



Written by [Bob Adelman](#) on December 28, 2020

Could Mike Pence Decide the Election?

With seven battleground/swing states — Arizona, Georgia, Michigan, New Mexico, Nevada, Pennsylvania, and Wisconsin — having sent dueling slates of electors to Congress, it may come down to how Vice President Pence handles those competing votes that decides the outcome of the election.

Constitutional scholar John Yoo, author of *Defender in Chief: Donald Trump's Fight for Presidential Power*, co-authored an article in October for the Claremont Institute titled ["What Happens if No One Wins?"](#) Yoo and Robert Delahunty, a professor of law at St. Thomas University, dove deeply into constitutional history and concluded:



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We suggest that the Vice President's role is not merely the ministerial one of opening the ballots [on January 6] and then handing them over to be counted.

Though the 12th Amendment describes the counting in the passive voice, the language seems to envisage a single, continuous process in which the Vice president both opens and counts the votes.

Yoo seeks to allay concerns that the vice president, all by himself, could determine the outcome of the election: "The check on error or fraud in the count is that the Vice President's activities are to be done publicly, 'in the presence' of Congress."

Yoo also explains that the vice president's responsibility goes far beyond just opening the envelopes:

And if "counting" the electors' votes is the Vice President's responsibility, then the inextricably intertwined responsibility for judging the validity of those votes must also be his....

We think ... that Vice President Pence would decide between competing states of electors chosen by state legislators and governors, or [instead] decide whether to count votes that remain in litigation.

Pence's responsibility is clear. A lawful valid vote is one that is cast by an eligible, properly registered voter as prescribed by the state legislature. It is a vote that is cast in a timely manner and in a proper form, also as prescribed by the legislative body. Any process that does not follow these rules is not an election, and anything that proceeds from it cannot be regarded as being lawful. This is the legal doctrine of ["the fruit of the poisonous tree."](#)

Edward B. Foley, associate law professor at Ohio State University, confirmed that Pence has the power,



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should he care to use it: “The President of the Senate has the exclusive constitutional authority to determine which ‘certificates’ to ‘open’ and thus which electoral votes ‘to be counted.’” He expands:

This interpretation can derive support from the observation that the President of the Senate is the only officer, or instrumentality, of government given an active role in the process of opening the certificates and counting the electoral votes from the states.

The Senate and House of Representatives, on this view, have an observational role only. The opening and counting are conducted in their “presence” — for the sake of transparency — but these two legislative bodies do not actually take any actions of their own in this opening and counting process.

How could they? Under the Constitution, the Senate and the House of Representatives only act separately, as entirely distinct legislative chambers. They have no constitutional way to act together as one amalgamated corpus. Thus, they can only watch as the President of the Senate opens the certificates of electoral votes from the states and announces the count of the electoral votes contained therein.

Ted Noel, writing at American Thinker, imagines the following scenario taking place on January 6. Vice President Mike Pence gavels the joint session to order and then says,

In my hand are envelopes purporting to contain electoral votes from Georgia. They are competing for consideration, so it is essential that I consider the law that governs this. That law, according to the Legislature of Georgia and Article II, Section 1 of the U.S. Constitution is the Georgia statute that includes procedures for signature-matching on absentee ballots, a requirement that all absentee ballots be first requested by a legitimate voter, and that election monitors be meaningfully present at all times while votes were counted.

The Georgia secretary of state, who is not empowered by the U.S. Constitution to make changes to election law, entered into a Consent Decree that gutted these protections enacted by the Georgia Legislature. The processes that he prescribed and were ultimately followed were manifestly contrary to that law. Further, the State of Georgia, in unprecedented concert with other states, suspended counting of ballots in the middle of the night, covering its conspiracy with a false claim of a “water main break.” We now know from surveillance video that many thousands of “ballots” were counted unlawfully in the absence of legally required observers.

Finally, the State of Georgia, under the authority of secretary of state Brad Raffensperger, a non-legislative actor, used fatally flawed Dominion voting machines that have been demonstrated to be unreliable. In testing, the error rate of Dominion machines has exceeded 60%, far in excess of legal limits. They are designed to facilitate fraud without creating the legally required paper trail. This alone is far more than enough to swing an election.

Since the state of Georgia has failed to follow the election law established by its legislature under Article II, Section 1 of the Constitution, it has not conducted a presidential election. Therefore, no “presidential electors” were appointed in Georgia. Further, “electors” “certified” by non-legislative actors pursuant to this process are in fact not “presidential electors.” The competing slate of “electors” is similarly deficient, having not been elected



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through a presidential election.

Therefore, the chair rules that Georgia has not transmitted the votes of any presidential electors to this body. Georgia presents zero votes for Donald Trump and zero votes for Joseph Biden.

The vice president could then follow the same procedure for the other six contested swing states, giving President Trump 232 Electoral College votes from uncontested states to Biden's 222 uncontested votes. Since neither candidate would have the necessary 270 Electoral College votes to be declared the victor in this scenario, the election would be thrown into the House of Representatives, where each state is allowed one vote according to delegations sent by state legislatures. Since 30 states are controlled by Republican-majority legislatures, many assume Trump would easily win such a House vote.

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