Appendix II: Decertification and the Electoral Count Act

Certification of electors in a state is a quintessentially political act, delegated by the United States Constitution to state legislatures, which may voluntarily adopt revocable and defeasible rules to guide the process. Wisconsin election law does not explicitly authorize the decertification of electors. But neither does it prohibit it. For this reason, the U.S. Constitution and the gap-filling common law against which backdrop the federal and Wisconsin Constitutions were adopted provide the ultimate guidance. And under those two documents, it is clear that the Wisconsin Legislature could lawfully take steps to decertify electors in any Presidential election, for example in light of violations of state election law that did or likely could have affected the outcome of the election. Furthermore, notwithstanding the current debate over amending the federal Electoral Count Act, the supreme responsibility for running state elections in Wisconsin is vested in our state Legislature—not any other state instrumentality, and not the federal government.

The U.S. Constitution provides in relevant respect that "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* ...." U.S. Const., art. II., § 1, cl. 2. This is a direct delegation to each state legislature. It is not a delegation to the Wisconsin Governor (or WEC) *and* its Legislature. The Framers knew how to delegate to, respectively, state legislatures or state executives, or to both acting concurrently. *Compare, e.g., id. with id.* at art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall

protect each of them against Invasion; *and on Application of the Legislature, or of the Executive* (when the Legislature cannot be convened) against domestic Violence.") (emphasis added) *and id*. at XVII amend. ("When vacancies happen in the representation of any State in the Senate, *the executive authority of such State* shall issue writs of election to fill such vacancies: *Provided, That the legislature of any State may empower the executive thereof* to make temporary appointments until the people fill the vacancies by election as the legislature may direct.") (emphases added).

The direct constitutional delegation to state legislatures here operates as a "plenary" power. *See McPherson v. Blecker*, 146 U.S. 1, 35 (1892); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."). Pursuant to that plenary power, it is true that after 1824 most state legislatures began to delegate, in effect, their plenary power to *a process of popular selection of the presidential electors* carried out under a suite of state law provisions. Yet, as applied here, these delegations and self-imposed statutory processes by the Wisconsin legislature are not irrevocable. An election of presidential electors that violates Wisconsin (or any other state legislature's relevant laws) is both void and voidable.

This Report has documented not just one, but a great collection of Wisconsin election law violations. As a political matter, the actions of state actors certifying electors in any Presidential election can be reconsidered as the Wisconsin Legislature sees fit using its plenary power under Article II of the federal Constitution, as recognized in *McPherson*

and *Bush v. Gore*. Indeed, *McPherson* noted that "there is no doubt of the right of the legislature to resume the power *at any time*." *McPherson*, 146 U.S. at 35 (emphasis added).

The process of presidential elections can be conceived of as having five steps: (1) certification pursuant to state law; (2) the arrival of the "safe harbor" date specified in the Electoral Count Act ("ECA"), 3 U.S.C. § 5, purporting to make "conclusive" the determination of election contests in the courts "or other methods and procedures" before that date; (3) the date when state-certified electors meet and cast their votes in their respective States; (4) the opening by the Vice President and counting of electoral votes pursuant to the ECA, 3 U.S.C. § 15, on January 6 of the year following a presidential election; and (5) the inauguration of the President on January 20 of that same year at noon, per the Twentieth Amendment to the Constitution. However, that Article II of the U.S. Constitution assigns to Congress only the power to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Hence, the relevance of the ECA should not be overstated. The powers to set the time for choosing electors and the day thereof is not the power for Congress to override the plenary power of state legislators to select the State's electors or to act to correct mistakenly certified electors who were certified only because state law was violated in the process.

Two legal analyses from Legislative Council and the Legislative Reference Bureau argue that various events on that five-step process timeline, coupled with silence or the lack of specificity in various sources of law, means that state legislatures cannot decertify.

This logic of those pieces is defective. They ignore the full logical implications of the "plenary" power of the state legislatures to act "at any time" to determine proper electors. For example, when electors were wrongly certified in Hawaii in the 1960 presidential election for Vice President Nixon, that problem was retroactively corrected and Hawaii's electoral votes were counted for John F. Kennedy.

As to the initial method for selecting the President, it matters what system of state law is put in place to select electors and when, relative to that system, new election laws are adopted. No one would support the Wisconsin Legislature allowing an election to be run using one set of election laws and then, just because a majority of both houses thereof did not like the tally of the people's votes occurring within the proper confines of Wisconsin law, adopting a new set of legislative rules and applying them to an already conducted popular election as if that had always been the law.

But the premise of the use of the method of popularly electing elections is inherently, and unavoidably, that such elections be conducted *without violation* of the relevant State's election laws to the extent that the outcome of the election did or likley could swing based on such violations of state law. If an election were purportedly run using the *ex ante* set of legislative election rules (or some of those rules), but *in reality*, the election was run in flat violation of those laws, then the decision of which set of electors to certify (or decertify) devolves back upon the Wisconsin Legislature, where the plenary power to select electors was initially reposed. This is particularly true when the courts do not reach the merits of election disputes brought to them for resolution of whether the *ex*

ante rules were actually followed, dismissing challenges, for instance, on grounds of lack of standing, laches, and the like, as is the case in Wisconsin regarding numerous legal challenges.

The ECA is not constitutional law and it cannot be used to strip state legislatures of their Article II plenary power over elector selection, especially when evidence of widespread violations of state election law become clear only late in an election cycle or even after an election cycle is over. At that point, the principle that comes into play is the common law principle that fraud or illegality vitiate results rendered under an illegal or fraudulent process. *See, e.g., United States v. Throckmorton*, 98 U.S. 61, 64 (1878) ("Fraud vitiates even the most solemn contracts, documents, and even judgments."); *see also United States v. Bradley*, 35 U.S. 343, 360 (1836) (citing *Pigot's Case*, 11 Co. Lit. 27b (1614)). To take just one example, the Third Circuit recognized more than a quarter century ago that an illegally certified candidate who was already sitting in the Pennsylvania Legislature and had been sworn in must be stripped of his office based on violations of that State's election laws. *See Marks v. Stinson*, No. Civ. A. 93-6157, 1994 WL 47710, at *15-16 (E.D. Pa. Feb. 18, 1994), *vacated in part*, 19 F.3d 873 (3d Cir.), *aff'd after remand*, 37 F.3d 1487 (3d Cir.). And this occurred where there was no mechanism in the Pennsylvania Constitution for explicitly applying such a remedy. The Legislative Council and Reference Bureau do not take account of this precedent, logic, or history.

Thus it is clear that the Wisconsin Legislature (acting without the concurrence of the Governor, *see supra*), could decertify the certified electors in the 2020 presidential

election. Two steps would be required for it to do so. *First*, the Legislature would need a majority in both houses to pass a resolution concluding that the 2020 election was (a) held in violation of state law, as detailed in this Report (or other sources), in one or more respects; and (b) the degree of violation of state law in place on November 3, 2020 rose to the level that fraud or other illegality under Wisconsin law could have affected the outcome, using any evidentiary test for certainty the Legislature agreed should apply (for instance, a preponderance, etc.). And *second*, the Legislature would need to invoke and then exercise its plenary power to designate the slate of electors it thought best accorded with the outcome of the election, had it been run legally in accord with the state election laws in effect on November 3, 2020. This would lead to decertifying the relevant electors, if the Legislature concluded that they were not the slate of electors that best accorded with the election if run consistent with all relevant Wisconsin laws in effect on election day.

However, this action would not, on its own, have any other legal consequence under state or federal law. It would not, for example, change who the current President is.