MISCONSTRUING THE ELECTORAL COUNT ACT: A RESPONSE TO EVAN A. DAVIS AND DAVID M. SCHULTE

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In an article appearing on *The Hill*,[1] Evan A. Davis and David M. Schulte put forward the position that president-elect Trump is barred by Section 3 of the Fourteenth Amendment from becoming President. Or, to put it more plainly, in spite of the Supreme Court's decision in *Trump v. Anderson*,[2] Congress is free to ignore the Court's decision and to determine that Trump was and remains disqualified. In those circumstances, the vote of presidential electors cast for Trump was a nullity. Given that the only remaining and otherwise lawful votes cast by presidential electors were cast for Vice President Kamala Harris, it is Harris who prevailed in the election, and she should be seated under the rules of the Electoral Count Act (1887) (as amended through 2022).[3]

Davis and Schulte explain:

> A vote for a candidate disqualified by the Constitution is plainly in accordance with the normal use of words "not regularly given" [in the Electoral Count Act]. Disqualification for engaging in insurrection is no different from disqualification based on other constitutional requirements such as age, citizenship from birth and 14 years' residency in the United States.
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> To make an objection under the Count Act requires a petition signed by 20 percent of the members of each House. If the objection is sustained by majority vote in each house, the vote is not counted and the number of votes required to be elected is reduced by the number of disqualified votes. *If all votes for Trump were not counted, Kamala Harris would be elected president*.[4]

Simply put, Davis and Schulte's analysis is not correct.

Challenges under the Electoral Count Act come in two varieties: Type-I and Type-II challenges. Generally speaking, Type-I challenges are allegations of *pre-appointment* illegality involving presidential electors, 3 U.S.C. § 15(d)(2)(B)(ii)(**I**), and Type-II challenges are allegations of *post-appointment* illegality involving presidential electors, 3 U.S.C. § 15(d)(2)(B)(ii)(**II**).[5] Again, generally speaking, a Type-I challenge involves an allegation that

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[1] Evan A. Davis & David M. Schulte, *Congress has the power to block Trump from taking office, but lawmakers must act now*, THE HILL (Dec. 26, 2024, 8:00 AM ET), https://tinyurl.com/rfmuxry5.

[2] 601 U.S. 100 (2024) (per curiam).

[3] Electoral Count Act, 49th Cong. 2d Sess., ch. 90, 24 Stat. 373 (1887), as amended by Electoral Count Reform and Presidential Transition Improvement Act of 2022, 136 Stat. 5233, Pub. L. 117–328.

[4] Davis & Schulte, *supra* note 1 (emphasis added).

[5] *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1540 (2021) ("This Essay has argued that 'regularly given' refers to a limited set of post-appointment controversies."); Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 617 n.462 (2004) (explaining that an objection alleging that electors' votes were not "regularly given" is "an inappropriate ground for objecting" where "there was no post-appointment misbehaviour" by the purported electors); Michael Stern, *How to Count to 270: The Electoral Count Act*

a purported presidential elector was not lawfully appointed or "certified."[6] By contrast, a Type-II challenge involves an allegation that an elector's "vote" was not "regularly given."[7]

The Constitution requires that a prevailing candidate for President in the Electoral College has a majority vote of all "appointed" electors.[8] Where the two Houses of Congress under the Electoral Count Act nullify a state's slate of electors based on a Type-I challenge, there is a two-fold effect. First, the votes cast by those presidential electors are not counted. Second, the denominator, that is, the number of electors considered lawfully "appointed," *is* reduced by the number of electors which were rejected.[9] But Type-II challenges are different. In a Type-II challenge, involving post-appointment illegality, where the challenge is upheld, the votes cast by those presidential electors are not counted, but the denominator *is not* reduced precisely because there was no challenge to the elector's or the electors' appointments.[10]

Davis and Schulte argue that Congress should adopt the position that the presidential electors' votes for Trump were not "regularly given." Of course, that is strictly a Type-II challenge, which leaves the denominator unaffected. Were every Trump elector thrown out by the Joint Session of Congress, then the final electoral vote would be Trump-0 to Harris-226 with 538 lawfully "appointed" electors. Because Harris would *still* lack a majority of all lawfully "appointed" electors, that is, she would *still* lack 270 of 538 lawfully "appointed" electors, no President would be elected by the presidential electors. In those circumstances, the process for electing the President would fall to the House, where the election would be held under constitutional and other elections provisions unique to House contingency elections for the President.[11] In the soon to be seated 119th Congress, the Republicans will have a (narrow) majority of all House seats, and the Republicans will have a majority (that is 29) of 50 state House delegations,[12] and, in all likelihood, the Republicans will elect the Speaker—and so, the Republicans will control the floor during all House proceedings to elect the President. Sooner or later, a Republican House, with a Republican Speaker, will elect a Republican President—the Republican majority will certainly not elect Harris.

This result is hardly surprising. A recurring fact pattern in electoral politics is that the prevailing candidate dies or is otherwise determined ineligible. Under the English Rule, in certain circumstances, the next placed candidate carries the election.[13] Not so here. Under the traditional American Rule, on such facts, the runner-up is not declared the winner. Rather, the election has failed to produce a winner, and a vacancy is declared. This has been the majority,

and the Election of 2000, POINT OF ORDER (Jan. 14, 2016), https://tinyurl.com/ymp8dayv (explaining that "the legislative history of the [Electoral Count Act] seems to show clearly that the phrase 'regularly given' refers to the conduct of the electors (such as voting for ineligible candidates), not to how the electors were chosen").

[6] 3 U.S.C. § 15(d)(2)(B)(ii)(I).

[7] 3 U.S.C. § 15(d)(2)(B)(ii)(II).

[8] *See* U.S. CONST. art. II, amended by *id*. amend. XII.

[9] *See* 3 U.S.C. § 15(e)(2).

[10] *See id*.

[11] *See* U.S. CONST. art. II, amended by *id*. amend. XII. *See generally* William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597 (2009).

[12] *A look at the partisan composition of the incoming state delegations for the 119th Congress*, BALLOTPEDIA NEWS (Dec. 6, 2024, 6:27 AM), https://tinyurl.com/3z5f6p39.

[13] *See, e.g.*, *In re* Parliamentary Election for Bristol S.E., [1964] 2 QB 257 (Gorman & McNair, JJ.) (Eng.) (declaring, after his prevailing in an election, that Anthony Wedgwood Benn, M.P., was barred from holding a U.K. House of Commons seat, as a result of Benn's having succeeded to a House of Lords seat which had been held by his late father, and further determining that the runner-up candidate takes the seat as a matter of law, absent any new election).

if not the universal rule across U.S. jurisdictions since the Founding Era.[14] Why would the presidency be any different?

Were Davis and Schulte's advice heeded, Harris would not become President. Their advice, at most, will only delay the Republicans from holding the presidency.

[14] *See* CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789–1901, at 220 (1901) (reporting majority's committee report, in *Smith vs. Brown* (40th Cong.), which stated: "the English rule had never been applied in this country and was hostile to the genius of our institutions"); JACK MASKELL, CONG. RESEARCH SERV., RL31338, DISQUALIFICATION, DEATH, OR INELIGIBILITY OF THE WINNER OF A CONGRESSIONAL ELECTION (2002). *See generally Result of election as affected by votes cast for deceased or disqualified person*, 133 A.L.R. 319 (1941 to current).