

# Authoritarian Electoral College Underpopulation: Historical Reflections and a Possible Countermove under Article I, Section 5

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## Executive Summary

The possibility of a contested presidential election in November 2020 to January 2021 is real, and one of the most common scenarios (discussed in a widely shared *Newsweek* article and by the legal scholar Lawrence Lessig) involves states refusing to certify or report slates of electors to the Electoral College with the result (and, in all likelihood, the intent) of throwing the election to the House of Representatives. I call this scenario *authoritarian Electoral College underpopulation*.

In this memorandum, I advance two points. First, neither Article II nor the Twelfth Amendment was designed for such scenarios, being rather intended for situations where multi-candidate or multiparty dynamics lead to no single candidate gaining a majority in the College (as occurred in 1800 and in 1824). Absent a multi-candidate scenario where no third candidate materializes, or absent an Electoral College tie, no contingent vote of the House should occur, because states should faithfully report their Electoral College slates in keeping with republican principles, that is, state popular majorities.

Second, I then argue that the House of Representatives could respond by reconfiguring its members using its powers under Article I, Section 5, with a combination of selective delegation seating or selective delegation reconstitution, to produce in the House contingent vote *the result that would have been produced* by a legitimate (republican) Electoral College vote and/or the national popular vote. While Article I, Section 5 powers are subject to abuse, they could be used under extreme circumstances to rectify un-republican actions among state authorities. Indeed, some such Section 5 powers have been used before in a similar corrective manner, to counter un-republican actions at the state level. While reform of our Electoral College institutions is a more desirable “first-best” aspiration, this argument points to ways of protecting the republican principle in near-term presidential elections.

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This memorandum imagines a state of affairs that I hope never comes to pass. It would involve state officials using their powers to strategically under-populate the Electoral College vote of December 2020 (or any Electoral College thereafter) to deny an Electoral College victory to a presumptively victorious candidate – who had, by reasonable perception and accurate counting, won popular majorities in the state elections for President sufficient to amount to such a victory — with the intent of throwing the election to the House of Representatives, where the President would be elected by “contingent vote” in which the unit of aggregation would be not individual House members but state delegations.

This scenario – which I call the “electoral college (EC) underpopulation scenario” – has been discussed in Wirth and Rogers, “How Trump could lose the election – and still remain President,” *Newsweek*, July 3, 2020.<sup>2</sup> A subsequent post by Harvard law professor Lawrence Lessig clarified that the real underpopulation scenario would happen not so much through the action of state legislatures, which rarely have the authority to certify slates of electors, but by state executives (either governors or secretaries of state, perhaps directed by other actors).<sup>3</sup> Both scenarios involve a plausible Biden victory of state majorities but a contingent vote that delivers the presidency to Trump.

I’m going to make two arguments here. First, deliberate underpopulation of the Electoral College with the intent of throwing an election to the House runs against the plausible foundations of both Article II and, especially, the Twelfth Amendment. EC underpopulation would be a form of extreme constitutional abuse, and the contingent vote thereby induced would not have the legitimacy of the votes in 1800 and 1824.

Second, a form of constitutional abuse by authoritarian state actors could possibly be met by another un-republican action, namely constitutional action under Article I, Section 5 to remake the state delegations early or mid-session, or by refusing to seat state delegations, thereby producing a majority of state delegations that would reproduce a vote for the legitimate Electoral College winner.

The most likely scenario in which deliberate EC underpopulation would occur in the coming months would be those discussed by Wirth-Rogers and Lessig, namely a genuine Biden-Democratic victory in state majorities followed by un-republican action by state officials to underpopulate the December 2020 Electoral College and a subsequent contingent vote that would, if partisanship alone

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<sup>2</sup> <https://www.newsweek.com/how-trump-could-lose-election-still-remain-president-opinion-1513975> (accessed most recently July 3, 2020). Alternative EC manipulation is possible and could in theory take different forms, such as state legislatures actively installing their preferred slates, as Republican state legislators began to do in Florida in 2000 before the *Bush v. Gore* decision obviated their need for further action.

<sup>3</sup> Lessig (<https://medium.com/@lessig/confused-electoral-college-crises-replying-to-wirth-rogers-in-newsweek-9e1be5aa0339>) corrects misunderstandings in the Wirth-Rogers piece but still holds that EC underpopulation is possible: “Imagine again that Biden presumptively wins in the Electoral College, but for some reason — either the above scenario or some version of the Wirth/Rogers hypothetical—it looks like no one will have a majority in the College.” For a more casual discussion, see a recent post at the website *Daily Kos* ([https://www.dailykos.com/stories/2020/7/26/1963884/-You-BETTER-REALY-WORRY-TRUMP-Will-Steal-the-election-The-Scenario-Provided-is-100-WRONG?utm\\_campaign=trending](https://www.dailykos.com/stories/2020/7/26/1963884/-You-BETTER-REALY-WORRY-TRUMP-Will-Steal-the-election-The-Scenario-Provided-is-100-WRONG?utm_campaign=trending)).

dictated the delegation votes, award the Presidency to Trump-Republicans. Accordingly, this memo follows that line of imagination.

## I. *This Time Is Different: Why a House Contingent Vote in 2020 Would Likely be Unprecedented and Illegitimate.*

The possibility that an Electoral College remains unresolved and the presidential election is thus “thrown” to the House is not new. Such a scenario was originally envisioned in Article II and, more vividly in the Twelfth Amendment. As that Amendment states,

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;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

In addition, there is historical precedent for presidential elections having been determined by the House of Representatives. Two such elections have been determined by contingent vote in the House before, in 1800 and 1824.<sup>4</sup>

A helpful CRS memorandum by Thomas H. Neale outlines three scenarios under which a contingent vote could occur in the present-day context (p. 4).<sup>5</sup>

- three or more candidates (tickets) split the electoral vote so that none receives a majority;
- “faithless” electors in sufficient numbers either cast blank ballots or vote for candidates other than those to whom they are pledged so as to deny a majority to any ticket or candidate; or
- the electoral college ties at 269 votes for each candidate (ticket).

It is the second of these scenarios – a kind of elector infidelity different from that recently litigated in the *Chiafalo* decision – that concerns me here. Observers and scholars are concerned with faithless electors for a whole bunch of reasons. I want to ask whether, due to faithless electors or the refusal or negligence of a state in certifying a slate of them, a presidential election could legitimately be thrown to the House. My answer is that unlike the first and third of Neale’s scenario’s, this would represent an abusive and unrepugnant triggering of a contingent vote.

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<sup>4</sup> The 1876 election was different from the 1800 and 1824, in that it did not entail a House contingent tally because Congress created a Commission to examine the electoral irregularities and, of course, because the future of southern Reconstruction lay hanging over the election and the proceedings.

<sup>5</sup> See Neale, “Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis,” Congressional Research Service report R40504, November 3, 2016; available at <https://www.everycrsreport.com/reports/R40504.html> (accessed most recently July 26, 2020).

A 2020 Nightmare would be Historically and Procedurally Different. Let me start with one clear observation. The kind of scenario envisioned by Wirth-Rogers and modified by Lessig is radically unlike either of the scenarios in which a contingent tally previously occurred. In 1800 and in 1824, the non-resolution of the Electoral College stemmed from the dynamics of more-than-two-party dynamics in the state elections. In 1800, it resulted from the fraction of the Federalist opposition.<sup>6</sup> In 1824, it resulted from the fraction of the Federalists themselves. In both cases, it is worth pointing out, the American political system was in a phase of transition between partisan regimes: in 1800, between the “non-partisan” world of the Founding and the “first party system,” and in 1824, between the first party system and the second party system. We know this fact of “transitionality” only in retrospect, but that fact is important in interpreting these earlier episodes of EC non-resolution and the use of the House contingent vote procedure.

Put differently, in both 1800 and 1824, the states faithfully reported their electors.<sup>7</sup> Let’s focus on the 1824 election as that was undertaken within the constraints of the Twelfth Amendment. William Crawford played the third-party spoiler to Adams and Jackson in winning Georgia and Virginia, and while Georgia’s electoral votes were not awarded by popular vote, Virginia’s were, and Crawford won Virginia with over half of the popular vote (over 55 percent), trouncing Jackson and Adams in the state. Accordingly, Virginia reported a slate of electors that cast all of their 24 EC votes for Crawford. So too, Jackson dominated Pennsylvania and that state, too, accorded all of its 28 EC votes to Jackson. More generally, *all 261 of the College Electors appeared and voted.* (Some “faithless electors” voted differently from their state majorities, but this fact did not aggregate to a non-resolution.) Given these faithful state certifications, what happened in 1824 (and had happened previously in 1800) was a non-resolution of the Electoral College: the electoral tallies were insufficient to produce a majority winner in the aggregation of the College.

Since the Democrat-Whig consolidation of the 1840s, this multi-candidate eventuality has been rendered nearly impossible in American politics. We have two major parties and one of those two major parties has won the state electoral majority every time since 1968, when George Wallace’s victories in five southern states was negligible in shaping the Nixon landslide. That year is, besides the well-known tightrope election of 2000, perhaps the closest the U.S. has come since 1824 to a presidential election decided by contingent tally in the House. Even twentieth-century third candidates garnering as much as twenty percent of the national popular vote, such as Ross Perot in 1992, did not win a single state majority. As with geographically-based third parties (e.g., the Parti Québécois in Canada) and Wallace, state majorities by “third-party” candidates seem most likely to be produced by candidates with strong regional or sub-regional appeal.

The only remaining eventuality is an electoral college tie (269 to 269) that could be induced by an exactly equal aggregation of EC votes for the two major candidates. This is a function of the even-numbered Electoral College population and could be a target for reform. But it remains possible

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<sup>6</sup> The other operative reason in 1800 was, of course, that state electoral college voters did not yet distinguish between votes for President and Vice President. Burr and Jefferson ended up in an Electoral-College-vote tie of 73 votes each, less because of a tight election in the states, and more because they were running mates.

<sup>7</sup> The electors did, however, occasionally split their votes *within* delegations, as in Illinois, a tightly contested state where Adams won a plurality of votes (32.5 percent to Jackson’s next-best showing at 27.2 percent) but whose electors split two for Jackson to one for Adams.

now. Assuming that state electoral certification was faithful, such a non-resolution of the Electoral College would seem an appropriate setting in which to involve other means. Of course, for many, this is a reason to reform the EC altogether,<sup>8</sup> but that is not at debate here.

A 2020 Nightmare would be Constitutionally Different. Let me now state a second point. The Twelfth Amendment has been subject to considerable study (though less for the rules of contingent election). Yet the Wirth-Rogers-Lessig scenario also seems radically different from the kinds of dynamics that the Twelfth Amendment framers had in mind when they drafted its text.

Take for instance one of the most important points of debate on the Amendment, the eventual specification that the House, in its contingent vote for President, can vote on only the top three candidates. This came into play in the 1824 contingent vote, as from that contest there were at least four plausible candidates – Jackson, John Quincy Adams, Clay and William Crawford, Clay being excluded from the contingent vote (which helped make the Corrupt Bargain possible). It is arguable that the intent and spirit of the Twelfth Amendment was to deal with the scenario of Electoral College non-majorities due to multiple state-winning candidates, *not* to deal with EC non-resolution produced by deliberate underpopulation. Indeed, to argue the opposite – that the Twelfth Amendment would allow for non-reporting of state Electoral College slates to trigger a House contingent vote – strains credulity.

The Twelfth Amendment to the U.S. Constitution has been studied elsewhere.<sup>9</sup> As scholars have written, the Amendment leaves the door open to abuse of the Electoral College and for many odd, arbitrary and potentially unfair outcomes. Still, read in its time as a Jeffersonian construct (the only states failing to ratify were, outside of Delaware, the Federalist havens of Massachusetts, Connecticut and Vermont), it structured an Article II presidency more directly electorally accountable to the people by bringing the Electoral College and the combined Presidency and Vice Presidency closer to a near-national vote.

The Twelfth Amendment embedded an assumption that the electors would be reported, and that states would send them in (though not all states conducted popular tallies for presidential elections). And the Twelfth Amendment implicitly assumed that the reason for having a contingent vote in the House would be that the Electoral College was insufficient to produce a clear statement of the people's will in a single candidate.

When, then, if states refuse or fail to report their electors? Lessig imagines an “Equal Protection” argument against states choosing not to report their electors. This seems plausible. The inequality of protection would be that one state acts in such a way as to deprive its citizens of the right to participate in the choosing of a President whereas other states do not. But then we must ask what the argument would have been before 1870 (or 1872, the first election that would have been shaped

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<sup>8</sup> Alexander Keyssar, *Why Do We Still Have the Electoral College?* (Cambridge, Mass.: Harvard University Press, 2020).

<sup>9</sup> Joshua D. Hawley (yes, *that* Josh Hawley), “The Transformative Twelfth Amendment,” 55 *William and Mary Law Review* 1501 (2014). Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804* (Greenwood Press, 1994). Keyssar, *Why Do We Still Have the Electoral College?*, esp. 52-55.

by the Fourteenth). Suppose a state had decided not to report its electors before “equal protection” came to govern the states through constitutional mechanisms. Would there have been a clear constitutional prohibition? I’m not sure, but it is clear that the “republican principle” that governed state politics under the Articles of Confederation and under the new Constitution, the very principle that James Madison defined in a majoritarian fashion in *Federalist* #10, would have been violated.

## II. The Potential Crisis and a Possible House Countermove

The second part of this memorandum is an exercise in political strategy at the boundaries of constitutional norms. It hopes to put an ideational arrow in the quiver of those who would defend our democratic republic from the illegitimate undermining of a hypothetically genuine electoral result. The basic idea is that *the House, were it illegitimately thrown an election by the deliberate underpopulation of the Electoral College, could respond by reconfiguring its delegations under Article I, Section 5 powers to produce the result that **would** have been produced by the Electoral College in the event of faithful state reports and certifications.* The countermove involves powers not used for partisan purposes in over a century, but historical precedent for their use in padding majorities does exist.

**The Benefits of Brandishing Delegation Reconstitution.** In the present context, it may be that the best purpose of laying out this countermove is that *House Democrats can threaten to use this “nuclear option” in response to state officials considering or moving on prior nuclear options to underpopulate the EC.* If, say, Senate Majority Leader McConnell appears to be considering a bad-faith version of the scenario posed by Professor Lessig – pushing for an “immediate” December vote by holding that the Electoral Count Act does not bind his Congress – then Pelosi could threaten to use her majority’s powers under Article I, Section 5 to immediately reconstitute the state delegations. Strategists may wish to think of other hard options that can be brandished if authoritarian politicians attempt to undo the results of popular majorities at the state level.

Assume the following hypothetical facts, facts tailored to a Biden-Trump contest:

**A1. A Genuine Biden Victory.** The Democratic candidate (hereafter assumed as “Biden”) has won clear popular majorities in enough states to claim slates of electors sufficient to win an Electoral College majority under “regular” circumstances.

**A2. Illegitimate Electoral College Underpopulation with Intent to Throw the Election to the House.**<sup>10</sup> By dint of state officials refusing to certify their elector slates (for whatever reason they produce), the Electoral College is **underpopulated** and neither Trump nor Biden win the requisite Electoral College majority in December 2020. This throws the presidential election to the House of Representatives (“House”), where votes will occur by state delegation.

**A3. Retention of Democratic House Majority.** By at latest mid-December (December 12<sup>th</sup>), (A3a) Democrats know they will retain the majority in the 117<sup>th</sup> House and know that A2 is true. They also expect (A3b) that the state delegation majority will remain with Republicans.

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<sup>10</sup> By “illegitimate” I mean neither plainly illegal nor unconstitutional. I mean un-republican, in the sense that the state legislative or executive decisions would not respect the majoritarian principle at the state level.

Violation of A3a would mean that Democrats cannot harness a member-based majority to exercise their Article I, Section 5 powers to adjudicate elections or delegation seating, or to exercise other authority over rules. Violation of A3b means that they would have sufficient partisan votes to control the eventual vote by state delegation, making any resort to Article I, Section 5 power needless.

**A4. Sufficient (and Sufficiently Placed) Challengers.** There are sufficiently many legally-established Democratic challengers in House districts apparently won by Republicans that the delegation majority can be affected by awarding apparently-won Republican House seats to Democrats. A4a – There *were* sufficient challengers in the elections held for the 116<sup>th</sup> Congress in November 2018. A4b – There are sufficient challengers for the elections in the 117<sup>th</sup> Congress held in November 2020.

**A5. Factual Democratic Majority in 117<sup>th</sup> House.** The Democrats do retain their majority for the 116<sup>th</sup> House in the 117<sup>th</sup> House and Pelosi (assumed here) or another Democrat is elected Speaker on the first day of the Congress, the House Administration Committee being immediately fillable.

**A6. Contingent Vote for President.** A6a. The relevant delegation vote to elect the President occurs in the 117<sup>th</sup> House, after the vote to elect the Speaker and appointments to the Committee on House Administration.<sup>11</sup> A6b. The contingent vote occurs in December 2020, before the 117<sup>th</sup> Congress is seated.

The upshot of Assumptions A1, A3 and A6 is an illegitimate and strategic underpopulation of the Electoral College with the intent of throwing the presidential election to the House, where Republicans would have a majority of delegations. Assumptions A1, A3 and A6 capture the essential components of the Wirth-Rogers scenario. But note also that Wirth and Rogers assume other parts of a narrative that need not occur in the one I am laying out. In particular, Attorney General William Barr doesn't need to launch a national security emergency in order for the rigged EC non-majority to happen (the state officials can just claim "rigged elections" on their own), and the Biden popular vote majorities in Arizona, Michigan, Wisconsin and Pennsylvania could be overwhelming, counter to the Wirth-Rogers article's hypothetical scenario. The Wirth-Rogers scenario basically involves gerrymandered state legislatures acting in such a way as to throw the election to the House. Lessig's July 4<sup>th</sup> clarification shows that other actors would have to be involved in this non-certification. Either way, no national security emergency is necessary for EC underpopulation to occur. The state officials can simply supply their own reasons, or not.

Note that what this scenario assumes is that House delegations vote purely and entirely on a partisan basis. It is possible that ethically-minded members of Congress would not behave in such a partisan fashion.

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<sup>11</sup> This is the conclusion of Neale of the Congressional Research Service in his print "Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis," CRS 7-5700-R40504. He writes that "A contingent election would be conducted by a newly elected Congress, immediately following the joint congressional session that counts and certifies electoral votes. This session is set by law for January 6 of the year following the presidential election, but is occasionally rescheduled."

## A republican-rectifying House countermove

The countermove I have in mind would rest upon Article I. It involves a power that the House used very commonly (legally but perhaps unethically) in the 19th century under Article I, Section 5, namely of strategically setting up disputed elections which are then resolved by vote of the House itself. If the Wirth-Rogers or Lessig scenario were to crystallize, Democrats would have plenty of advance notice, making plausible concerted action ahead of a hypothetical January 6<sup>th</sup> vote on the President. If the relevant vote were in December 2020, the House would hypothetically have time in November or early December to conduct votes to reconstitute delegations, though the historical precedent of doing this so late in a Congress would be weaker in this case.

Since the 12<sup>th</sup> Amendment assumes a House constituted under mechanisms in Article I, Section 5, that Amendment doesn't come into play here except perhaps to push the vote to the 116<sup>th</sup> Congress. In that case, Democrats can still act in November and early December 2020 to reconstitute the delegations, though again, it would be less consistent with historical precedent.

I begin with the scenario of **A6a**, a contingent vote in January 2020. The republican-rectifying House countermove is as follows:

**P1. Challenger Materialization.** Given A3 and A4, candidates form challenges in sufficiently many districts as are necessary to eventually induce a Democratic (or pro-Biden) delegation majority by early January 2020. These challenges are legitimated by the Federal Contested Elections Act of 1969 (2 U.S.C. 381 et seq.).

**P2. Challenge Acknowledgement.** Upon her election to the Speakership January 3<sup>rd</sup>, Speaker Pelosi immediately acknowledges the challenges and refers them – following the 1969 Act – to the House Administration Committee, which immediately acts upon them.

**P3. Challenger Referral.** The House Administration Committee, with a cohesive and clear Democratic majority, takes immediate action and finds in favor of the Democratic challengers in sufficiently many contests to produce a Democratic majority of delegations.

**P4. Seriatim House Votes to Reconfigure State Delegations.** The full House votes to accept the recommendations of the Administration Committee and replace apparently elected Republicans with Democrats. Majority votes suffice, as they did in the nineteenth century.

**P5. House Vote for President, by Delegation.** The legally reconstituted House votes, delegation by delegation, and elects Biden as president, consistent with the clear popular majorities and deserved Electoral College Majority that was produced in November 2020 in favor of Vice President Biden (A1).

Note that the mechanism here uses contested elections, not the refusal to seat a delegation (as occurred during the Reconstruction Congresses) to repopulate the state delegations. Delegation seating refusal is another potential avenue for House Democrats to consider in light of illegitimate Electoral College underpopulation.



## The Lessig Scenario of a Vote in the 116<sup>th</sup> Congress

The Lessig scenario invokes the Twelfth Amendment language of immediacy to argue that the contingent vote would occur “immediately” after the non-resolution of the EC. In this case, the relevant delegation reconstitution would have to occur in the 116<sup>th</sup> Congress, near the end of the session but before a contingent vote in December 2020. A plausible countermove then would be as follows:

**PA1. Challenger Materialization.** Given A3 and A4, candidates form challenges in sufficiently many districts as are necessary to eventually induce a Democratic (or pro-Biden) delegation majority by December 12<sup>th</sup>, 2020.

**PA2. Challenger Acknowledgement.** As soon as possible after November 3<sup>rd</sup> (when the hypothetical under-population would be evident), Pelosi acknowledges challengers to a set of Republican seats.

**PA3. Challenger Referral.** The House Administration Committee, with a cohesive and clear Democratic majority, takes immediate action and finds in favor of the Democratic challengers in sufficiently many contests to produce a Democratic majority of delegations.

**PA4. Seriatim House Votes to Reconfigure State Delegations.** The full House votes to accept the recommendations of the Administration Committee and replace apparently elected Republicans with Democrats. Majority votes on House resolutions suffice, as they did in the nineteenth century.

**PA5. House Vote for President, by Delegation.** The legally reconstituted House votes, delegation by delegation, and elects Biden as president, consistent with the clear popular majorities and deserved Electoral College Majority that was produced in November 2020 in favor of Vice President Biden (A1).

## Plausibility in the 117<sup>th</sup> Congress

Assuming the contingent vote takes place in the 117<sup>th</sup> Congress, is the countermove plausible? Does it assume too much action taken too quickly, say between January 3<sup>rd</sup> and January 6<sup>th</sup>? I don't think so. Here are some considerations.

- If EC underpopulation occurs, we will know about its likelihood quickly. State officials will begin making noises to this effect in November, perhaps right after November 3<sup>rd</sup>.
- The House usually acts slowly but partisan majorities can act pretty quickly. House Rules are again decided by the House itself and so should not interfere. The Federal Contested Elections Act of 1969 might impose so much procedural minima that action is delayed until after January 6<sup>th</sup>, but this does not seem insuperable.

- The politics assume a unified Democratic majority in the House sufficiently outraged by the illegitimate action of Republican state legislatures that they unite to act clearly and courageously to do this.
- There is precedent for disputed elections, including for majority padding. It was usually done at the outset of the session, but nothing in the Constitutional text prevents it from being undertaken at any point in the legislative calendar.

## Plausibility in the 116<sup>th</sup> Congress

The same reasoning applies to the 116<sup>th</sup> House. If EC underpopulation occurs, we will know about its likelihood quickly. State officials will begin making noises to this effect in November, perhaps right after November 3<sup>rd</sup>. It's possible that some state officials would wait until the last minute to refuse to certify their elector slate, in order to forestall congressional action, but even this delay would amount to a "tell" upon which House Democrats could act.

## Concerns

**C1. Ethicality.** To be clear, I've been sketching a scenario that I hope never comes to pass. In many ways the Pelosi countermove I have in mind would amount to a legal but unsavory action (manipulating House elections, which has historical precedent) in response to previous bad-faith action (states not sending electors so that the EC cannot produce a result and thereby shift the venue to the House itself, which does not have such precedent). It would amount to an unrepugnant move to counter an earlier unrepugnant move. What is illegitimate about the Wirth-Rogers scenario (Assumptions A1, A3 and A6) is not that the EC is not merely inconclusive, but is *intentionally underpopulated* with the express intent of shifting the venue for the presidential election to a venue where Republicans have an advantage by the rules of aggregation.

The "republican-rectifying" defense of this countermove is that if authoritarian Republicans are willing to subvert state popular majorities in favor of Biden and to abuse the process of populating the EC by state legislatures, then it is, in the context of nuclear war, legitimate for Democrats to use a legal action to undo that underpopulation (and that underpopulation alone). *Claiming the authority to do so would also be a way of deterring Republican state legislatures from proposing and acting toward ungainly ends in the first place.*

The idea of aggressively using Article I, Section 5 powers has recent support from former members of Congress. While it is not the same Article I, Section 5 power, note that former Indiana congressman Lee Hamilton, former Maine senator William S. Cohen and National Academy of Public Administration scholar Alton Frye have recently proposed, in [a Washington Post op-ed](#), that constitutional powers could be used to refuse to seat state congressional delegations that were produced by abusive gerrymandering. Refusing to seat state delegations is also an action with a largely nineteenth-century history, and it also represent a potentially illegitimate and unrepugnant move. But Hamilton, Cohen and Frye note that the House has this power and, moreover, they

argue that using it in this aggressive manner would be ethically appropriate as a means to counter an earlier unrepresentative action.

**C2. Acceleration of Nuclear War.** Another concern is that this move just heightens the polarization and the war of all against all. It's the equivalent of elected branch nuclear war.

Let me be clear that once the EC is strategically underpopulated by state legislatures and the vote is thrown to the House, we're already there. A deferral of a clear Biden victory to the House would be the essential end of the Republic and of our constitutional democracy. The 1800, 1824 and 1876 elections were different – corrupt in their own way, perhaps – affected by multiparty dynamics, not by a deliberate refusal of states to report their electoral college slates.

Some have suggested that the best way to ward off this threat is for the Democrats to capture so many House seats that they render this a voting impossibility. While it would be preferable for this electoral result to happen so as to forestall the rationale for EC underpopulation, the Democratic House supermajority strategy gives too much away.<sup>12</sup> Taken to an extreme, *an electoral strategy that requires the Democrats to capture a supermajority of the House* that suffices to give them a delegation majority, *just so that they can protect the will of the peoples in the presidential election at the state level*, risks legitimizing the EC underpopulation strategy in the first place.

Note that what the “Pelosi countermove” strategy does not entail is any sort of armed force. The actions taken are unrepresentative but have clear historical precedent, rest on textual Constitutional authority and are themselves taken, in this scenario, only in response to previous aggressive and illegitimate action.

**C3. Legality and Possible Court Intervention.** As for the legality of this maneuver, let me admit we're in deeply unsettled territory here. What is not unsettled is the fact that the House majority regularly padded its majorities in the 19th century, sometimes rather quickly after the launch of the legislative session. The constitutionality and legality of this was not in serious doubt at the time. Article I, Section 5 is pretty clear, as is the 1969 legislation, that the chambers are the ultimate arbiters here. Let's visit some considerations seriatim.

**C3a. Constitutional Text.** Article I establishes chambers and the chambers alone as the ultimate arbiters (“Judge”) of disputed elections. Court intervention to undo the Pelosi countermove would require federal courts to attempt (it is by no means clear they would succeed) to actively regulate the internal affairs of Congress. No one doubts that federal courts can invalidate a statute on the basis that, say, it included a revenue-raising measure and did not first receive lower chamber approval. But this is statutory review, of course, not review of procedures in the House. The question would depend on whether, by having passed a statute that regulates its own affairs in these matters, the chambers have invited the courts into the process.

**C3b. The Federal Contested Elections Act of 1969 (FCEA).** One opening for the courts might be to invalidate the House's choice on the basis that procedural minima from the Federal Contested

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<sup>12</sup> Professor Larry Tribe hints at this (<https://mobile.twitter.com/tribelaw/status/1279023076194357250>), though it would be unfair to describe the full argument to him. Let's instead imagine something called the “Democratic House supermajority electoral strategy.” An alternative title would be the Democratic House double-majority strategy (majority of members, majority of delegations).

Elections Act of 1969 were not followed. These minima include, most importantly, a thirty-day window following the election in order to register challenges, something that has passed for the 116<sup>th</sup> Congress. They also include evidentiary requirements such as hearings and testimony on the disrupted election in question.

C3c. Intervention under *Powell v. McCormack*, 395 U.S. 486 (1969). Under *Powell* and related law, one could imagine a court-based intervention stipulating that since the members denied seats under delegation reconstitution had been properly elected, the House cannot deny them a seat. The Court in this case principally concerned the House's decision on the grounds of qualifications, however, with the a priori understanding that *Powell* had in fact been fairly elected. So whether *Powell* provides grounds for federal court intervention into the House's role as "Judge" of elections is another matter.

One possibility is that under the FCEA, a court could intervene (it has never done so before, to my knowledge) and invalidate a set of chamber resolutions deciding to re-award seats. The justiciability argument would perhaps invoke the fact that the FECA amounted to an invitation of the judicial branch into these affairs (Lisa Marshall Manheim, "Judging Congressional Elections," *Georgia Law Review* (2016); Kristen R. Lisk, "The Resolution of Contested Elections in the U.S. House of Representatives: Why State Courts should Not Help with the House Work" *NYU Law Review* (2008)).

A counter to arguments for judicial intervention under C3b and C3c would be an argument that the chambers can never alienate the powers they possess under Article I, Section 5. The FCEA is therefore at most guidance for a chamber, never a controlling statute. The idea here is that no statute passed by a previous Congress can interfere with powers plainly reserved to its chambers under Article I, Section 5.

Another counter is that, if courts can, theoretically, order reconsideration of the disputed elections case, they do not have constitutional authority to decide the eventual winner. The "Judge" – that is, the ultimate judicial function – rests with the chambers themselves.

This possibility of judicial invalidation of a disputed election decision makes clear that the default fallback option here is both important and unclear. If in our hypothetical countermove the Democrats are trying to unseat Republicans, and the courts say that the Democrats have not followed sufficient procedure in doing so, and the House respects the courts' decision,<sup>13</sup> does the member initially expecting to have held the seat continue to hold the seat for purposes of the January 6<sup>th</sup> vote, or is the seat occupied for the time by the Democrat? Or is the seat left open (unfilled)? If the seat is left unfilled, then the Democrats have, in this scenario, another way to counter the EC underpopulation scenario with reconstituted House delegations.

C3c. Federal law on presidential elections. Larry Lessig reminds me that *Oregon v. Mitchell* (400 U.S. 112 (1970)) and *Fitzgerald v. Green* (124 U.S. 377 (1890)) put limits on Congress' ability to regulate

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<sup>13</sup> It is not clear that they need to do so. The House could claim that its Article I, Section 5 powers are inalienable and, as a coordinate reader of the Constitution and all powers over the chambers in Section, reject any judicial intrusion upon these prerogatives. There is a deeper argument here about justiciability versus enforceability of issues relating to congressional structure.

presidential elections, especially presidential elections in the states. Lessig has a good point here. There are a set of electoral matters under the purview of Congress and a set of things excluded from that purview. This is especially the case when Congress is attempting to directly regulate the conduct of presidential elections within the states.

The operative question, though, is what is included in the operative and functional penumbra of “presidential election.” Put differently, does the “presidential election” to which federal election law applies include the contingent vote upon a non-resolution of the EC? As I understand it, decisions such as *Oregon* and *Fitzgerald* refer to the “presidential election” in the states and the appointment of electors. But if the “presidential election” is the *contingent election* in the House, *assuming* an unresolved EC, then I’m not so sure those decisions apply.

Put differently, is a contingent vote in the House of Representatives, following a non-resolution of the Electoral College, a part of the presidential election *sufficiently inseparable* from the parts known to be regulated by federal election law that reconstitution of delegations, known elsewhere to be a prerogative of the chambers, cannot be undertaken for this purpose? We haven’t had a contingent election since 1824, so exactly what court decisions would say is unclear.

One thing is clear. We know that in the contingent election, House delegations are not bound by the majorities of their states. Otherwise 1800 would not have witnessed so many ballots where delegations and their members switched sequentially. And otherwise, Jackson would have prevailed in 1824. So the connection between the “presidential election” and the contingent tally in the House would seem to be pretty thin already.

One could further specify the “federal election justiciability enigma” as follows. Exactly how would we arrive at the joint conclusion that (1) the presidential electoral majorities in the states are orthogonal to the contingent tally in the House, but also that (2) the processes regulating those presidential electoral majorities must somehow regulate the proceedings of the contingent tally or any prior moves in the House?

**C4. Countermoves by authoritarian Republicans.** Authoritarian Republicans might have countermoves. Don’t just underpopulate the EC but name Trump-friendly electors and give him the election at that stage. The January 6<sup>th</sup> vote never occurs and Republican subterfuge occurs at the point of the EC vote. This would be a different kind of Constitutional crisis. It’s not unimaginable.

**C5. Promotion of Abuse of Article I, Section 5 Powers by Later Majorities.** In principle, without judicial intervention or clarification, the powers under Article I, Section 5 could be used *ad infinitum* by a majority, including to challenge the election of *any and all* partisan opponents. There is a clear unrepugnant incentive in leaving these powers to majorities, and undoubtedly any attempt to open the door to late nineteenth-century equilibria would potentially legitimate and invite a wider set of abuses. For instance, a set of chambers dominated by one party could in principle use untrammled authority under Article I, Section 5 to produce chamber majorities sufficient to impeach and convict the President, thus shaping reality outside of the legislative branch.

It would seem that two forms of legitimate non-resolution of the Electoral College would be insufficient reason, under existing institutions, to move ahead with a House contingent vote and without any resort to Article I, Section 5. The first would be a 269-269 electoral college tie produced under legitimate state elections. The second would be a three-or-more candidate reality as

occurred in 1800 or 1824. The second of these potentialities is, I think, negligible in 2020. The propriety of republican-rectifying delegation reconstitution in the case of the first would be low unless the EC tie had been produced by authoritarian or un-republican moves at the state level (e.g., Lessig's example of Florida's legislature and governor voting their own slate in lieu of that voted by the popular majority of the state's voters).

The only potentially legitimate use of such a strategy would be the deliberate undermining of the EC by authoritarian state actors who intended to throw the election to the House because it was the only (or most likely alternative) venue where they would get the result they wanted. It again seems unlikely, but it is the exact scenario sketched by With and Rogers and, later, in a different way, by Lessig. I describe this as "potentially legitimate" according to the republican principles outlined earlier, because delegation reconstitution involves an un-republican action taken in response to an earlier un-republican action.

Assuming impartial courts not beholden to a particular candidate or party, I agree with Lessig that it would be preferable for the courts to intervene to compel states to report certified slates of electors consistent with the majorities in those states. Without commentary on the current U.S. Supreme Court or federal courts, it is clear that partisan battles over and within some state supreme courts have now reached the point where it is not facile to argue that such judicial restraint and impartiality would be expected.

## The benefits of having the House countermove in the Democrats' quiver, even if it isn't used

By *threatening* the countermove I have described, Democrats could show that they do not intend to bow to nefarious actions and will use all constitutional powers at their disposal to protect our democratic republic. It might be a way of sending a shot across the bow to state legislatures that are considering this illegitimate undermining of republican institutions.

The other result is that a House countermove as imagined here might invite court intervention. If state actors are behaving in illegitimate ways, then inviting the courts to enter the fray at the stage of the House vote might open up time for additional judicial or other institutional intervention. Indeed, if state legislatures act as Wirth and Rogers imagine them doing, or if state governors and executive officials act as Lessig fears them doing, then "buying time" and inviting the interposition of other actors would be important desiderata of any political strategy.