

The Other 12th Amendment Issue

"FOR LACK OF A QUORUM"

by Joseph DeMaio, ©2020

(Nov. 15, 2020) — As the 2020 election and ballot fraud train-wreck continues down the track – and more [power](#) to Jenna Ellis, Rudy Giuliani and [Sidney Powell](#) – it becomes increasingly important to review, again, the significance of the [12th Amendment](#).



Although in the past, your faithful servant has cited the 12th Amendment – coupled with Art. 2, § 1, Cl. 5 of the Constitution, the presidential Eligibility Clause – as the reason why Kamala Devi Harris may well be ineligible to the office she [seeks](#), that amendment also concerns the Electoral College and the role of the House of Representatives in the event of “problems.” Yes, Virginia, we are approaching the area of “problems.”

Specifically, the 12th Amendment provides that if no candidate for the office of President or the office of Vice-President garners a majority of the votes cast by the electors of the various states – *not*, ahem, a majority of the “popular” vote, even if *otherwise* genuine – the decision on who shall fill those offices devolves to the House of Representatives.

Stated otherwise, if one or more state legislatures notify the President of the Senate (*i.e.*, Michael Pence) that, because of the massive evidence and appearance of fraud that has characterized the results of the 2020 election in several “swing states” – notably Wisconsin, Michigan, Georgia and, of course, Pennsylvania – they cannot agree on the person to whom their electoral votes will be given, accordingly, none of the state’s electoral votes will be given to either candidate.

In 2020, therefore, that would mean neither President Trump nor Joe Biden would receive any of that (or those) states’ electoral votes. This, in turn, would likely drive both candidates’ “unofficial” vote counts below the 270-vote threshold required to be elected president, thereby activating the role of the House of Representatives under the 12th Amendment.

Note, however, that under the U.S. Supreme Court’s recent (July 6, 2020) [decision](#) in *Ciafalo v. State of Washington*, addressing the issue of “faithless electors,” the ultimate

arbiter of who a state's electors shall be – and, more importantly, how they shall vote – lies with each state's elected state legislature.

So what happens next?

Glad you asked. The operative text from the 12th 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 . . .***” (Emphasis added)

So far, so good, yes? Each state would have one vote as to who the President would be. As of today, Republicans outright control both houses (*i.e.*, no Senate/House party split) of their respective legislatures in 29 states while the Democrats have outright control (no Senate/House party split) over 20 state legislatures, with a “[split](#)” in Alaska. For ease of discussion, let us for the moment place Alaska in the Democrat column. Thus, for discussion purposes, Republicans control 29 state legislatures, Democrats control 21.

If that were all there was to the story, President Trump would be (presumably, barring any state “Mittens Romney” defections) declared the winner of the 2020 election by the vote of 29 states versus the “nay” votes of 21 states. Full stop. Boom. But wait... there's more...

Immediately following the prior quoted sentence from the 12th Amendment is this condition: “[but] 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.” OK, so what does that mean?

First, it means that for such a vote to take place at all, a “quorum” consisting of two-thirds of the states (*i.e.*, 34) must be present for the vote. Second, a majority of all of the states (*i.e.*, 25) is required for the vote to be binding. It is clear that the Republicans, possessed of 29 “votes” in such a proceeding, would satisfy the second criterion, *i.e.*, concurrence or ratification by at least 25 states.

But what about the “two-thirds” quorum requirement? Even if the Republicans have a 29 vs. 21 advantage over the Democrats in control of their respective state legislatures, in order for the vote to take place at all, the amendment requires a two-thirds quorum of all of the states, not merely a two-thirds quorum of the “states present” at the time of the vote. Plainly, 29 GOP states through their “member or members” (probably the senior member) would show up for the vote.

But what if... shudder..., the Wretch from San Francisco, aka the “Speaker of the House,” Nancy Pelosi, declared that, because of the Wuhan pandemic – yes, Virginia..., the virus originated in and came here from Wuhan, Hubei Province, People’s Republic of China... [not Europe](#)... – none of the 21 states under Democrat control should appear for the vote? For lack of a “quorum,” would that not prevent the House of Representatives from fulfilling its constitutional duties under the 12th Amendment? Why would that childish and petulant act by Pelosi not constitute obstruction of justice and election interference?

Moreover, if you think that such boycotts of actions (aka, obstruction of justice) are unprecedented, recall that this is exactly what all Democrats on the Senate Judiciary Committee did when the [vote was taken](#) on forwarding the nomination of now U.S. Supreme Court Justice Amy Coney Barrett to the floor of the Senate for its “advice and consent” vote. If this “boycott” scenario unfolded, the trip across the street to the Supreme Court could make the 2000 *Bush v. Gore* election [debacle](#) look like a four-year old’s birthday party... right up Pelosi’s alley.... but watch where you step....

Ladies and gentlemen, boys and girls and dogs and cats of America everywhere: this fight could get even more complicated in the coming days and weeks. Stay tuned.