least some disputes over the legitimacy of electoral votes. We fully acknowledge, however, that our reading is not free from doubt."[10]

The shift from the active voice ("The President of the Senate shall . . . open") to the passive voice ("and the votes shall then be counted") has been the source of contention over the years. Suggestions have arisen that the President of the Senate holds the power to count.[11] But it has long been assumed that Congress holds this responsibility.

What inference should be drawn from the shift in language? Professors Delahunty and Yoo spar with Matthew Seligman about hypothetical examples that use this structure.[12] I shall supplement this discussion with one more example, which arose in the contested election of 1877:

> The Committee on Powers, Privileges and Duties of the House in regard to the electoral vote is endeavoring to throw all the light it can upon the subject. It has held numerous meetings, and many grave and weighty arguments have been made on one side and the other during the last ten days. As a part of the gossip of the hour, there is a well authenticated story in reference to this committee, which is told as follows:—Professor Seelye, a few days ago, was making a very learned argument upon that part of the constitution which says that "the President of the Senate shall,

8. U.S. CONST. art. II, § 1, cl. 3, *superseded by* U.S. CONST. amend. XII.

9. U.S. CONST. amend. XII.

10. Delahunty & Yoo, *supra* note 3, at 52.

11. *See, e.g.*, WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 116 (2004); THE PRESIDENTIAL COUNTS: A COMPLETE OFFICIAL RECORD, at xli (New York, D. Appleton & Co. 1877).

12. Delahunty & Yoo, *supra* note 3, at 53–54 n.136 (illustrating doubt through a "mundane example" that "the switch to the passive voice excludes the President of the Senate from the counting function"); *see also* Matthew Seligman, The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes (Jan. 6, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020 [https://perma.cc/4DZK-YQFA]; Joel K. Goldstein, *The Ministerial Role of the President of the Senate in Counting Electoral Votes: A Post-January 6 Perspective*, 21 U.N.H. L. REV. 369, 388–90 (2023).

> in the presence of the senate and House of Representatives, open all the certificates and the vote shall then be counted." Mr. Seelye, who is a republican, was of course maintaining that Mr. Ferry, the President of the Senate, had the clear and indisputable right, not only to open the votes, but to do the counting. At a particularly vigorous and eloquent point in his argument, Mr. Proctor Knott, the chairman of the committee (so the story goes), remarked:—
>
> "Professor, I do not wish to interrupt you in your eloquent constitutional argument, but I want you to explain to me an invitation I have just received to dinner, the interpretation of which perplexes me a good deal. It is as follows:—
>
> 'The pleasure of your company is request at dinner to-morrow evening, at Weicker's, to meet Professor Seelye and other distinguished gentlemen. The dishes will be uncovered by the steward precisely at seven o'clock, and the dinner will then be eaten.'
>
> "Now what I want you to interpret for me, Professor," said Mr. Knott, "is who is to eat the dinner—the steward, or you and I and the rest of the guests?"[13]

This debate over language, however, turns on prior assumptions about these phrases. On the one hand, the power to "count" is surely greater than the power to "open." One might conclude that the shift in verb voice then suggests a shift in the actors, particularly as one individual, the President of the Senate, expressly holds the lesser power. And the presence of the House and the Senate during the counting of electoral votes suggests a role for Congress in the exercise of this greater power.

On the other hand, Professors Delahunty and Yoo rightly note that the presence of the House and the Senate is essential because if the counting concludes with no candidate receiving a majority, the House "immediately" proceeds to choose the President by ballot.[14] Congress's presence is necessary to expedite a contingent election. And the inference is just as plausible, they argue, that the switch to the passive voice does not *exclude* the President of the Senate.[15]

The textual argument is a challenging one, but, in my judgment, the better argument weighs against the views espoused by Professors Delahunty and Yoo. The change in verb voice does suggest a change in

13. *The Authority of the Presiding Officer of the Senate to Count the Vote—a Parallel Case Furnished a Distinguished Constitutional Debate*, N.Y. DAILY HERALD, Jan. 11, 1877, at 10.

14. U.S. CONST. amend. XII; Yoo & Delahunty, *supra* note 3, at 52–54.

15. Yoo & Delahunty, *supra* note 3, at 53 n.136.

responsibility. While a plausible inference could conclude that the phrase "the votes shall then be counted" may be ambiguous as to who should count, the decision to *change* verb voices from active to passive after allocating express responsibility to the President of the Senate is more significant than the failure to add Congress in a role of express responsibility.

But my argument does not hinge on this claim. The practice of Congress between 1789 and 1803 provides strong evidence that the Twelfth Amendment anticipates Congress holds the power to count electoral votes.

II. CONGRESSIONAL PRACTICE BEFORE THE TWELFTH AMENDMENT

Even if one concedes an ambiguity in the text of Article II about who counts, congressional practice strongly suggests that Congress holds the power to count. Three aspects of congressional practice weigh in favor of this interpretation. First, in 1792, Congress enacted a statute reflecting its power to direct federal and state officers about the rules surrounding electoral votes, rules that would then assist Congress in deciding what to count. Second, Congress's appointment of tellers, who contemporaneous records reveal counted on behalf of Congress, shows that Congress understood it had the power to count electoral votes. Third, each house of Congress in 1800 approved a bill that would dictate rules for how Congress would resolve disputes over electoral votes.[16] These practices suggest that when Congress approved the Twelfth Amendment in 1803, which reincorporated the language of Article II, it understood that Congress had the power to "count" electoral votes.

It is worth parsing out the timeline of events leading up to the Twelfth Amendment. Article II, Section 1, Clause 3 was drafted as a part of the original Constitution in 1787 and became effective in 1789.[17] The first presidential election took place in 1789, with some slightly unusual procedures on account of organizing the government for the first time.[18] Congress enacted a law in 1792 regulating presidential elections and the counting of electoral votes.[19] Two more presidential elections then took place in 1792 and 1796.[20] In 1800, Congress

16. *See infra* Parts II.A–C.

17. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

18. Delahunty & Yoo, *supra* note 3, at 94.

19. An Act relative to the Election of a President and Vice President of the United States, and declaring the Office who shall act as President in case of Vacancies in the offices both of President and Vice President, 1 Stat. 239 (Mar. 1, 1792) [hereinafter Act of March 1, 1792].

20. Delahunty & Yoo, *supra* note 3, at 96–99.

extensively debated bills regarding the regulation of presidential elections.[21] Each chamber passed a bill in 1800, but they did not concur on a bill.[22] Another presidential election took place in 1800, with no candidate receiving a majority; the House selected a President in 1801.[23] The Twelfth Amendment was approved by Congress in 1803 and ratified in 1804.[24]

The sequence of these events informs the original public understanding of the Twelfth Amendment. While the Twelfth Amendment changed some things about Article II, Section 1, Clause 3, it also reenacted some identical language.[25] But reenactment is crucial. While there may have been some ambiguities about the meaning of certain clauses in 1787, this Essay argues that Congress's practices between 1789 and 1803 unambiguously clarify the meaning of the text. Congress's actions establish the original public meaning because the Twelfth Amendment's Counting Clause pertains to Congress's own behavior and power.

A. The Act of March 1, 1792

First, Professors Delahunty and Yoo argue the act of March 1, 1792, relating to electoral votes bears a "resemblance" to Article II and to the later Twelfth Amendment, which in turn suggests an understanding that the President of the Senate counts electoral votes.[26] But the act of March 1, 1792, includes far more than Professors Delahunty and Yoo describe, and it also includes crucial details omitted in their analysis. And the act of March 1, 1792, supports the notion that Congress holds substantive power to guide the counting of electoral votes.

Professors Delahunty and Yoo cite the language of section 5 of the act of March 1, 1792,[27] but here I begin with sections 2, 3, and 4:

> Sec. 2. *And be it further enacted*, That . . . the electors in each state shall make and sign three certificates of all the votes by them given, . . . and shall by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of

21. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1669–73 (2002).

22. *Id.* at 1672–73.

23. Bernard A. Weisburger, *America Afire: Jefferson, Adams, and the Revolutionary Election of 1800*, at 227–77 (2000).

24. Levison Sanford & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 927 & n.6 (2001).

25. *Compare* U.S. CONST. amend. XII, *and* U.S. CONST. art. II, § 1, cl. 3, *with* U.S. CONST. amend XII.

26. Delahunty & Yoo, *supra* note 3, at 95.

27. *Id.*

> government, before the first Wednesday in January then next ensuing, one of the said certificates, and the said electors shall forthwith forward by the post-office to the President of the Senate, at the seat of government, one other of the said certificates, and shall forthwith cause the other of the said certificates to be delivered to the judge of that district in which the said electors shall assemble.
>
> Sec. 3. *And be it further enacted*, That the executive authority of each state shall cause three lists of the names of the electors of such state to be made and certified and to be delivered to the electors on or before the said first Wednesday in December, and the said electors shall annex one of the said lists to each of the lists of their votes.
>
> Sec. 4. *And be it further enacted*, That if a list of votes, from any state, shall not have been received at the seat of government on the said first Wednesday in January, that then the Secretary of State shall send a special messenger to the district judge in whose custody such list shall have been lodged, who shall forthwith transmit the same to the seat of government.[28]

Congress exercised significant authority over the counting of electoral votes—not just over the time of choosing presidential electors, which is a power it expressly and unequivocally holds.[29] Congress ordered electors, and other actors, to do more things than the Constitution required of them.[30] Specifically, (1) Congress directed multiple certificates of the electors to be delivered to the President of the Senate in different manners, and certificates to be delivered to a federal judge; (2) Congress ordered state governors to make certificates identifying presidential electors in each state; (3) Congress ordered electors to include with their list of votes for President the certificates of their own election; and (4) Congress empowered the secretary of state to secure a copy of electoral votes from a federal judge in the event electoral votes did not make it to the capital. Furthermore, when Congress updated the statute in 1804, immediately after the passage of the Twelfth Amendment, it likewise understood it held the authority to provide these types of directions.[31]

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28. Act of March 1, 1792, §§ 2–4, 1 Stat. 239, 240.

29. U.S. CONST. art. II, § 1, cl. 4, *amended by* U.S. CONST. amend. XII.

30. *See* U.S. CONST. art. II, § 1, cl. 3 (1789).

31. An Act supplementary to the act intituled "An act relative to the election of a President and Vice President of the United States, and declaring the officer who shall act as President, in case of vacancies in the offices both of President and Vice President," § 3, 2 Stat. 295, 296 (1804) ("[T]he executive authority of such state shall cause six lists of the names of the

These actions of Congress stand in contrast to the conclusion of Professors Delahunty and Yoo. They argue, "Neither Article II nor the Twelfth Amendment explicitly grants the House and Senate any authority over the counting of the electoral votes. The constitutional text grants the only affirmative role to the Vice President."[32] If that is the case, it is hard to see how Congress holds any power to regulate the things that it did in 1792. If Congress has no power to count, it has no power to establish the tools for counting. Congress is not the agent of the President of the Senate. Indeed, Professors Delahunty and Yoo go further and hold, "Congress has no constitutional power to interfere with the electoral count."[33] But its series of rules dictating how to go about securing electoral votes strongly suggests that it did, in 1792, believe it had *some* power over counting.[34]

Additionally, note the language used in Section 5 of the act and what it omits: "the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted."[35] The act uses the passive voice for the act of "counting." But it also uses the passive voice for the act of "opening." That is, Congress here expressly ousts the President of the Senate from the text of its statute, in a way that does not bear an "unmistakable" "resemblance" to the text of the Constitution.[36] True, Congress cannot by statute contradict the Constitution's commands. But the act of March 1, 1792, demonstrates that Congress understood it had the power to regulate activities surrounding the counting of electoral votes.

B. The Role of Congress's Tellers in the Joint Session

Second, beginning in 1793, and in every presidential election ever since, the Senate and the House have appointed "tellers" to count the

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electors for the state, to be made and certified, and to be delivered to the said electors . . . .").

32. Delahunty & Yoo, *supra* note 3, at 81.

33. *Id.* at 57.

34. Relatedly, Professors Gary Lawson and Jack Beermann argue that "[t]he President of the Senate, not Congress, determines what counts as a 'certificate' for purposes of the Twelfth Amendment." Gary Lawson & Jack Beermann, *Congressional Meddling in Presidential Elections: Still Unconstitutional After All These Years; A Comment on Professor Sunstein*, 103 B.U. L. REV. (forthcoming 2023) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412032 [https://perma.cc/CQJ4-3V8M]. Congress—well before the Twelfth Amendment—enacted a statute that described the process of creating and transmitting the true certificates that would later be counted in Congress. The original public meaning of the Twelfth Amendment is best understood as embracing the actions that Congress took and the authority Congress believed it had.

35. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239, § 5.

36. Delahunty & Yoo, *supra* note 3, at 95.

electoral votes.[37] These tellers tally the votes and deliver the totals to the President of the Senate, who reads the totals aloud before the two houses after these tellers, acting on behalf of Congress, have "ascertained" the vote totals.[38]

Professors Delahunty and Yoo suggest that the role of the "tellers" "seems to have been entirely ministerial."[39] In one sense, that is true. The rules in 1793, for instance, explained that the tellers would "make a list of the votes as they shall be declared."[40] But consider the reporting in the congressional record of what the tellers actually did. In 1793, the Senate record reports that "the certificates of the Electors of the fifteen States in the Union, which came by express, were, by the Vice President, opened, read, and delivered to the tellers appointed for the purpose, who, *having examined and ascertained the votes*, presented a list of them to the Vice President."[41] The tellers performed the act of counting. The same happened in 1797: the Senate record reports that the Vice President "opened and delivered" the certificates, and "the tellers, appointed for the purpose, who, *having examined and ascertained the number of votes*, presented a list thereof to the Vice President."[42] And again, in 1801:

> The President of the Senate, in the presence of both Houses, proceeded to open the certificates of the Electors of the several States, beginning with the State of New Hampshire; and as the votes 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 . . . .[43]

These records suggest that the tellers are the ones doing the counting, on behalf of Congress. Their role was effectively ministerial because there was no dispute about any electoral votes from any states.

37. Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 484 (2010).

38. *Id.*

39. *Id.* at 96–97.

40. 2 ANNALS OF CONG. 644 (1793). Professors Jack Beermann and Gary Lawson acknowledge that "the two Houses of Congress apparently tallied" the electoral votes in 1793. Jack Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) About Counting Electoral Votes*, 16 FLA. INT'L U. L. REV. 297, 303 (2022). Professors Beermann and Lawson, however, apparently conclude that this is not the "counting" of votes and that the President of the Senate "at least" is the "supervisor of the count," if not the one responsible for counting. *Id.* at 304.

41. 2 ANNALS OF CONG. 645 (1793) (emphasis added).

42. 4 ANNALS OF CONG. 1542 (1797) (emphasis added).

43. 6 ANNALS OF CONG. 1023. (1801) (emphasis added).

No state submitted competing or alternative slates of electors. No one doubted the validity of the certificates. In short, there was no dispute to resolve.

Finally, Professors Delahunty and Yoo worry that this power to count has been "delegated" by Congress to these tellers.[44] But this misconceives the role of tellers. The tellers are acting on behalf of Congress and reflecting its will. In ministerial cases, there is no exercise of discretion, and the tellers expeditiously carry out the work on behalf of Congress. In situations where disputes arise, Congress articulates the dispute resolution mechanisms to resolve any problems. The Electoral Count Act is one such set of rules it put in place in 1887.[45] Once Congress has resolved any controversies, the tellers again return to their ministerial role to reflect the judgment of Congress.

C. The Debate of 1800 and the Statements of Senator Charles Pinckney

Professors Delahunty and Yoo give significant weight to the views of Senator Charles Pinckney during a debate in 1800 over Congress's role in counting electoral votes.[46] They are correct that Senator Pinckney spoke at length about how to handle disputes over the selection of presidential electors. He emphasized that state legislatures should be trusted to resolve any conflicts that may arise. But one cannot rely on Senator Pinckney too heavily for two reasons. First, his own statements during that debate are more ambiguous than Professors Delahunty and Yoo suggest. Second, the views of one Senator are very weak evidence of original meaning. It is further weakened given that the Senate immediately voted at the conclusion of Senator Pinckney's speech to approve a bill he opposed—essentially, adopting the opposite of the position he argued. In terms of the original public meaning of the Twelfth Amendment, Congress's actions in 1800 give important context. The debate of 1800 suggests that the ensuing text ratified in 1803 approved of the power that Congress believed it held.

On March 28, 1800, Congress debated a bill to regulate how Congress would resolve disputes over electoral votes. Senators proposed a six-member committee that would consider objections, gather testimony, and resolve disputes ahead of the counting.[47] The bill had been read, and amendments to it considered, over the previous six weeks.[48] But Senator Charles Pinckney strongly objected to the bill on this date.

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44. Delahunty & Yoo, *supra* note 3, at 56, 96–97 & n.373.

45. S. Con. Res. 1, *supra* note 2.

46. Delahunty & Yoo, *supra* note 3, at 100–01.

47. 6 ANNALS OF CONG. 125–26 (1800).

48. *Id.* at 47.

Pinckney opened his remarks by observing, "Congress have no power to interfere, *except* in the manner I shall hereafter detail."[49] That is, there *are* powers of Congress to "interfere," at least in certain circumstances. He noted the propriety of the act of March 1, 1792, on the topic, for instance.[50]

He went on to explain that the Constitution gives "to Congress no interference in, or control over the election of a President. It is made their duty to count over the votes in a convention of both Houses, and for the President of the Senate to declare who has the majority of the votes of the [e]lectors so transmitted."[51] He continued elsewhere, "[N]o power . . . is given to Congress, even when both Houses are assembled in convention, further than to open and count the votes, and declare who are the President and Vice President, if an election has been made."[52] That is, Pinckney appears to acknowledge that Congress counts votes. And if Congress counts votes, that means the President of the Senate does not count votes.

Pinckney seemed unconcerned with the fact that Congress counts electoral votes. Instead, he was concerned over what would happen if there were disputes over what to count. And here, Pinckney acknowledged the problem:

> [S]uppose a State Legislature should so far forget its duty, as not to pass . . . the manner in which, within the proper time, Electors of a President should be elected, and the people should, notwithstanding, assemble and elect under a different authority; would the votes of the Electors, under these circumstances, be receivable? Or suppose that two different sets of Electors should insist that they were constitutionally elected, and that double returns should be transmitted, one certified by the Governor of the State, and the other not; which are to be received, and who is to have the power to decide to which the preference is to be given?
>
> On this subject I am to remark, that the Constitution supposes a mutual confidence to exist between the Federal and State Governments; that not only in its formation, but in the strict and honorable performance of their relative duties, there will be the greatest punctuality and exactness; that neglect, and particularly refusal, on the part of either must endanger the existence of both; and that until the case does actually arise, it is extremely impolitic in either to suspect it, and particularly to adopt measures in anticipation, on suspicions unsupported by proofs, to

49. *Id.* at 126 (emphasis added).

50. *Id.* at 128.

51. *Id.* at 130.

52. *Id.* at 137.

> meet situations that have never yet occurred, or probably never will.[53]

Pinckney knew that disputes may arise. But he simply did not want to answer the hard questions at that moment. He really offered no answer about who should resolve disputes. Pinckney acknowledged that state dispute resolution mechanisms may not solve the problem, but he insisted that the question should simply be left unanswered until a problem arose. That is, it would infringe on state autonomy to doubt the integrity of the states.

But it certainly appears that Pinckney did not believe the President of the Senate held that power. If he believed the President of the Senate could resolve disputes, it seems he would have raised it here.

Pinckney acknowledged the risk of Congress being put into the position of resolving disputes:

> But, surely, its friends never could have considered the extent and danger of giving to this committee, or even to Congress, the right to decide on double returns, or they must immediately have seen the extreme impropriety of attempting it. It is, in short, nothing less than holding out to the minority in all the States, a temptation to dispute every election, and to always bring forward double returns.[54]

Pinckney also complained that if Congress had the "right to reject or admit the votes of States," it would be, in his view, a "gross and dangerous . . . absurdity."[55]

But this is only half the question that Professors Delahunty and Yoo address. Pinckney believed it would usurp the responsibilities entrusted to the states if Congress took on the role of resolving disputes.[56] But how much more so for the President of the Senate! If Pinckney was flustered at the prospect of a committee of Congress resolving disputes, it is hard to think he would have embraced *a single* member of the legislative branch, the President of the Senate, resolving those disputes.

Finally, and most importantly for purposes of the original public meaning of the Twelfth Amendment, the Senate rejected Pinckney's views. Immediately after the conclusion of Pinckney's speech, and over Pinckney's objections, a majority of the Senate voted in favor of the bill, 16–12.[57]

53. *Id.* at 133.

54. *Id.* at 134.

55. *Id.* at 130.

56. *Id.* at 146.

57. *Id.*

The House likewise considered a similar bill.[58] The House version would ensure the committee had no "decisive" power.[59] If questions arose, the houses would divide to resolve the questions.[60] By a vote of 52–37, the House approved an amended version of the Senate bill.[61] But the two chambers never resolved their differences, and the bill never became law.

In 1800, majorities of both houses of Congress (despite Pinckney's failed efforts in his floor statements to persuade his colleagues) agreed that Congress had the power to count votes and resolve disputes, even if the houses failed to agree on the precise mechanisms in the bill. Just a few years later, Congress ratified the Twelfth Amendment—a rule that expressly included a provision about counting electoral votes in the presence of the House and Senate.[62] It seems strange to conclude that the enactment of the Twelfth Amendment disclaimed the very power majorities of both houses of Congress believed they already possessed just a few years earlier. And it is for this crucial reason that one should separate the original public meaning of Article II from the original public meaning of the Twelfth Amendment. Article II may include ambiguity. But the Twelfth Amendment is best read as ratifying the practices of Congress and Congress's understanding of the scope of its own authority. And on that front, there was no ambiguity. Congress believed it had the power to count electoral votes and to resolve disputes in counting them.

It is the rare amendment where the contemporaneous practice of Congress can be traced to reenacted language that best reflects the original public meaning of the provision. That is, Congress was counting electoral votes when it enacted a provision that said, in part, "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."[63] This language was identical to language that already existed in the Constitution and supplanted it. But it seems natural for Congress to enact a provision that would be best understood as ratifying its existing practices.

D. The Actions of the Vice President in 1797 and 1801

Professors Delahunty and Yoo highlight the actions of Vice President John Adams in 1797 and Thomas Jefferson in 1801. The actions of these Vice Presidents, they suggest, weigh in favor of their

58. *Id.* at 130.

59. 6 ANNALS OF CONG. 691 (Apr. 29, 1800).

60. *Id.* at 692 (Apr. 30, 1800).

61. *Id.* at 697 (May 2, 1800).

62. U.S. CONST amend. XII.

63. *Id.*

conclusion that the President of the Senate holds the power to resolve disputes. For this proposition, they rely on the "unique account" of Professors Bruce Ackerman and David Fontana.[64]

Professors Ackerman and Fontana overread the events in these elections to advocate for a historical conclusion that Vice President Thomas Jefferson "counted himself" into the presidency.[65] They note that technical deficiencies were present in the Vermont electoral votes in 1796 and the Georgia electoral votes in 1800. Both Adams and Jefferson, the narrative suggests, "counted" the votes in their favor. That means these Vice Presidents had "the power to resolve such disputes."[66]

But it is strange to say that Adams and Jefferson "resolved" disputed votes, as unanimous consent of Congress (or the failure to object) is a weak basis to say that these Presidents of the Senate resolved any controversies. Indeed, the record, if anything, demonstrates the opposite. Tellers "ascertained the number of votes" in 1797 and 1801, to use the language in the Annals of Congress.[67] That is, Congress understood that it was doing the counting. If its tellers wanted to refuse to count votes, they freely could. And many members of Congress in 1800 had an open debate about how far it could go in counting electoral votes and resolving disputes, with myriad views on the subject voiced in Congress and with majorities in each chamber asserting the power to do so.[68] It is strange that they would all sit on their hands if they disputed what Jefferson would do months later. Instead, the acquiescence of Congress to Adams and Jefferson "call[ing] the electoral votes in their favor"[69] suggests that there was nothing in dispute.

Professor Ned Foley has pointed out these weaknesses in the interpretation of events by Professors Ackerman and Fontana. For one thing, "there was no doubt about whom Georgia's electors voted for."[70] That is, there was really nothing of substance to dispute. For another, counting the votes did not "spark an objection from Federalists, despite the fervor with which they were opposing Jefferson—and insofar as they were concocting other plots by which they might hold onto the

64. Delahunty & Yoo, *supra* note 3, at 58 (citing Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 552 (2004)).

65. *See* Goldstein, *supra* note 12, at 391–94.

66. Delahunty & Yoo, *supra* note 3, at 58–59.

67. *See supra* note 42 and accompanying text.

68. 6 ANNALS OF CONG. 146, 697 (1800).

69. Delahunty & Yoo, *supra* note 3, at 59 (noting that "the House and Senate, which were sitting in observation," did not challenge these actions).

70. EDWARD B. FOLEY, BALLOT BATTLES 398 n.100 (2016).

presidency."[71] "The Federalists could have objected if they wanted to."[72] And the notion that they would sit on their hands because they believed they lacked the power to object strains credulity. Indeed, Professors Ackerman and Fontana admit, "If they wished to create a 'Pseudo-president' by raising some legal quibbles, it was up to them to make a clear and focused objection."[73] That is, the Federalists had the capacity to object and they did not do so, likely because there was no dispute as to the true results of the electors of the state of Georgia.

Professors Ackerman and Fontana further suggest that "it is abundantly clear that the tellers had absolutely no authority to resolve the matter."[74] While the adverbs "abundantly" and "absolutely" are powerful, the tellers' role as agents of Congress is the more sensible understanding. Professors Ackerman and Fontana are correct to note that "Article II does not mention their existence."[75] But the tellers did "put the assembled House and Senate on notice of the Georgia deficiency."[76] They counted and reported the totals to the President of the Senate. In short, they were the agents of Congress who selected them.

The actions of Vice Presidents in 1797 and 1801 offer little support for the notion that the President of the Senate holds the unilateral authority to count electoral votes and resolve disputes. It runs contrary to the weight of congressional practices and records before these events. And there was no true dispute in either of these elections. There were deficiencies in the form of the electoral certificates, but there was no controversy over the substantive results of the elections in the states. Congressional silence and acquiescence in a time of bitter partisanship are best understood to mean that there was no controversy for Congress to resolve.

III. THE STRUCTURE OF THE CONSTITUTION

Early in their article, Professors Delahunty and Yoo explain that they will use "Vice President" and "President of the Senate" interchangeably.[77] That is a categorical error. And it is an error that affects the heart of the structural argument. In short, the President of

71. *Id.*

72. *Id.*

73. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 U. VA. L. REV. 551, 615 (2004).

74. *Id.* at 608.

75. *Id.* at 602, 608.

76. *Id.* at 633.

77. Delahunty & Yoo, *supra* note 3, at 29 n.4 ("We shall employ the terms 'Vice President' and 'President of the Senate' interchangeably because the Constitution designates the Vice President as President of the Senate.").

the Senate is sometimes the Vice President, sometimes not. The structural role of the President of the Senate as a legislative officer in Congress weighs heavily in favor of a recognition that Congress, not the President of the Senate, holds the power to count electoral votes and resolve disputes.

Article I of the Constitution describes the office of President of the Senate. First, "[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."[78] Second, "[t]he Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States."[79] The President of the Senate is a legislative official, not an executive official—and that includes the Vice President when acting in the capacity of President of the Senate.[80] In certain circumstances, the President of the Senate may be chosen by the Senate.

The office of Vice President was routinely vacant before ratification of the Twenty-Fifth Amendment.[81] Seven Vice Presidents died while in office. Another resigned.[82] Eight others vacated the office upon the death of the President.[83] And that does not include instances of a mere absence of the Vice President from the Capitol. The President of the

78. U.S. CONST. art. I, § 3, cl. 4.

79. *Id.* cl. 5.

80. *See, e.g.*, Kyle Cheney, *Secret Pence Ruling Breaks New Ground for Vice Presidency*, POLITICO (Mar. 30, 2023, 9:53 AM), https://www.politico.com/news/2023/03/30/mike-pence-immunity-ruling-00089629 [https://perma.cc/7YSS-KM5R] ("Vice presidents have long suggested they should enjoy the legal protections afforded to Congress, but [Judge James] Boasberg's ruling is the first time a court has extended so-called speech-or-debate immunity to the vice presidency."); Jody C. Baumgartner, *The Vice Presidency in the Twenty-First Century*, 44 PEPP. L. REV. 561, 575 (2017) ("According to the Constitution, vice presidents have a role in the legislative process."); Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 662–64 (2016); Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers, Part II: Political Branch Interpretation and Counter-arguments*, 24 KAN. J.L. & PUB. POL'Y 294, 295 (2015) (concluding that "the Vice President is a part of both elected branches—with his exact locus at a particular point in time varying depending on context"); DICK CHENEY WITH LIZ CHENEY, IN MY TIME: A PERSONAL AND POLITICAL MEMOIR 307–08 (2011).

81. Goldstein, *supra* note 12, at 402–03.

82. *About the Vice President: Vice Presidents of the United States*, U.S. SENATE, https://www.senate.gov/about/officers-staff/vice-president/vice-presidents.htm [https://perma.cc/E5JP-8A4G] (last visited Apr. 21, 2023).

83. *Id.*

Senate, then, was often a Senator.[84] A majority of the Senate chooses its president pro tempore.[85] That means one chamber of Congress could choose the President of the Senate.

If the President of the Senate holds the unilateral power to count electoral votes and resolve disputes over them, it leaves the conclusion of Professors Delahunty and Yoo in an unusual place: Congress does not have the power to count electoral votes. But Professors Delahunty and Yoo conclude that one member of the Senate, chosen by a majority of the Senate, sometimes holds the power to count electoral votes. That would be an absurdity.

Their categorical error leads to other mistaken conclusions. For instance, they claim that "performance of the functions in question necessarily falls to the Vice President—a different constitutional actor from Congress."[86] In cases where the President of the Senate is chosen out of Congress, however, the claim that this is a "different constitutional actor" falls flat. Likewise, Professors Delahunty and Yoo claim that the Electoral Count Act serves to "violat[e]" the "separation of powers" set up in the Constitution.[87] Again, if the President of the Senate is a legislative officer, and sometimes an officer chosen by the Senate, it is hard to see how there is a violation of the "separation of powers."

They also note, "It would appear, but does not seem settled, that the president pro tempore of the Senate would preside over the joint session in the absence of the Vice President."[88] It is unclear why this matter would not be "settled" by the plain text of the Constitution. The President of the Senate is the Vice President. The president pro tempore serves as President of the Senate in the absence of the Vice President. Article II, and later the Twelfth Amendment, expressly gives the "President of the Senate" a role to play at the counting of electoral votes.[89] And in 1817, the first instance in which the office of Vice President was vacant, the President of the Senate still presided: "The seals of the votes were broken by the President of the Senate, and by him handed to the Tellers, by whom they were read aloud, and recorded on the Journals of the Senate and of the House of Representatives."[90]

84. *About the President Pro Tempore*, U.S. SENATE, https://www.senate.gov/about/officers-staff/president-pro-tempore.htm [https://perma.cc/2Y9X-GA5J] (last visited Apr. 21, 2023).

85. *Id.*

86. Delahunty & Yoo, *supra* note 3, at 84.

87. *Id.*

88. *Id.* at 125 n.529.

89. U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. amend. XII.

90. 30 ANNALS OF CONG. 944 (1817).

It is strange to claim that the President of the Senate—sometimes, a single Senator—has the power to handle disputes over electoral votes, but the entire Congress does not. That claim is even stranger when one recognizes that the Senate can choose its own officers, including the president pro tempore, and effectively give the Senate control over the counting of electoral votes. And it is an important structural argument in defense of Congress's power to count electoral votes.

IV. THE ELECTORAL COUNT REFORM ACT

Congress holds the power to count electoral votes and resolve disputes. The President of the Senate is the presiding officer in the joint session and initiates the proceedings, including opening the envelopes and calling for objections.

In 2022, Congress enacted the Electoral Count Reform Act as part of an omnibus spending bill.[91] The Act continues Congress's regulation over the time of choosing electors and the rules relating to the counting of electoral votes, including the transmission of votes from the states to Congress—rules it first enacted in 1792.[92]

The Act did several important things. First, it clarified the scope of Election Day to ensure that the rules of elections are in place before Election Day and that states cannot adopt rules after Election Day to try to circumvent the events of Election Day. Second, it abolished the "failed to make a choice" provision, which invited states to choose electors after Election Day in unclear circumstances, and created a simpler rule for states to address election-related emergencies. Third, it ensured that Congress receives timely, accurate electoral appointments from the states. Fourth, it raised the objection threshold in Congress, from one member of each chamber to one-fifth of the members of each chamber. Fifth, it enacted new counting rules to define and limit Congress's role at the count. Sixth, it clarified the denominator used to determine whether a candidate has reached a majority of votes cast.[93]

The Act also conditions the "Powers of the President of the Senate," who serves as the "presiding officer" in this session:

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91. Electoral Count Reform Act of 2022, part of the Consolidated Appropriations Act of 2023, Pub. L. No. 117-328.

92. *See supra* Part II.

93. Electoral Count Reform Act of 2022, part of the Consolidated Appropriations Act of 2023, Pub. L. No. 117-328.

I provided testimony before the U.S. Senate Committee on Rules & Administration on August 3, 2022, on the topic "The Electoral Count Act: The Need for Reform" and examined these provisions in greater detail. But because the focus of this Essay is on the role of the President of the Senate and Congress's decision to narrow the responsibilities allocated to that role during the counting of electoral votes, I focus only on that aspect of the Electoral Count Reform Act.

> (1) MINISTERIAL IN NATURE.—Except as otherwise provided in this chapter, the role of the President of the Senate while presiding over the joint session shall be limited to performing solely ministerial duties.
>
> (2) POWERS EXPLICITLY DENIED.—The President of the Senate shall have no 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.[94]

The Act does give the President of the Senate specific instructions about how to proceed. The President of the Senate, for instance, opens certificates in alphabetical order from the states and calls for objections, if any.[95]

The President of the Senate may also play a role in counting electoral votes—simply not the role that Professors Delahunty and Yoo suggest. The President of the Senate has "no power to *solely*" resolve disputes over electoral votes. But the President of the Senate, of course, may vote separately on objections in the chamber to resolve any disputes over electoral votes. If the President of the Senate is the Vice President, she "shall have no vote, unless they be equally divided."[96] If the President of the Senate is the president pro tempore of the Senate, he may vote on any question as he ordinarily does. Congress adds the qualification that President of the Senate has no sole authority to resolve disputes. Congress routinely regulates the conduct of the presiding officer, and decisions of the presiding officer are subject to appeal from the entire legislative body.[97]

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94. Electoral Count Reform Act of 2022, § 109(a) (amending 3 U.S.C. § 15), part of the Consolidated Appropriations Act of 2022, Pub. L. No. 117-328.

95. *Id.*

96. U.S. CONST. art. I, § 3, cl. 4.

97. *See, e.g.*, Standing Rules of the Senate, S. Res. 285, 113th Cong. XX(1) (2013). *See also* Andrew Hyman, *The Only Time I Withdrew a Blog Post from the Originalism Blog Pre-Publication Was on January 5, 2021*, ORIGINALISM BLOG (Mar. 22, 2023, 6:02 AM), https://originalismblog.typepad.com/the-originalism-blog/2023/03/the-only-time-i-withdrew-a-blog-post.html [https://perma.cc/U8YS-6XB5] ("As to the constitutionality of the Electoral Count Act either before or after the 2022 amendments, that Act places limits upon the Vice President as the presiding officer. The rules of the U.S. Senate have for centuries limited the VP as presiding officer of the Senate, and limiting the VP as presiding officer of a joint session seems like pretty much the same thing."); Cass R. Sunstein, *The Rule of Law vs. "Party Nature": Presidential Elections, the U.S. Constitution, the Electoral Count Act of 1887, the Horror of January 6, and the Electoral Count Reform Act of 2022*, B.U. L. REV. (forthcoming) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4313291 [https://perma.cc/Q246-J6JN] (emphasizing that any judgments

CONCLUSION

On January 6, 2021, as Capitol police sought to get a riot under control as protestors disrupted the counting of electoral votes, Pence's counsel, Greg Jacob, sent an email to one of Trump's attorneys: "I do not begrudge academics debating the most far-flung theories. I love doing it myself, and I view the ferment of ideas as a good and helpful thing."[98] The notion that one person would have unilateral authority to resolve disputes over a presidential election was, in Jacob's view, "far-flung." Concededly, the use of the passive voice in Article II in 1787 created problems one might never have anticipated would arise. But the strongest interpretation of the text, the original public meaning of the Twelfth Amendment informed by congressional practice, and the structural role of President of the Senate lean in favor of the conclusion that Congress holds the power to count and resolve disputes over electoral votes. The Electoral Count Reform Act further constrains the President of the Senate. And the Act further constrains Congress itself, making it more difficult to reject electoral votes and giving more deference to the judicial process. The power to alter the outcome of a presidential election is a great power, and Congress's efforts to constrain institutional actors is both constitutionally appropriate and politically laudable.

made by the President of the Senate "are limited to technical issues and also reviewable by Congress"). *But see* Delahunty & Yoo, *supra* note 3, at 83 (arguing that this purports to "control the function of another constitutional actor—the Vice President").

98. Aaron Blake, *The Heated Jan. 6 Email Exchange Between Trump's and Pence's Lawyers, Annotated*, WASH. POST (Mar. 3, 2022, 1:27 PM), https://www.washingtonpost.com/politics/2022/03/03/heated-jan-6-email-exchange-between-trumps-pences-lawyers-annotated/ [https://perma.cc/6FFV-PZS6].