



## Joint Session of Congress on Jan 6: rules of engagement

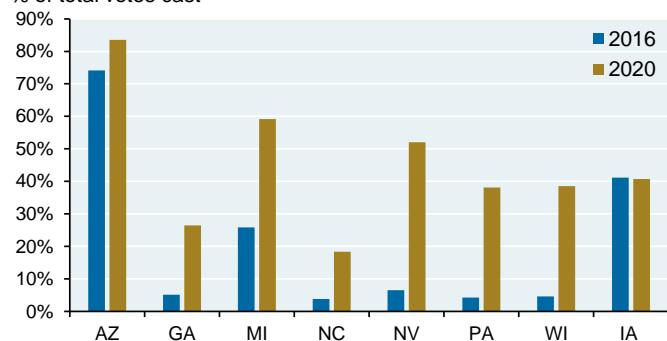
The Joint Session of Congress on Jan 6 is shaping up to be a very contentious session given competing slates of electors and other objections. There's a lot of misleading information regarding how this process works and what the powers of the Vice President are. This brief note reviews the rules you need to know.

### Background: the Courts, Congressional challenges and the Caravan

- During the spring and summer of 2020, election laws and rules in many states were changed due to COVID
  - Changes enacted by Federal/State court orders, state legislature amendments, Governors suspending deadlines during states of emergency and Chief Election Officer decisions (i.e., Sec'y of State)
- Some pre-election lawsuits successfully challenged attempts by lower courts/election officials to relax rules
  - In MN, WI, OH, SC, GA and AZ, Federal Courts (including US Supreme Court) and State Supreme Courts struck down attempts by lower courts and election officials to lengthen absentee ballot deadlines, mandate increased dropbox availability, lengthen "curing" deadlines and relax signature requirements
- The election itself: absentee ballot usage surged and at the same time, absentee ballot rejection rates were often lower than in prior elections, particularly in some swing states (see 2 exhibits below)
- After the election, the Trump campaign and unaffiliated groups responded with a flurry of lawsuits in multiple states. Courts have found these lawsuits to be without merit so far (one tally we've been following shows 36 defeats, 4 cases pending and 0 wins). The reasons cited by a bipartisan group of judges:
  - Unsubstantiated fraud claims
  - Self-serving witness statements and expert testimony with little evidentiary value
  - Individual incidents of fraud and/or clerical errors cannot be assumed to have taken place on a larger scale (i.e., a high bar for proving that such incidents were "dispositive" and would have changed results)
  - Lack of standing (i.e., Texas has no standing to sue other states for election handling)
  - "Laches": a legal principle under which challenges to election procedures must be made in a timely manner and not after the fact (i.e., Wisconsin Supreme Court ruling on certain ballot challenges)
- Even so, 100+ GOP House Reps and at least 13 GOP Senators<sup>1</sup> may challenge Electoral College results in several states on Jan 6, and even if they do not, Congress must sort out any competing slates of electors that were cast on Dec 14**
- Trump supporters are planning a caravan to DC to coincide with the Jan 6 session

### Absentee/mail-in ballot share, 2016 vs 2020

% of total votes cast



Source: Election Assistance Commission, National Election Pool, NBC Decision 2020, JPMAM. December 2020.

State	Rejected absentee/mail-in ballot percentage		
	2016	2018	2020
AZ	0.53%	0.45%	?
GA	6.42%	3.10%	0.60%
MI	0.49%	0.57%	0.46%
NC	2.71%	6.11%	2.47%
NV	1.60%	2.05%	1.00%
PA	0.95%	4.45%	0.28%
WI	0.20%	1.68%	?
IA	0.65%	1.57%	0.15%

Source: Ballotpedia. December 2020.

<sup>1</sup> Senator Josh Hawley (R-MO), who once clerked for Chief Justice Roberts, was first. It will be interesting to see if Hawley comments on the accusations made against Justice Roberts' character and judicial rulings by election lawyers that have been retweeted by Trump.



## **Joint Session on Jan 6: the Electoral Count Act will be in force, not 12<sup>th</sup> Amendment Contingent Elections**

The US Constitution does not provide a framework for resolving electoral vote disputes. After a bitter post-Civil War election in 1876, the US faced the possibility of dueling inaugurations given disputes about valid electors. This led to a constitutional crisis and a compromise in which Rutherford B Hayes eventually became President. Congress then debated ways of avoiding such disputes in the future, and a decade later passed the Electoral Count Act in 1887<sup>2</sup>. The ECA has only been used once to sort out competing slates: in 1961, when multiple slates were submitted for Hawaii (the outcome would not have affected JFK's victory). It has also been invoked on multiple occasions to deal with objections to state submissions when competing slates were not involved.

**Competing slates.** The ECA requires the House and Senate to meet on Jan 6 and vote separately on competing slates, unless an unchallenged determination is made that one slate is entitled to Safe Harbor status, in which case it is automatically counted. Voting within each chamber follows ordinary rules: each *member* casts a single vote, rather than each state *delegation* casting a single vote. Democrats control the House by a *very* slim margin of ~10 seats<sup>3</sup>. The Senate balance on Jan 6 will be 51R–48D for reasons related to Georgia runoff elections, one of which is a special election. Several GOP Senators have indicated that they will accept certified Biden electors instead of any uncertified Trump slates. In any case, it would **only take 2 GOP Senators** to accept Biden slates to doom a competing slate effort for Trump in the Senate.

Competing slate tie-break: if the two chambers disagree, the tie-breaker goes to the slate approved by the state's governor ("highest Executive"). In PA/MI/WI/NV/AZ/GA, **governors already approved the Biden slate**. There are Jan 6 procedural issues that involve decisions by Vice President Pence such as determination of Safe Harbor status, but **none of them rise to the level of the VP effectively being able to determine the outcome**.

So, using the common interpretation of the ECA *and* assuming Congress adheres to it, the **only way for Trump to win** would be for both chambers to accept 3 or more uncertified Trump slates which have not been signed by the state's Governor, nor approved by the majority of any state legislature, nor mandated by any court<sup>4</sup>.

**Single slate objections.** In states without competing slates of electors, members of Congress can still object to certified Biden slates on Jan 6. However, such an effort would be **doomed to fail** since objections to single slates require both chambers to discard. Given Democratic House control, that's almost certainly not going to happen.

Last point: news stories on **Contingent Elections** described in the 12<sup>th</sup> Amendment (one vote per state in the House to pick the President) are often **misleading**. Contingent Elections would only occur in case of an Electoral College tie or if three or more candidates prevent the 270 threshold from being reached, in "faithless elector" scenarios<sup>5</sup>, if the winner of the Electoral College died or became incapacitated before Jan 6, or if both chambers of Congress agreed to reject electoral votes on some other grounds.

<sup>2</sup> Some scholars believe the **Electoral Count Act is unconstitutional**. Their main argument: the 12<sup>th</sup> Amendment grants authority directly to Congress to determine validity of electoral votes and procedures used to count them, so federal laws cannot impose restrictions on the scope of that authority. However, challenges to the ECA's constitutionality would only be an issue if one chamber didn't want to abide by its procedures; no members have indicated any desire to ignore it. **If that were to happen one day, the US would be in no-man's-land**, with no way out except an eventual Congressional compromise, as in 1876. In that event, on January 20 the Speaker of the House (presumably Pelosi) would have the opportunity to resign from Congress and be sworn in as Acting President until Congress settled on rules and finished counting electoral votes.

<sup>3</sup> The Democratic lead in the House is practically the smallest since 1901; see page 13 in the Outlook.

<sup>4</sup> Courts could rule that slates should be decertified between now and Jan 6, but Congress is free to accept or reject such decisions since the Constitution ascribes to Congress the sole right to count electoral votes

<sup>5</sup> In **faithless elector** scenarios, appointed electors switch votes on Dec 14<sup>th</sup> to runner-up and other individuals so that no candidate wins a majority of appointed electors. Most states prohibit faithless electors but only 14 have effective enforcement that treat faithless electors as invalid and allow states to immediately replace them.



#### Other things to know, on the Courts:

- Charles Geyh from Indiana Law School described many of the Trump lawsuits as follows: “What we saw here were a bunch of overzealous lawyers trying to make the transition from the political realm, where facts and law have ceased to be very important, into the judicial realm, where the norms are still hard and fast”
- **That said, the US Supreme Court may eventually rule in favor of the Trump campaign on some issues**, although any such rulings would not impact the outcome of the election or Congress' actions concerning electoral votes. The Court hasn't decided whether to rule on challenges to the Pennsylvania Supreme Court 3-day extension of absentee ballot deadlines (note: post-Election Day ballots in Pennsylvania didn't determine the outcome). The Supreme Court may rule that in future elections, **only State Legislatures can change election rules** as per authority ascribed to them in the Constitution, and that State courts cannot strike down state laws regulating federal elections for purportedly violating state constitutional restrictions
- Trump lawyers might also succeed in “**equal protection**” cases still pending that involve disputes around selective application of ballot-curing, ID requirements, etc. However, Wisconsin's Supreme Court ruled against Trump on this issue last month, and even if some courts eventually find in favor of plaintiffs, requested remedies are unlikely (i.e., reallocating or decertifying state electors before Jan 6)
- **A Wisconsin case highlights the hurdles for successfully reversing results after the fact.** While a county clerk was prevented in March 2020 from telling all Dane County voters that they could self-designate as “indefinitely confined” due to COVID to avoid absentee ballot photo ID requirements, that message could still have circulated through other forums, allowing people to obtain absentee ballots without identification. The inability to prove how many voters took undue advantage of this approach (i.e., they were not really indefinitely confined) led the Courts to reject general election challenges based on this issue

#### Other things to know, on **Executive Orders**:

- Twitter is ablaze with references to Executive Order 13848 signed by Trump in 2018, but this Order only applies sanctions to foreign govt's, companies and individuals who are determined by the Director of National Intelligence to have attempted to interfere with US elections. It has **no jurisdiction of any kind** over the handling of US election results or challenges to them

#### On the future of the **GOP**:

- Trump supporters intend to mount primary challenges against GOP politicians that do not support Jan 6 Joint Session objections. How will most GOP politicians vote in the Joint Session? I don't know, but I'm reminded of the following Ben Franklin quote in Peter Stone's 1776: “We must indeed all hang together, or most assuredly we shall all hang separately”
- Meanwhile, Democrats hold one of the smallest House majorities since 1900 and face the possibility of losing more House seats (as almost all Presidential parties have) at the 2022 midterm elections. As we illustrate on page 13 of the Outlook, instead of a “Blue Wave” the Democratic tide actually went *out* this year: our Partisan Balance Index of Congressional, Gubernatorial and State Legislature seats became more red after the election rather than more blue

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