COMMENTARY

Electoral Count Act of 1887: Part 8—Comparison of H.R. 8873 and S. 4573 Amendment in the Nature of a Substitute

The many provisions that S. 4573 and H.R. 8873 provide for federal court suits and expedited Supreme Court review raise issues of confidence in prior Supreme Court presidential election decisions.

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Election and Political Law

By William Josephson and Sue Ann M. Orsini | December 08, 2022 at 10:00 AM

Pending in the U.S. Senate, as of its adjournment for the midterm elections, was S. 4573, Amendment in the Nature of a Substitute, to reform the 1887 Electoral Count Act, as codified in 3 U.S.C. §§1-21 (2000). It was proposed by Senate Rules Committee Chair Amy Klobuchar (D-MN) and Ranking Minority Senator Roy Blunt (R-MO) who is retiring. It would supersede the version of S. 4573 introduced last July by Sens. Susan Collins (R-ME) and Joe Manchin (D-WV) previously discussed in the seven prior New York Law Journal articles in this series. S. 4573 would also amend the Presidential Transition Act of 1963 to ensure its even-handed administration during presidential transitions between Election Day and the January 20 inauguration.

The House of Representatives passed H.R. 8873, the Presidential Election Reform Act, by 229 to 203 on Sept. 21, 2022. The Act has since been delivered to the Senate, but it remains at the desk and has not been referred to a committee at this time.

The purpose of this article is to discuss the major differences between the S. 4573 Substitute and H.R. 8873. All further references in this article are to the S. 4573 Substitute.

Hopefully, the Senate will pass some version of S. 4573 and/or H.R. 8873 during its "Lame Duck" session this year. S. 4573 originally had at least 10 Republican co-sponsors, and Minority Leader Senator Mitch McConnell, in a statement dated Sept. 27, 2022, expressed support for S. 4573. He also warned that any successful version of the Electoral Count Act reform should follow the Senate's version as opposed to H.R. 8873.

1. Findings. H.R. 8873 begins with a series of findings. The first finding is a complete and useful description of the constitutional provisions for the election of President and Vice President in Article II and the Twelfth Amendment. The first finding concludes, "Congress' authorities in these respects are further bolstered by the Necessary and Proper Clause of the Constitution (article I, section 8, clause 18)." For support for the application of the Necessary and Proper Clause to Congress's Joint Session powers and duties with respect to the electoral count, see William Josephson, *Electoral Count Act of 1887: Part 4*.

The second finding consists entirely of quotations from *Trump v. Thompson*'s description of the Jan. 6, 2021 attack on the Capitol, 20 F.4th 10, 15, 16, 18-19, 35 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 1350 (2022).

The third finding states: "The Electoral Count Act of 1887 should be amended to prevent other future unlawful efforts to overturn Presidential elections and to ensure future peaceful transfers of Presidential power."

The fourth and final finding states: "The reforms contained in this Act are fully consistent with States' constitutional

authority vested by Article II to appoint electors; the reforms herein do not restrict the mode in which States lawfully appoint their respective electors or resolve related contests or controversies, but instead ensure that those appointments, and the votes cast by those electors, are duly transmitted to Congress."

These findings are useful predicates for the amendments to the Electoral Count Act proposed in H.R. 8873.

S. 4573 does not contain any findings.

2. Timing and Appointing of Presidential Electors. S. 4573 §102 and H.R. 8873 §3 reach the same result in defining Election Day. H.R. 8873 usefully endeavors to obviate any ad hoc or ex post facto Election Day state legislation by its reference to state laws enacted prior to Election Day.

Both bills would authorize the states to modify the voting period for "force majeure" events that are, as S. 4573 states, extraordinary and catastrophic. By its silence, S. 4573 leaves it up to each state to define force majeure events and to prescribe procedures to modify Election Day.

H.R. 8873 §4 would enact comprehensive provisions for presidential candidates, in federal court actions, to extend Election Day if a catastrophic event is likely negatively to affect the appointment of electors. Catastrophic event is defined in H.R. 8873. Procedures to expedite such a suit and any appeal are described in great detail.

Especially because catastrophic events could affect several states, the comprehensive approach of H.R. 8873 is preferred. It would create uniform rules applicable to all affected states and the District of Columbia.

H.R. 8873 would seem to require separate actions in each state. Multistate federal court suits should be authorized.

3. Elector Vacancies. Section 103 of S. 4573 and §5 of H.R. 8873 would each amend existing 3 U.S.C. §4 to make clear that the state laws for the filling of elector vacancies must have been enacted prior to Election Day.

H.R. 8873 would add the following sentence to 3 U.S.C. §4, "Vacancies occurring after the day fixed by section 1 of this title for the appointment of electors shall be filled only by alternative electors appointed under State law pursuant to this section." This addition would be substantively improved if "such" were added immediately before "state law" to make clear that the reference was not to any state law, but to one enacted prior to Election Day.

More substantively important, the proposed new provisions forgo an opportunity to have a nationwide rule for the filling of elector vacancies, *preferably* by the election of alternate electors on Election Day. By neglecting to address this important issue, both S. 4573 and H.R. 8873 perpetuate the current hodgepodge of state elector vacancy provisions, some of doubtful constitutionality. See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 Journal of Legislation 145, 170-72 (1996).

4. Certificate of Appointment of Electors. Section 6 of H.R. 8873 would repeal 3 U.S.C. §5, "Determination of controversy as to appointment of electors," the so-called six-day Safe Harbor provision that the Supreme Court per curiam opinion so grotesquely misconstrued in *Bush v. Gore*, 531 U.S. 98, 110 (2000) ("That statute, in turn, *requires* that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12 [2000]") (emphasis added).

Justice Stevens correctly construed 3 U.S.C. §5 in his dissenting opinion in *Bush v. Gore*:

It hardly needs stating that Congress, pursuant to 3 U.S.C. §5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, §5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither §5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law.

Bush v. Gore at 124 (dissenting opinion).

Justice Stevens continued: "They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined." Id. at 127 (citing Repairing supra at 154 & 155 n. 5). See Laurence H. Tribe, *eroG v. hsuB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 Harv. L. Rev. 170 (2001) (passim).

Section 5, properly construed, is useful, because states that can take advantage of it are assured that their electors' ballots will be "conclusive" and not subject to objection in the Joint Session.

Thus, S. 4573's decision entirely to amend §5, rather than repeal it, as H.R. 8873 would do, is welcome. S. 4573's redrafting of the Safe Harbor is careful and comprehensive.

5. Archivist. Section 105 of S. 4573, "Duties Of The Archivist," makes minimal amendments to 3 U.S.C. §6.

H.R. 8873's §7 comprehensively and usefully amends §6 in its entirety.

6. Electors Meetings. Both bills would amend 3 U.S.C. §7, "Meeting and vote of electors." H.R. 8873 §8 would replace the first Monday after the second Wednesday in December with December 23 and provide for the possibility that that date may be a Saturday or Sunday.

Section 106 of S. 4573, "Meeting Of Electors," changes Monday to Tuesday and adds the "in accordance with the laws of the State enacted prior to election day" formulation.

H.R. 8873's later day for the electors meeting is obviously preferable, and S. 4573's addition of previously enacted laws is far better than silence on that issue.

These provisions should be combined.

7. Electors Voting. Neither bill proposes any changes to 3 U.S.C. §§8 or 9. §8 provides the "manner of voting" by the electors as "directed by the Constitution" (and the Twelfth Amendment, i.e., by secret ballot, see Repairing supra at 172-74). §9 provides for "Certificates of votes for President and Vice President."

8. Elector Certificates. S. 4573 would make minor substantive changes to 3 U.S.C. §10, "Sealing and endorsing certificates."

9. Transmission of Certificates. Both bills would amend 3 U.S.C. §11, "Disposition of certificates" to make it easier to read. Section 107 of S. 4573's version of §11 is more detailed and should be enacted.

10. When No Certificates Have Been Received. 3 U.S.C. §§12, 13 and 14 provide instructions for when certificates of elector votes have not been received by the Senate or the Archivist. Both H.R. 8873 and S. 4573 make organizational changes to §§12 and 13 of the Electoral Count Act to make them more easily understood and to update them for a modern world. 3 U.S.C. §14 provides for a penalty against persons who are appointed to deliver a state's certificates to Congress, but fail to do so. H.R. 8873 provides for an increased penalty, while S. 4573 repeals the section entirely.

With this exception, the changes that the two bills would make to 3 U.S.C. §§12 through 14 are consistent. Depending on what should be decided about the penalty in §14, the enactment of either version would be consistent with the public interest.

11. What is now 3 U.S.C. §15 of the Electoral Count Act is its heart.

(a) S. 4573. S. 4573 §109, "Clarifications Relating To Counting Electoral Votes," would amend §15, "Counting electoral votes in Congress," in its entirety. It is short and to the point.

Subsection (a) would make the Senate President the Joint Session's presiding officer.

Subsection (b) would deny to the Senate President "any" power to solely determine, accept, reject or otherwise adjudicate or resolve disputes over the proper list of electors, the validity of electors, or the votes of electors.

Subsection (d)(2)(A) directs the presiding officer, "shall," to call for objections, if any.

Subsection (d)(2)(B) provides that an objection must be in writing, signed by at least one-fifth of Senators (20), and of Representatives (87) and state one of two grounds:

1. The state's electors were not "lawfully certified."

2. The vote of one or more electors was not "regularly given."

The Senate then withdraws to decide on the objection, and the House remains in its Chamber to decide.

Subsection (d)(2)(C), "Consideration of objections" (ii) "Determination," would provide, "No objection may be sustained unless such objection is sustained by separate concurring votes of each House."

Subsection (e)(2) would provide that the absolute majority vote of electors required by the Twelfth Amendment to elect a president "shall be reduced by the number of electors whom the State has failed to appoint or as to whom the objection was sustained."

(b) H.R. 8873. H.R. 8873 §10, "Counting Electoral Votes in Congress," like S. 4573, would also amend in its entirety §15.

The bills agree that the Senate President (or President pro tempore) presides over the Joint Session, that she or he has no discretionary powers.

However, H.R. 8873 introduces, in addition to objections, appeals from decisions of the Senate President and motions including motions to recess. All of them must be in writing and signed by at least one-third of each House, i.e., 34 Senators and 145 Representatives. The latter is so large as to make any objection difficult, if not impossible. While in general majority votes of each House are required, a majority of either House may recess. The dilatory possibilities of appeals, motions and recesses could be endless.

Two H.R. 8873 §10 provisions are clearly superior to S. 4573:

(b) "Rules for Identifying the Duly Appointed Electors of a State" and (c) "Objections to Certificate of Electoral Votes."

As we have seen, S. 4573 would perpetuate the ambiguities of the 1887 Act which failed to define either "lawfully" certified or "lawfully" appointed electors or what are "regularly given" elector votes.

H.R. 8873 §10(c),[1] "Objections to Certificate of Electoral Votes," Subsection "(2) Grounds for Objections." To raise an objection under this subsection, a Member must submit such objection pursuant to the requirements of subsection (a)(5) and specify in writing the number of electoral votes objected to and one of the following grounds for the objection, all of which are constitutionally based (Bracketed words explain the constitutional provisions when they are not self-explanatory. The bracketed comments at the end are also the authors'. None of the bracketed material is part of Section 10):

"(A) The State in question was not validly a State at the time its electors cast their electoral votes and is thus not entitled to such votes, except that such objection may not be raised with respect to the District of Columbia.

"(B) The State in question submitted more votes than it is constitutionally entitled to, and thus a corresponding number of its purported votes should be rejected.

"(C) One or more of the State's electors are constitutionally ineligible for the office of elector under article II, section I, clause 2 [*"no Senator or Representative or Person holding an Office of Trust or Profit under the United States shall be appointed an Elector"*] or section 3 of the Fourteenth Amendment [*insurrection or rebellion*] of the Constitution of the United States, except if a State has replaced the ineligible elector with an eligible elector pursuant to the authority described in section 4 of this title prior to the casting of electoral votes by its electors, then it shall not be in order to cite the initial appointment of the ineligible elector as grounds for raising an objection under this subparagraph.

"(D) One or more of the State's electoral votes were cast for a candidate who is ineligible for the office of President or Vice President pursuant to—

"(i) article I, section 3, clause 7 of the Constitution of the United States *[judgment of impeachment];*

"(ii) article II, section 1, clause 5 of the Constitution of the United States *[citizenship, residence, 35 years old];*

"(iii) section 3 of the Fourteenth Amendment to the Constitution of the United States *[insurrection or rebellion]*; or

"(iv) section 1 of the Twenty-second Amendment to the Constitution of the United States *[two presidential elections limitation].*

"(E) One or more of the State's electoral votes were cast in violation of the requirements enumerated by article II, section 1, clause 4 of the Constitution of the United States by failing to vote on the date specified in section 7 of this title, or one or more of the State's electoral votes were cast in violation of the Twelfth Amendment to the Constitution of the United States by failing to be cast—

"(i) by ballot; or

"(ii) distinctly for the offices of President and Vice President, one of whom is not an inhabitant of the elector's State.

[Another ground for objection might be based on Section 2381 of Title 18 of the United States Code, which relates to treason:

whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $100,000; and shall be incapable of holding any office under the United States.

[Article III, §3, Clause 2, provides, "The Congress shall have Power to declare the Punishment of Treason." An issue might arise whether or not a statute can add to the grounds for presidential ineligibility under the Constitution.]"

H.R. 8873 would provide for reduction of the Twelfth Amendment's absolute majority requirement if elector votes are rejected as does S. 4573.

12. Protecting the Vote. H.R. 8873 §11, "Protection of Tabulation and Certification" is new and authorizes federal court actions by aggrieved candidates. Why not criminalize persons willfully acting under color of law who violate §11?

Presidential election cases have not enhanced the reputation of the 2000 Supreme Court, see *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000); *Bush v. Gore*, 531 U.S. 98 (2000); see Laurence H. Tribe, *eroG v. hsuB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 Harv. L. Rev. 170 (2001); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Supreme Court Review 1 (2022) (University of Chicago Law Review).

Most of the legal issues that could arise under the Electoral Count Act are state election law issues which should be

decided, whenever possible, by the relevant state courts. To the extent that state court lawsuits also raise federal questions, state court judges are bound by the Supremacy Clause, Article VI, Clause 2, to the same extent that are federal court judges, and Supreme Court review of state court decisions of federal questions is available.

The many provisions that S. 4573 and H.R. 8873 provide for federal court suits and expedited Supreme Court review raise issues of confidence in prior Supreme Court presidential election decisions. Some may believe those issues are now also raised by the apparent polarization and possible politicization, of the current Supreme Court justices. The Senators and Representatives should reconsider the wisdom of those federal court lawsuit provisions.

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