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# Legal Processes for Contesting the Results of a Presidential Election

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## Summary

Questions occasionally surface regarding potential voting fraud or election irregularities in presidential elections. (See, for example, Sean Sullivan and Philip Rucker, “Trump’s Claim of ‘Rigged’ Vote Stirs Fears of Trouble,” *Washington Post*, October 18, 2016, p. A1; Edward-Isaac Dove, “Fears Mount on Trump’s ‘Rigged Election’ Rhetoric,” *Politico*, October 16, 2016; Daniel Kurtzleben, “5 Reasons (And Then Some) Not to Worry About A ‘Rigged’ Election,” *NPR*, October 18, 2016). If legitimate and verifiable allegations of voting fraud, or indications of misconduct by election officials on election day are presented, what legal recourses are available to complainants to litigate and potentially to remedy such wrongs and to contest the result of a presidential election?

Presidential elections are conducted in each state and the District of Columbia to select “electors” from that state who will meet and formally vote for a candidate for President on the first Monday following the second Wednesday in December. Under the U.S. Constitution, these elections for presidential electors are administered and regulated in the first instance by the states, and state laws have established the procedures for ballot security, tallying the votes, challenging the vote count, recounts, and election contests within their respective jurisdictions. A candidate or voters challenging the results of a presidential election in a particular state would thus initially seek to contest the results of that election in the state according to the procedures and deadlines set out in the laws of that specific state.

After the results of an election for presidential electors are officially certified by the state, the selected presidential electors meet and cast their votes for President in December. The certificates indicating the votes of the electors are then sent to the federal government, and those certificates are opened and the electoral votes formally announced during the first week in January in a joint session of the U.S. Congress, under the directions of the Twelfth Amendment of the Constitution. The counting and the official tabulation of the electoral votes from the states within Congress provides a further opportunity to challenge and protest electoral votes from a state. Under federal law and congressional precedents, an objection may be made to the counting of electoral votes from a state by a formal objection made in writing by at least one Member of the House of Representatives and one Senator. Once made, each house of Congress separately debates and votes on the objection. If both houses of Congress sustain the objection, the electoral votes objected to are not counted; but if only one house, or neither the House nor the Senate, votes to sustain the objection, then the electoral votes from that state are counted.

## **Contents**

Contests in the State .....	1
Examples of State Procedures .....	3
Challenges to Electoral Count in Congress .....	7

## **Contacts**

Author Contact Information .....	8
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Although it has national impact, the presidential election is, in essence, 50 state and District of Columbia elections for presidential electors held on the same day throughout the country.<sup>1</sup> Therefore—and consistent with the states’ traditional authority over the administration of elections within their jurisdictions—it is an individual state that has the initial responsibility for resolving a challenge, recount, or contest to the results of a presidential election within that jurisdiction. The state rules and procedures for filing election contests generally, and with respect to the selection of presidential electors specifically, may vary greatly from state to state. Candidates or electors who seek to challenge election results must follow the particular rules and meet the specific state deadlines for such actions within that jurisdiction.

It should be noted that the Electoral Count Act of 1887, as amended<sup>2</sup>—which governs procedures for Congress to count the electoral votes and certify the presidential winner under Congress’ Twelfth Amendment responsibility—contemplates that contests and challenges to the vote for presidential electors are to be initially handled in the states. The electoral count law provides that if a contest or challenge in a state to the election or appointment of presidential electors is resolved in that state by an established procedure before the sixth day prior to the meeting of the electors, that such determination shall be “conclusive” and shall “govern” when Congress counts the electoral votes as directed in the Twelfth Amendment.<sup>3</sup> The Supreme Court has referred to this as the “safe harbor” provision.<sup>4</sup> This year the presidential electors are scheduled to meet on December 19, 2016.<sup>5</sup> Six days prior is December 13, 2016 which, therefore, would be the last day for a state to make a final determination in order for it to be “conclusive” when Congress counts the electoral votes.

## Contests in the State

Under the U.S. Constitution, the states are delegated the initial and principal authority for the administration of elections within their jurisdictions, including elections to federal office.<sup>6</sup> Such election administration in the states would generally include provisions for recounts, challenges, or contests to the results of such elections in the state that may be filed by the appropriate parties within a specific time frame and procedure established by state law.<sup>7</sup>

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<sup>1</sup> State elections for presidential electors have, since 1845, been required to be held on the same day in November every presidential election year. 5 Stat. 721, ch. 1 (1845)(now 3 U.S.C. § 1). *Note* U.S. CONST., art. II, § 1, cl. 4.

<sup>2</sup> Electoral Count Act of 1887, 24 Stat. 373, ch. 90 (1887); *see* P.L. 771, 62 Stat. 671 (1948)(now 3 U.S.C. §§ 3-21).

<sup>3</sup> 3 U.S.C. § 5.

<sup>4</sup> *Bush v. Gore*, 531 U.S. 98, 110-11 (2000).

<sup>5</sup> 3 U.S.C. § 7. The electors are to meet on the first Monday after the second Wednesday in December.

<sup>6</sup> U.S. CONST., art. 2, § 1, cl. 2, *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), *Bush v. Gore*, 531 U.S. 98, 105 (2000) (as to states’ authority over the “Manner” of appointing electors); and U.S. CONST., art. 1, § 4, cl. 1, *Storer v. Brown*, 415 U.S. 724 (1974), *Jenness v. Fortson*, 403 U.S. 431 (1971); *see* *United States v. Gradwell*, 243 U.S. 476, 482, 484-85 (1917), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-35 (1995) (as to states’ authority over congressional federal elections). Congress has an express reserved and superseding authority with respect to congressional elections (U.S. CONST., art. 1, § 4, cl. 1), and a recognized inherent authority to assure the integrity of presidential elections.

<sup>7</sup> For a general overview, *see* Marie Garber and Abe Frank, *Contested Elections and Recounts, A Summary of State Procedures for Resolving Disputed Federal Elections*, National Clearinghouse on Election Administration, Federal Election Commission (1990); William and Mary School of Law, *ELECTION LAW MANUAL* Ch. 9, “Election Contests.” (<http://www.electionlawissues.org/Resources/Election-Law-Manual.aspx>); and Steven F. Huefner, *Remedying Election Wrongs*, 44 *HARV. J. ON LEGIS.* 265 (2007).

Recounts of election results generally involve a re-canvassing or re-tabulation of votes and/or vote tallies that were given and recorded in the state or in particular election districts.<sup>8</sup> Such recounts may be automatic under state statute for particularly close election results, or may follow a request or petition for a recount made by a candidate under circumstances that allow such recounts.

An election contest, however, usually addresses allegations of fraud in voting, or mistake or irregularity in election administration, that has resulted in the wrong candidate having been found to have received the most votes in the election, or which has made the ascertainment of the winner “reasonably uncertain.” Courts have been historically cautious in interfering with and overturning the results of a popular election on the basis of allegations of fraud or election irregularities.<sup>9</sup>

As is the case in general with civil law suits under American jurisprudence, the burden of proof is upon the challenger, that is, the moving party, not only to prove all of the allegations and charges with specific, credible evidence,<sup>10</sup> but also—in the case of an election contest—to show that any fraud or irregularity proven was to such an extent that it would actually have changed the result of the election or rendered the actual outcome reasonably uncertain.<sup>11</sup> This would mean, for example, that even if a candidate could show that there were, in fact, several *hundred* fraudulent votes in a particular election, if that candidate lost in the state by several *thousand* votes, the results of that election would not be affected by such fraud or errors. However, even where the number of illegal, fraudulent, or mistaken votes is shown to exceed the margin of victory, such showing may not, in most states, necessarily invalidate or overturn the results of an election. This is because it may be difficult for a challenger to show for whom those votes were given, or would have been given. In many jurisdictions it must be shown by “direct evidence” (or by some acceptable method of “proportional deduction”)<sup>12</sup> that any such illegal, fraudulent, or mistaken votes were for the “winning” candidate in such numbers that he or she would not have won the election.

It should be noted that there may be several different types and categories of potential voter or election “fraud” or irregularities that may occur in any particular election. With respect to in-person voting fraud, including voter “impersonation” or multiple voting by one person, such fraud to any extent that would affect the results of a statewide or nationwide election would appear to be unprecedented in recent American history, as several independent studies have

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<sup>8</sup> See generally, Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS., 265, 269-70 (2007); and Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, app. B at 1817-1836 (2005).

<sup>9</sup> Note, *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127, 1155-65, 1188-1200 (2006); See, e.g., *In re Wallingford-Swarthmore School Dist. Election*, 66 Pa. D. & C.2d 616 (1974).

<sup>10</sup> 29 AM.JUR.2D, *Evidence*, §174: “Typically, the plaintiff has the burden of pleading and proving every essential fact and element of his or her cause of action.”

<sup>11</sup> “Although their language varies by state, contest statutes typically require the contestant to plead that the complained of fraud or irregularities 1) changed the election’s outcome or 2) rendered the outcome uncertain. Known respectively as ‘but for’ and the ‘uncertain outcome’ tests, courts measure the contestant’s proof against these standards to determine if the contestant prevails.” ELECTION LAW MANUAL, *supra* at p. 9-7. (Footnotes omitted). “[T]o obtain judicial relief a contestant is ordinarily required to prove sufficient illegal votes to call the outcome into question [citation omitted]. When that predicate is not met, courts effectively have no authority to alter the election results, even if some illegal voting can be proven.” Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS., 265, 280, n. 85 (2007).

<sup>12</sup> “[M]any courts have been reluctant to adopt the elimination of uncertainty approach, and instead have turned to the direct evidence or proportional deduction method.” *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127, 1158 (2006).

shown.<sup>13</sup> An academic analysis of contested federal elections concluded, for example, that “[D]emonstrated cases of actual fraud are relatively uncommon, given the frequency with which Americans vote and the number of races involved.”<sup>14</sup> One reported study showed that over the last few decades, out of more than one billion total votes cast in the United States there were credible allegations of 31 fraudulent votes given in person on election day (and these allegations were not necessarily proven).<sup>15</sup> The Government Accountability Office (GAO), in a report to Congress, pointed out both the difficulty in quantifying and the scarcity of examples of voting fraud in the states. In that report GAO quoted the Department of Justice as noting that “... publicly available and related court records indicated that there were no apparent cases of in-person voter impersonation charged by DOJ’s Criminal Division or by U.S. Attorney’s offices anywhere in the United States, from 2004 through July 3, 2014.”<sup>16</sup>

## Examples of State Procedures

As noted, the procedures, deadlines, and rules for election contests (as well as for petitions or “triggers” for recounts in the states) may vary greatly from state to state. A candidate and/or electors who seek to challenge the results of an election of presidential electors within a state must, therefore, follow those state statutes, procedures, and deadlines for filing such challenges and contests. Several state procedures are discussed below as examples of those rules:

**Colorado** law provides that the Colorado “supreme court has original jurisdiction for the adjudication of contests concerning presidential electors....”<sup>17</sup> The Colorado Rules of Civil Procedure state that any “qualified elector” seeking to contest the election of presidential electors must, within 35 days after the canvass of the secretary of state, file in the office of the secretary of state a statement of an intent to contest.<sup>18</sup> Within 35 days after the filing of the statement of intent to contest, the person contesting the election must file a complaint in the office of the clerk of the supreme court.<sup>19</sup> The court will “hear and determine the [case] in a summary manner” without a jury.<sup>20</sup>

In **Florida**, an election may be contested by the filing of a complaint in the circuit court by an unsuccessful candidate, or by an elector or taxpayer, within 10 days after the date that the election

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<sup>13</sup> See, e.g., Justin Levitt, Brennan Center for Justice at New York University School of Law, *The Truth About Voter Fraud* (2007); News21, a project of the Carnegie Corporation and the John S. and James L. Knight Foundation, at the Walter Cronkite School of Journalism and Mass Communication, Arizona State University, *Exhaustive Database of Voter Fraud Cases Turns Up Scant Evidence That It Happens*, August 12, 2012, <http://votingrights.news21.com/article/election-fraud-explainer/index.html>.

<sup>14</sup> Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS., 265, 272 (2007).

<sup>15</sup> See Washington Post, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, August 6, 2014, <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast>.

<sup>16</sup> U.S. Government Accountability Office, *ELECTIONS - Issues Related to State Voter Identification Laws*, at 70 (GAO -14-634, September 2014). In overturning North Carolina’s voter identification requirement as overly burdensome on minority voters, the U.S. Court of Appeals for the Fourth Circuit found that “the State has failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina.” North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204, 235 (4<sup>th</sup> Cir. 2016).

<sup>17</sup> COLO. REV. STAT. ANN. § 1-11-204.

<sup>18</sup> COLO. R. CIV. P., 100(a).

<sup>19</sup> COLO. R. CIV. P., 100(b).

<sup>20</sup> *Id.*

has been certified.<sup>21</sup> The complaint must allege one of the four statutory grounds for overturning the results of the election (misconduct, fraud, or corruption of an election official; ineligibility of the successful candidate; receipt of a number of illegal votes or rejection of a number of lawful votes “sufficient to change or place in doubt the result of the election”; or proof of bribery of voters or election officials).<sup>22</sup> Previous case law in Florida has shown that the filing party has the burden of proving the allegations made, and of showing that the proven fraud or illegality was in such numbers that “but for” those irregularities the result of the election would have been different,<sup>23</sup> or that the true result of the election cannot be ascertained with reasonable certainty.<sup>24</sup>

**Nevada** provides that a candidate or any registered voter may contest an election, including election to the office of presidential elector, by filing “with the clerk of the district court” a written “statement of contest” which includes general identifying information as to the contestant, the defendant, the office concerned, as well as an explanation of the “particular grounds of contest.”<sup>25</sup> The statement of contest must be filed within five days after a recount is completed or, if there is no recount, no later than 14 days after the election.<sup>26</sup> An election may be contested on following grounds:

- (a) That the election board or any member thereof was guilty of malfeasance.
- (b) That a person who has been declared elected to an office was not at the time of election eligible to that office.
- (c) That illegal votes were cast and counted for the defendant, which, if taken from the defendant, will reduce the number of the defendant’s legal votes below the number necessary to elect the defendant.
- (d) That the election board, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected.
- (e) That the defendant has given, or offered to give, to any person a bribe for the purpose of procuring his or her election.
- (f) That there was a possible malfunction of any voting or counting device.<sup>27</sup>

The grounds of illegal votes given, or errors in canvassing returns must, therefore, be shown to be of such an extent that illegalities or errors would change the result of the election.

**New Hampshire** law does not appear to provide a specific statutory scheme for election contests relating to federal elections, but rather provides for a process for a recount and an appeal and hearing on such recount results. The New Hampshire statutes provide that “any candidate for whom a vote was cast” may apply for a recount, which application is to be made to the secretary of state no later than the Friday following the election.<sup>28</sup> During the recount process, the candidates and their counsels and representatives may “protest” the counting or failure to count

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<sup>21</sup> FLA. STAT. ANN. § 102.168(1) and (2).

<sup>22</sup> FLA. STAT. ANN. § 102.168(3)(a)-(d).

<sup>23</sup> *Smith v. Tynes*, 412 So.2d 925 (Fla. 1982).

<sup>24</sup> *Bolden v. Potter*, 452 So.2d 564 (Fla. 1984).

<sup>25</sup> NEV. REV. STAT. ANN. §293.407.

<sup>26</sup> NEV. REV. STAT. ANN. §293.413.

<sup>27</sup> NEV. REV. STAT. ANN. §293.410.

<sup>28</sup> N.H. REV. STAT. ANN. § 660:1.



any ballot, and the secretary of state is to rule on such protest.<sup>29</sup> An appeal of the recount results may be made within three days of the declaration of the results of the recount to the state ballot law commission, which may determine which candidate received the greatest number of votes.<sup>30</sup> That determination may then be appealed to the state supreme court within five days of the board's decision.<sup>31</sup> Although there is no specific statutory grounds or cause of action for an election contest to be brought in the case of an election for federal office, the New Hampshire statutes do recognize that nothing in their statutory scheme would necessarily prevent a common law cause of action and recourse "to the superior court on other questions, within the jurisdiction of such court, relating to the legality or regularity of general elections or the results thereof."<sup>32</sup>

**North Carolina** provides that election contests are, as a general matter, to be filed with the county board of elections.<sup>33</sup> However, because the county boards may rule that they cannot resolve the issue if an election is in more than one county,<sup>34</sup> and because a petition may be taken up directly by the State Board of Elections,<sup>35</sup> it would appear reasonable to file a petition directly to the State Board of Elections (or at least concurrently with a filing to the county board) with respect to irregularities or misconduct in the votes for presidential electors. The protest must state whether it concerns "the manner in which votes were counted and results tabulated," or whether it relates to some "other irregularity," and what remedy the protester is seeking.<sup>36</sup> If the protest involves the manner in which votes were counted and results tabulated, then it must be filed before the beginning of the county board of election's canvass meeting (or if good cause for delay is shown, it may be filed up to 5:00 P.M. on the second business day after the county board of elections has completed its canvass and declared the results<sup>37</sup>). If the protest involves some other irregularity, then it must be filed before 5:00 P.M. on the second business day after the county board of elections has completed its canvass and declared the results.<sup>38</sup> The State Board of Elections—when a known group of voters cast votes that were beyond retrieval or where a known group of voters were given an incorrect ballot style—may authorize a county board to allow those voters to recast their votes during a period of two weeks after the canvass by the State Board of Elections.<sup>39</sup> The State Board of Elections may order a new election if

- (1) Ineligible voters sufficient in number to change the outcome of the election were allowed to vote in the election, and it is not possible from examination of the official ballots to determine how those ineligible voters voted and to correct the totals.
- (2) Eligible voters sufficient in number to change the outcome of the election were improperly prevented from voting.
- (3) Other irregularities affected a sufficient number of votes to change the outcome of the election.

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<sup>29</sup> N.H. REV. STAT. ANN. § 660:5.

<sup>30</sup> N.H. REV. STAT. ANN. § 665:8.

<sup>31</sup> N.H. REV. STAT. ANN. § 665:16.

<sup>32</sup> N.H. REV. STAT. ANN. § 665:8.

<sup>33</sup> N.C. GEN. STAT. ANN. §163-182.9 ("Filing an election protest").

<sup>34</sup> N.C. GEN. STAT. ANN. §163-182.10(d)(2)d.

<sup>35</sup> N.C. GEN. STAT. ANN. § 163-182.12.

<sup>36</sup> N.C. GEN. STAT. ANN. §163-182.9(b)(2)(3).

<sup>37</sup> N.C. GEN. STAT. ANN. §163-182.9(b)(4)a. and b.

<sup>38</sup> N.C. GEN. STAT. ANN. §163-182.9(b)(4)c.

<sup>39</sup> N.C. GEN. STAT. ANN. §163-182.12.



(4) Irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness.<sup>40</sup>

After a decision by the State Board of Elections, an aggrieved party may appeal the decision to the Superior Court of Wake County within 10 days of the date of service of the final decision.<sup>41</sup>

**Ohio** appears to be an exception as far as election contests with respect to elections for federal office are concerned, including elections of presidential electors. The contested election procedure set out in the Ohio Code expressly states that it does not apply to an election for presidential elector, or for other federal office. Rather, the Ohio law provides that any such contests for presidential electors, as well as for other federal offices, “shall be conducted in accordance with the applicable provisions of federal law.”<sup>42</sup>

In **Pennsylvania**, an election contest dealing with the selection of electors for President and Vice President of the United States<sup>43</sup> must be filed within 20 days after the election,<sup>44</sup> regardless of whether a recount of that election is proceeding or not.<sup>45</sup> The contest is initiated by the filing of a petition in the appropriate court of jurisdiction in Pennsylvania by affidavit of at least five petitioners who are registered electors in Pennsylvania and who voted in the election being contested.<sup>46</sup> The complaint must “concisely set forth the cause of the complaint, showing wherein it is claimed that the primary or election is illegal.”<sup>47</sup> An “illegal” election refers to allegations of fraud or wrongdoing in the casting, computation, and returns of votes,<sup>48</sup> and must aver facts which, if proven, would definitely change the results of the election.<sup>49</sup>

In **Virginia** a contest to the election of electors for President and Vice President may be filed by a written complaint of one or more of the unsuccessful candidates,<sup>50</sup> and contest proceedings are to be held in the Circuit Court of the City of Richmond before a special judicial panel.<sup>51</sup> Such notice to contest must be filed no later than 5:00 p.m. on the second calendar day after the State Board certifies the result of the election, and a copy of the complaint is to be served on each contestee within five days after the Board has certified the election.<sup>52</sup> Grounds for the complaint are either objections to the eligibility of the contestee, or objections to the conduct or the results of the election “accompanied by specific allegations which, if proven true, would have a probable impact on the outcome of the election....”<sup>53</sup> The contest is to be heard and determined without a

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<sup>40</sup> N.C. GEN. STAT. ANN. §163-182.13(a).

<sup>41</sup> N.C. GEN. STAT. ANN. §163-182.14(b).

<sup>42</sup> OHIO REV. CODE ANN. § 3515.08.

<sup>43</sup> 25 PA. STAT. AND CONS. STAT. ANN. § 3291.

<sup>44</sup> 25 PA. STAT. AND CONS. STAT. ANN. § 3456.

<sup>45</sup> *In re* Petition to Contest General Election for Dist. Justice in Judicial Dist. 36-3-03 Nunc Pro Tunc, 670 A.2d 629 (Pa. 1996); *In re* Opening of Ballot Box of Greenwood Township, 25 A.2d 330 (Pa. 1942)

<sup>46</sup> 25 PA. STAT. AND CONS. STAT. ANN. §§ 3457, 3458.

<sup>47</sup> 25 PA. STAT. AND CONS. STAT. ANN. § 3456.

<sup>48</sup> *In re* Petition to Contest Primary Election of May 19, 1998, 721 A.2d 1156 (Pa. Commw. Ct. 1998).

<sup>49</sup> *In re* Philadelphia Democratic Mayoralty Primary Election Contest, 11 Pa. D. & C.3d 381 (1979).

<sup>50</sup> VA. CODE ANN. § 24.2-807.

<sup>51</sup> VA. CODE ANN. § 24.2-805. The special judicial panel is composed of the chief judge of the Circuit Court of Richmond and two circuit court judges of circuits not contiguous to the City of Richmond appointed by the Chief Justice of the Virginia Supreme Court.

<sup>52</sup> VA. CODE ANN. § 24.2-805.

<sup>53</sup> VA. CODE ANN. § 24.2-807.

jury,<sup>54</sup> shall be held “promptly,” and shall be completed at least six days before the time fixed for the meeting of the electors.<sup>55</sup>

## Challenges to Electoral Count in Congress

The Twelfth Amendment to the U.S. Constitution provides that Congress shall meet in joint session to count and certify the electoral votes for President. Implicit in the express authority of Congress to count the electoral votes and to formally announce the winner of the presidential election, has been the authority (and practical necessity) to determine which electoral votes to count.

When Congress meets to count the electoral votes in January following the meeting of the presidential electors in December, objections may be made to the counting of electoral votes from a particular state. Federal law, known as the Electoral Count Act of 1887, sets forth a detailed procedure for making and acting on objections to the counting of one or more of the electoral votes.<sup>56</sup> When the certificate or equivalent paper from each state or the District of Columbia is read, “the President of the Senate shall call for objections, if any.” Any such objection must be presented in writing and must be signed by at least one Senator and one Representative. Furthermore, the objection “shall state clearly and concisely, and without argument, the ground thereof,” and no debate on the objection is to be made in the joint session itself. When a properly made objection is received, the joint session is temporarily dissolved and each house is to meet to consider the objection separately. For an objection to be sustained, it must be agreed to by each house of Congress meeting separately.<sup>57</sup>

By way of example, due to alleged voting irregularities in the state, an objection was made to the Ohio electoral votes during the January 2005 joint session.<sup>58</sup> In accordance with federal law, the chambers withdrew from the joint session to consider the objection, but neither the House nor Senate agreed to accept the objection. When the House and Senate resumed in joint session, “because the two Houses have not sustained the objection,” Ohio’s electoral votes were counted as cast.<sup>59</sup>

Similar to an election contest in the states, it appears that the burden of proof within Congress to overcome the presumption of regularity of an officially certified election may be significant. As noted earlier, the Electoral Count Act indicates the congressional determination that the states are to be the initial arbiter of election contests for presidential electors within their respective jurisdictions. Thus the provision of the Electoral Count Act known as the “safe harbor” provision expressly provides for final and “conclusive” determinations of the election of presidential electors in the states when timely contested under established state procedures.<sup>60</sup>

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<sup>54</sup> VA. CODE ANN. § 24.2-810.

<sup>55</sup> VA. CODE ANN. § 24.2-805.

<sup>56</sup> 24 Stat. 373, ch. 90 (1887); see P.L. 771, 62 Stat. 671 (1948)(now 3 U.S.C. § 15).

<sup>57</sup> 3 U.S.C. § 15. For an objection to be sustained, it must be approved by both houses by a majority vote in each house of Congress. For general information on the electoral vote count in Congress, see CRS Report RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress*.

<sup>58</sup> 151 CONG. REC. 198-199 (2005).

<sup>59</sup> 151 CONG. REC. 242 (2005).

<sup>60</sup> 3 U.S.C. § 5. “The Electoral Count Act was a clear and unmistakable message to the States that the Congress did not want to assert original jurisdiction in election disputes involving Presidential Electors although they reserved the right to make an ultimate judgment.” Marie Garber and Abe Frank, *Contested Elections and Recounts 1, A Summary of State* (continued...)

Even where no contest in a state has occurred, the election results and returns from each state that have reached the Congress, under the procedures of the Electoral Count Act, would have been officially certified by state officers. The official “certificates of ascertainment” regarding the election would have already been transmitted by the governor of each state to the National Archives and Records Administration and to the Presiding Officer of the joint session.<sup>61</sup> With reference to contests relating to other federal elections—federal congressional elections—or in other challenges to the credentials of Members-elect, the practice in Congress has been to place a clear burden of proof upon the objecting party to overcome the presumption of validity of an election that has already been officially certified by the proper state officials.<sup>62</sup> Regarding their own congressional elections, the House of Representatives and the Senate have adopted a “but for” test, requiring the contestant to prove that “but for” the alleged fraud or irregularity the result of the election would have been different.<sup>63</sup> It is likely that a similar standard as that applied in congressional precedents with respect to the burden of proof would at least influence Congress in the case of challenges to the results of a state-certified election of presidential electors.<sup>64</sup>

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(...continued)

*Procedures for Resolving Disputed Federal Elections*, National Clearinghouse on Election Administration, Federal Election Commission, 13 (1990).

<sup>61</sup> 3 U.S.C. §§ 6-14.

<sup>62</sup> See generally George W. McCrary, A TREATISE ON THE AMERICAN LAW OF ELECTIONS, 237–39 (4<sup>th</sup> ed. 1897): The certificate of election “constitutes *prima facie* evidence” of the regularity of the election proceedings and that the individual presenting such certificate has been “duly elected.” In Senate, Floyd M. Riddick and Allan S. Frumin, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, “Credentials and Oath of Office,” S.Doc. 101-28, at 704, 708-10; Senate Legal Counsel, *Contested Election Cases*, at 11 - 14 (October 2006); in House, see *Gormley v. Goss*, H.Rept. 73-893 (1934).

<sup>63</sup> House: 2 U.S.C. § 385, and *Pierce v. Pursell*, H.Rept. 95-245 (1977). Senate, see Senate Legal Counsel, *Contested Election Cases*, *supra* at 22–3.

<sup>64</sup> II HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §1317 (1907); see William Holmes Brown, Charles W. Johnson, and John V. Sullivan, HOUSE PRACTICE, Chapter 50, § 2, 112<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2011): “On the theory that a government of laws is preferable to a government of men, the House has repeatedly recognized the importance of following its precedents and obeying its well-established procedural rules.”

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