

January 5, 2020

**Report: The National Democrat Party Effort to
Usurp State Legislature's Control of Election
Laws & the Implications for the 2020
Presidential Election Certification**

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Summary.

In the 2020 election, the national Democratic Party carried out a highly coordinated, massively financed, nationwide campaign to displace state regulation of absentee ballots by means of a flood of election-year litigation. This effort was designed to overwhelm the judicial system and disrupt the administration of the election. In support of the effort, Democrats' national litigation leaders employed unethical procedural jockeying, including forum shopping, repetitive suits and collusive settlements with cooperating Democrat officials, state and local. The Democrats' objectives were to weaken ballot security, undermine positive identification of voters, and provide opportunities for post-election ballot-box stuffing. This has been a national, partisan attack on the Constitutional delegation of authority to regulate elections specifically to state legislatures.

Tomorrow, January 6, 2021, Congress will meet for the count of the electoral vote for President of the United States. Because the Democrats' campaign of litigation has tainted some states' elections, I will join in objections to those states' electors. I consider this to be an obligation of utmost gravity, predicated on my oath to defend the Constitution, and I hope that the controversy at hand will lead to restoring the administration of elections as the Constitution envisions.

Democrats mounted a nationwide assault by litigation.

Many believe that outright fraud and misconduct changed the outcome of the 2020 presidential election. Those issues remain subject to investigation and analysis.

On the other hand, the scope and intensity of the Democrats' election-year litigation campaign is not subject to dispute. The Democrats' national elections lawyer, Marc Elias, details the effort state-by-state at the website democracydocket.com.

Contrary to conventional wisdom, this was not a response to COVID-19. It was an election-year strategy. In January 2020, before COVID entered public consciousness, Elias identified the prototype for the litigation tsunami to come: a 2018 suit attacking Florida's absentee ballot signature-matching law. ([We Are Not Counting Every Vote | Democracy Docket](#)) *See also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019).

As 2020 unfolded, the Democrats' initiative played out in state after state. In South Carolina, Elias sued to nullify the state's ballot witness requirement. An Obama-appointed federal judge quickly obliged with a preliminary injunction, and the Fourth Circuit's¹ Obama-appointed majority denied an emergency stay. Before the

¹ The United States Court of Appeals for the Fourth Circuit.

election, however, the Supreme Court stepped in to reinstate the enacted law. *Andino v. Middleton*, 208 L.Ed.2d 7 (U.S. Oct. 5, 2020).

State executive and judicial branch Democrats colluded.

In North Carolina, events took a different course. Elias sued to nullify the witness and in-person delivery requirements for absentee ballots and to extend the ballot receipt deadline. He lost on almost all grounds, a federal court ordering only that absentee voters be given notice and chance to “cure” a witness omission.

Then, in late August, Elias started over in state court with a duplicative suit. Almost immediately, the Democrat-appointed State Elections Board, under advice of the Democrat attorney general, capitulated to claims previously defeated. Republican legislative leaders, although parties to the litigation, were kept in the dark until the settlement was announced.

The settlement eliminated the witness requirement, mandated the counting of ballots left in anonymous drop-boxes, and extended the ballot receipt deadline to nine days after the election. A Democrat state court judge (who issued a ruling last year, subsequently reversed on appeal, that the state legislature was a “usurper body”) approved the settlement over objections of the state legislative leaders. ([In Collusive Settlement with Other Democrats, Dem-Controlled Board of Elections Agrees to Rewrite Absentee Ballot Law to Make Ballot Harvesting Easier | by Senator Berger Press Shop | Medium](#))

This became a pattern. Where Elias’ ubiquitous, election-year litigation did not meet success with Obama-appointed judges, Democrat executive branch and administrative officials at the state and local levels stepped in to help. Some “threw the case” through collusive settlements and similar litigation maneuvers. Others simply implemented, in disregard of state elections laws, the changes to election procedures that the Democrats’ national project sought.

On behalf of the same union retiree association as in the collusive North Carolina settlement, Elias procured a consent order from the Democrat Secretary of State of Minnesota extending the absentee ballot receipt deadline and waiving the postmark requirement. *See Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), at 2-7 (explaining background). In Michigan, he prompted the Democrat Secretary of State voluntarily to suspend an absentee ballot signature-matching requirement. ([PR 20200421 MI-SOS-Revises-Signature-Match-Process-As-a-Result-of-Federal-Lawsuit.pdf \(democracydocket.com\)](#)) A month later, that official undertook unilaterally to distribute absentee ballot applications to all registered voters, without legislative authorization. In Pennsylvania, after Elias sued, the Democratic Secretary of State asked the Democrat-dominated state supreme court to enter the case under extraordinary, original jurisdiction, which it promptly did, ordering the use of anonymous ballot-return drop boxes, nullifying the election-day

postmark requirement, and extending the ballot-receipt deadline. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 354 (Pa. 2020). On it went.

A divided judiciary failed to enforce the Electors Clause.

In response to the Democrats’ strategically timed litigation onslaught, legislative leaders and candidates asked federal courts, in pre- and post-election challenges, to enforce legislative control. Expedited processes yielded more chaos.

In an appeal from North Carolina, the Fourth Circuit’s Obama-appointed en banc majority stripped the case from an assigned three-judge panel, which was poised to rule for the legislature, and then denied an emergency stay. *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020).² One judge was shocked at the “departure from our traditional process.” *Id.* at 118 (Niemeyer dissent).

Jarred by the brass-knuckle treatment from colleagues, three dissenting judges took note of the enormity of the Democrats’ ongoing effort:

Let’s understand the strategy that is being deployed here. ... Our country is now plagued with a proliferation of pre-election litigation that creates confusion and turmoil and that threatens to undermine public confidence in the federal courts, state agencies, and the elections themselves.

The “385 lawsuits filed against election rules this year,”³ the dissenters said, “make a mockery of the Constitution’s explicit delegation ... to the state legislatures” of the power to make election rules. *Id.* at 105, 116. The Electors Clause (Art. II, § 1, Cl. 2) and Elections Clause (Art. I, § 4, Cl. 1), they observed, “do[] not assign these powers holistically to the state governments but rather pinpoint[] a particular branch of state government — ‘the Legislatures thereof.’” *Id.* at 104. The “avalanche of partisan and destabilizing litigation enacted against election rules duly enacted by state legislatures,” these dissenters observed, was a deliberate attack on the Constitution. Alarmed, they exhorted the appellants to seek relief in the Supreme Court “immediately. Not tomorrow. Not the next day. Now.” *Id.* at 106.

The legislative leaders did further appeal, but the Supreme Court declined to step in. *Moore v. Circosta*, 208 L.Ed.2d 264 (U.S. Oct. 28, 2020). This refusal followed within ten days the Court’s 4-4 denial of an emergency stay sought by the leader of one house of the Pennsylvania legislature to the non-legislative election procedure

² I was a plaintiff in *Wise*.

³ The source cited by the dissenting judges now, less than 90 days later, counts 613 cases related to the election. ([Healthy Elections Project - Case List \(stanford.edu\)](#))

changes in that state. *Republican Party of Pa. v. Boockvar*, 208 L.Ed.2d 225 (U.S. Oct. 19, 2020).

As public debate over this phenomenon has sharpened, some have derided as meritless or even frivolous the argument that the Electors Clause was violated. Indeed, some assert that the claim has been uniformly rejected by courts across the country. (See, e.g., [Debunking the Frivolous and Dangerous Last-Gasp Effort to Overtake the Election - The French Press \(thedispatch.com\)](#); see also [Memo of Rep. Liz Cheney \(R-WY\), Jan. 3, 2021](#)). They are wrong.

In *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), the Eighth Circuit indeed held that the Minnesota Secretary of State violated the Electors Clause by agreeing to extend the Minnesota ballot receipt deadline without legislative authorization. *Id.* at *17-19 (“The Secretary’s instructions to count mail-in ballots received up to seven days after Election Day stand in direct contradiction to Minnesota election law”). The court prohibited the counting of late-received ballots. *Id.* *24.

Other courts have disagreed, to be sure, including in opinions written by “Trump judges.” Notably, these decisions appear blind to both Supreme Court jurisprudence under the Electors Clause and the Democrats’ national litigation “strategy” identified by the Fourth Circuit dissenters. See, e.g., *Trump v. Wis. Elects. Comm’n*, 2020 U.S. App. LEXIS 40360 (7th Cir. Dec. 24, 2020).

Still other courts have avoided ruling on the merits of Electors Clause claims by asserting standing (lack of cognizable legal injury) and laches (waiting too late) doctrines. See, e.g., *Bognet v. Sec’y of State of Pa.*, 980 F.3d 336, 2020 U.S. App. LEXIS 35639, *20-21 (3d Cir. 2020) (Pennsylvania candidate plaintiffs “lack standing to sue over the alleged usurpation of the General Assembly’s rights under the Elections and Electors clauses”; *Wood v. Raffensperger*, 981 F.3d 1307, 2020 U.S. App. LEXIS 37971, *12 (11th Cir. Dec. 5, 2020) (Georgia plaintiff asserting Electors Clause violation “asserts only a generalized grievance”); *King v. Whitmer*, 2020 U.S. Dist. LEXIS 228621, *27-28 (E.D. Mich. Dec. 7, 2020) (Michigan “[p]laintiffs fail to establish injury-in-fact and thus standing to bring their Elections Clause and Electors Clause claims.”).

The circuit split on the merits and the avoidance of the issue by other federal courts of appeals does not “debunk” claims of a constitutional violation. Rather, they tend to emphasize what is otherwise evident: given the nature of the judicial process and the Democrats’ coordinated national blitz, courts have been unable to protect state legislative control as contemplated by the Electors Clause through hundreds of simultaneous, election-year cases. By no means does this suggest that Congress can take comfort in the outcome.

The Electoral Count

The House and Senate meet tomorrow for the count of the vote of the electoral college, pursuant to the Twelfth Amendment. Although ratified in 1804 to address pitfalls recognized in Article II, Section 1, the amendment says little about how the count proceeds: “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 winner of a majority of electoral votes is elected President, “and if no person have such majority, then ... the House of Representatives shall choose immediately, by ballot, the President ... the votes ... taken by states, the representation from each State having one vote.”

The Electoral Count Act, passed in 1887, purports to add detail regulating the electoral college vote and Congress’s receipt and review of it. The constitutionality of the Act is debated. Compare, e.g. *Vasan Kesavan*, “*Is the Electoral Count Act Unconstitutional?*,” 80 N.C.L. Rev. 1653 (2002) (arguing unconstitutional); *Chris Land & David Schultz*, “*On the Unenforceability of the Electoral Count Act*,” 13 *Rugers J.L. & Pub. Pol’y* 340 (2016) (same); with *David Fontana & Bruce Ackerman*, “*Thomas Jefferson Counts Himself into the Presidency*,” 90 *Va. L. Rev.* 551, 634-43 (2004) (arguing constitutional).

My view is that the Act is unconstitutional because it violates the doctrine of legislative entrenchment by purporting to bind future Congresses as well as by granting roles to the President (by signing the Act) and Senate that the framers purposefully excluded. See, e.g., *Land & Schultz*, *supra*, at 343 (“the ECA unconstitutionally impinges on Congress’s internal procedural authority”). Nevertheless, I do not agree that, [as some argue](#), the Twelfth Amendment reduces the House of Representatives to a merely ministerial role — or more accurately, the role of silent observer — to the electoral count.

At least since John Adams paused for Congressional objections to the electoral vote in 1796, *Fontana & Ackerman*, *supra*, at 579-81, Congress has assumed a role of reviewing the electoral count. Some have argued the President of the Senate is empowered to rule on the validity of electoral votes; more have seen the power as reposed in Congress. Certainly, Congress exercised this power in selecting Rutherford B. Hayes following the 1876 presidential election. And since the enactment of the Act ten years later, at least as a matter of comity, Congress has exercised the power subject to procedural and substantive constraints.

It seems inescapable that the Twelfth Amendment implicitly confers some power of review because there must at least be a means of resolving dueling submissions of certified slates of electors in cases where that occurs. Accordingly, I disagree with those who argue that it is improper or beyond Congress’ authority to entertain objections at the electoral vote count tomorrow.

My Objections

Because I am certain that the national Democratic Party carried out a coordinated, nationwide campaign to undermine the rule of law governing the election as structured in the Constitution, as recognized in part by Judges Wilkinson, Agee and Niemeyer on the Fourth Circuit, I will join in objecting to the electoral slates of Georgia, Michigan, Pennsylvania and Wisconsin.

It is specifically the fact that the Democrats pursued this strategy of nationwide scope and with massive resources that gives it unmistakable constitutional dimension. It is a chaos strategy that Democrats perceive to benefit them electorally, no matter the outcome. If state legislatures lose effective control of election regulation, Democrats are content to manipulate *ad hoc* decisions of state and local bureaucrats. If the chaos leads Congress to regulate federal elections under its reserve power, Democrats are prepared to dominate that process as they proposed last session in H.R. 1, and they benefit from concentrating power in Washington and further diminishing the power of state legislatures, from which they were swept in massive numbers by voters in 2010 and have never recovered.

Congress must stand in support of the rule of law under the Constitution. I have already explained the Electors Clause violations in Michigan, Pennsylvania and Wisconsin. The situation in Georgia bears further comment.

Georgia reflects the implications of allowing the Democrats' national litigation strategy to go unchecked. It is the canary in the coal mine. National Democrats, through Marc Elias, attacked Georgia's absentee ballot signature-matching process in 2018. In 2019, a badly divided Eleventh Circuit panel gave final approval to an injunction entered during the 2018 midterm election to micromanage signature matching. *Georgia Muslim Voter Proj. v. Kemp*, 918 F.3d 1262 (11th Cir. 2019). This case was a companion to the 2019 Florida signature-matching case that Elias pointed to as the pilot for the 2020 mass-litigation project.

Neither of the 2019 cases advanced to the Supreme Court, but they enticed Elias to seek to further impair Georgia signature matching in 2020 with an expanded lawsuit. And they intimidated Georgia's Republican Secretary of State, who capitulated and entered into a settlement agreement with Elias further hobbling the signature-matching process in Georgia, without state legislative authorization. This also was a violation of the Electors Clause.

Finally, some have asked the justification for not objecting to electors' slates from all the other states in which Democrat litigation pressure led to Electors Clause violations, including North Carolina. The answer is that in some of the states, including North Carolina, Democrats failed. The Electors Clause violations they procured did not change the outcome of the election in their favor. In others, the Democrat victory margin is too large to have resulted from the Electors Clause violation. But in the states I have selected, the violation was plausibly outcome

determinative, and it is fair to assign Democrats the burden to prove that it was not.

I look forward to fulfilling my oath to defend the Constitution in the electoral count by objecting to the slates of Georgia, Michigan, Pennsylvania and Wisconsin.