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Part II
Through History's Lens
Clouded or Clear – Looking Back at the 2020 Election

Hon. Charles B. Schudson

What happened? Who happened? Are we still counting votes? Are we in the courts? We've barely recovered ... isn't this the last thing we want to talk about? But we can't stop – it's so confusing, and interesting ... and important. So trying to make some sense of it all, let's get some help from history.

Through history's lens – clouded or clear – let's see what made a difference: voter suppression ... foreign interference ... climate change ... immigration ... electoral college ... pandemic? With help from a presidential election historian, we'll ask whether America has ever experienced a presidential election anything like this last one ... whether this, indeed, may be our *last one* (and, if not, why so many were so worried that it might be). We'll try to answer history's questions: "Now (or once the votes are counted), where do we stand ... and are we still standing?"

Recommended Readings

Ellis, Joseph J., *The Quartet / Orchestrating the Second American Revolution, 1783-1789* (Alfred A. Knopf, 2016)

Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* (Simon & Schuster, 2013)

Schudson, Charles Benjamin, *Independence Corrupted / How America's Judges Make Their Decisions* (University of Wisconsin Press, 2018)

Gil Troy, *See How They Ran / The Changing Role of the Presidential Candidate* (revised and expanded edition; Harvard University Press, 1996)

Charles Benjamin Schudson is a Wisconsin Reserve Judge Emeritus and law professor. A graduate of Dartmouth College and the Wisconsin Law School, he served as a state and federal prosecutor, a trial and appellate judge, and a Fulbright Scholar teaching at law schools abroad. He has been a featured guest on NPR, PBS, and *Oprah*, and is the author of many published works including, *Independence Corrupted / How America's Judges Make Their*

Decisions (University of Wisconsin Press, 2018) a nominee for the National Book Award. In 2006, he served as an international election observer for the presidential election in Venezuela, in which Hugo Chavez was re-elected.

Three More Crystal Balls / *The New York Times*, March 7, 2019

“Given my experience working for Mr. Trump, I fear that if he loses the election in 2020, there will never be a peaceful transition of power.”

Michael Cohen
Attorney for Donald Trump

“The U.S. is not 1930s Germany or contemporary Hungary, Venezuela, or Turkey. The U.S. has much stronger democratic institutions than these countries and it has a much stronger opposition [to despotism]. So whereas in Hungary and Venezuela autocrats steamrolled weak oppositions, Trump faced pushback on multiple fronts, including, very importantly, the electoral front in November 2018. So, yes, U.S. democracy is hard to kill.”

Steven Levitsky
Professor of Government, Harvard University
Co-author, *How Democracies Die*

“So there’s plenty to worry about, but let’s acknowledge that the American system so far has shown itself resilient. In my more hopeful moments, I think that we are seeing a backlash to Trumpian authoritarianism that may ultimately strengthen the rule of law, as happened after Watergate.

“For those still wringing their hands and unconvinced, here’s my bottom-line reassurance: Trump won’t manage a coup, and he seems to me more likely to end up a felon than a president for life.”

Nicholas Kristof. Op-ed journalist

The Electoral College

The Historical Foundation

Joseph J. Ellis, *The Quartet / Orchestrating the Second American Revolution, 1783 – 1789*

Page 143 The debate over the executive took up more time and energy than any other issue at the [1787 Constitutional] convention, largely because the delegates could not agree on how much authority to place in the office; whether it should be a single person or a troika representing the northern, middle, and southern states; how long he should serve (a woman was unimaginable); and how he should be elected and impeached. ... [L]ate in their deliberations the delegates invented that strange thing that continues to befuddle foreign observers called the Electoral College.

Page 269 It is important to recognize that [the three-fifths clause] was intended not as a moral statement about the lesser human value of slaves but as a political compromise about how to count them as part persons, part property for the purpose of representation in the House and then in the Electoral College. The political advantage it gave the southern states in presidential elections is the main reason that Jefferson was referred to as “the Negro president” after his narrow victory in the election of 1800.

So here’s what the Founding Fathers came up with

The United States Constitution

Article II, Section 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The third paragraph – the longest and most complicated of Article II Section 1 – then detailed the systems for selection of the president and vice president, and what to do in case of an electoral vote tie, or in case no candidate received an electoral vote majority.]

... WHOOPS! The election of 1800:

In 1800, Thomas Jefferson and Aaron Burr tied, each receiving 73 electoral votes. Thus, as provided by the Constitution, the election was decided by the House of Representatives, each state's delegation having one vote. Following fifty-six ballots, Jefferson prevailed; Burr, in second place, became Vice President. Thus, political rivals occupied to nation's two highest offices.

Back to the drawing board.

The Twelfth Amendment revised the third paragraph of Article II, Section 1 to provide that electors vote *separately* for president and vice president. Read it (but don't expect to understand it) and weep:

The Twelfth Amendment (ratified 1803-04)

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; – 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. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. – The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

So that means ... what?

See:

Maggie Astor, “What Happens Next? Routine Stuff (Normally),” *The New York Times* (November 13, 2020)

Trip Gabriel and Stephanie Saul, “Legislatures Pick Electors For Trump? Not Likely,” *The New York Times* (November 14, 2020)

Rick Rojas, Campbell Robertson, and Will Wright, “Who Won? Many G.O.P. Governors Still Would Rather Not Say,” *The New York Times* (November 19, 2020)

Maggie Astor, “The Certification Process Targeted by Trump,” *The New York Times* (November 20, 2020)

The 2020-21 Calendar

November 3, 2020 – the people vote

December 14, 2020 – the electors meet and vote

January 3, 2021 – the new Congress is “seated” (sworn-in)

January 6, 2021 – the new Congress, in joint session, counts the electoral votes

January 20, 2021 – the President-elect and Vice President-elect are inaugurated

The 2020-21 Functional Progression

- 1) Counting the votes – local election officials (village, town, city, county – whichever governmental units are responsible for election administration in each state, territory, and the District of Columbia) tabulate the ballots; they then report their final tallies to the state’s chief election official (usually, but not always, the state’s Secretary of State).
- 2) Submitting the final tally – each state’s chief election official (usually, but not always, the state’s Secretary of State), compiles the local totals and submits them to the governor (and does so according to whatever deadline has been set by state law).
- 3) Certifying the “ascertainment” – by December 14, each governor must send the U.S. Congress a “certificate of ascertainment” certifying the state’s vote totals and naming the state’s electors. (Such certifications, if submitted by December 8 – the “safe harbor” deadline – usually cannot be challenged.)

In 2020, a “primary tactic of the Trump campaign and conservative groups has been to use lawsuits and other maneuvers to try to prevent states from certifying their results, or at least [to try to] delay the process. The idea is, in part, that if election officials can’t certify Mr. Biden’s victories in time, Republican-controlled

state legislatures could step in and name pro-Trump electors. ... Even if counts were certified on time, state legislators could still, in theory, go rogue and appoint pro-Trump electoral slates certified by governors.”

Maggie Astor

The New York Times, November 13, 2020

- 4) Casting the Electoral College votes – On December 14, each state’s electors cast electoral votes. (Most states have laws requiring electors to vote for the candidate to whom they were pledged. In July 2020, in *Chiafalo v. Washington*, the U.S. Supreme Court unanimously upheld state authority to hold electors to their pledges; i.e., to prevent them from “going rogue.”)
- 5) Counting the electoral votes – on January 6, 2021, Congress counts the electoral votes.
- 6) Inaugurating the President and Vice President – on January 20, 2021, the Vice President Elect and President Elect take their oaths of office.

But what else could happen?

The only honest and certain *conclusion* is, “Who knows?” To a great extent, we are treading untested waters. One never knows what evil notions, genuine arguments, and clever theories may lurk in the hearts and minds of motivated men and women.

But consider what happened in 1876, the only election, until Bush-Gore in 2000, that broke all molds, following no formula found in the Constitutional framework of Article II, Section 1, and the Twelfth Amendment.

“When the electoral college met it was determined that Tilden had 184 uncontested votes[,] ... one less than a majority[,] and that Hayes had 165. One vote in Oregon was in dispute and the nineteen votes of Florida, Louisiana[,] and South Carolina ... were claimed by both parties.

“Congress set up an Electoral Commission composed of fifteen members, five from the House, five from the Senate, and five from the Supreme Court. Voting on party lines, the Commission awarded the twenty disputed votes to Hayes, who was declared President Elect just two days before his inauguration. Cries of ‘Tilden or blood’ and threats of a Congressional filibuster extending beyond [inauguration day] so that the country would be without a President were stilled by Tilden’s declaration that he preferred ‘four years of Hayes to four years of civil war.’”

J. Doyle Dewitt

America Goes to the Polls / Highlights of the Presidential Campaigns 1789-1964

The Five Electoral College Anomalies

<u>Candidate</u>	<u>Party</u>	<u>Electoral</u>	<u>Popular</u>
<u>1824</u>			
Andrew Jackson	Democratic-Republican	99	152,013
John Quincy Adams*	Democratic-Republican	84	114,013
Henry Clay	Democratic-Republican	37	47,217
William H. Crawford	Democratic-Republican	46	46,979

*Elected President by the House of Representatives from the three candidates with the most electoral votes.

<u>1876</u>			
Samuel J. Tilden	Democratic	184	4,285,992
Rutherford B. Hayes*	Republican	185	4,033,768
Peter Cooper	Greenback	0	81,737
Green Clay Smith	Prohibition	0	9,522
James R. Walker	American	0	2,636

*Elected President with the designation of twenty disputed electoral votes by an Electoral Commission.

1888

Grover Cleveland	Democratic	168	5,540,050
Benjamin Harrison	Republican	233	5,444,337
Clinton B. Fisk	Prohibition	0	250,125
Alson J. Streeter	Union Labor	0	146,935
Robert Cowdrey	United Labor	0	2,818
James L. Curtis	American	0	
Belva Lockwood	Equal Rights	0	

2000

Albert A. Gore, Jr.	Democratic	266	50,996,582
George W. Bush*	Republican	271	50,456,062
Ralph Nader	Green	0	2,858,843
Pat Buchanan	Reform	0	438,760
Others		0	613,051

*Elected following the U.S. Supreme Court's 5-4 decision in ***Bush v. Gore***, which stopped the State of Florida's recount of the presidential vote, which, prior to the recount, showed a Bush margin of 537 votes.

2016*

Hillary Clinton	Democratic	227	65,853,625
Donald Trump	Republican	304	62,985,106
Gary Johnson	Libertarian	0	4,489,223
Jill Stein	Green	0	1,457,222
Evan McMullen	Independent	0	729,824

*Source: Wikipedia 2/13/17. Adding all the Green Party votes to her totals, Clinton would have carried Michigan and Wisconsin but still would have lost Pennsylvania by 20,000 votes. Seven

other electoral votes were cast: Colin Power, 3; John Kasich, 1; Ron Paul, 1; Bernie Sanders, 1; Faith Spotted Owl, 1.

“Wasted” Votes – the 2016 Curiosities (See *The New York Times*, “How to Explain Split Between Popular Vote and Electoral College,” December 20, 2016)

The Electoral College bias may be less *against* big states than *for* the battleground states of all sizes, from New Hampshire to Florida. If they break overwhelmingly to one candidate, that’s who wins.

In 2016, by odds-defying chance, Trump won four of the five closest states – the four *that were the four biggest* of the five closest states, thus capturing 75 of their 79 votes. “There has never been a close election in the United States in which one candidate has claimed such a resounding electoral vote margin out of the closest states.” Donald Trump – the 2016 master of dumb luck. And 2020?