

Counting Votes

Elizabeth Joh [00:00:00] So, Roman, do you remember what happened at the beginning of the month?

Roman Mars [00:00:04] I do. I mean, there's a lot of things.

Elizabeth Joh [00:00:07] A lot happened?

Roman Mars [00:00:08] Oh, well, Trump got COVID.

Elizabeth Joh [00:00:10] He did get COVID. And I thought that that would be the subject of our conversation this time around.

Newscaster #1 [00:00:18] It is quite simply that the president of the United States and the first lady have both tested positive for the coronavirus.

Elizabeth Joh [00:00:26] Remember, very early in the middle of the night on October 2nd, Trump tweets out that he and the first lady have tested positive. And then the president spends the next couple of days at Walter Reed National Medical Center, where he gets an experimental treatment that's not available to the general public as well as a bunch of other things. He gets released a few days later on October 5th. And, you know, by now--this is the end of October--he's campaigning, and he says he feels just fine. But you remember during those few days, everyone was wondering, "Well, what if Trump got so sick that he couldn't campaign anymore? Or worse--what if he died before the election? Or who would people vote for if his name was still on the ballot? What if he's so sick right now and he's not telling us? Should he temporarily hand over power to Vice President Pence?" Well, so all those things kind of more or less resolve themselves. So, we didn't have a kind of succession disaster or a ballot disaster in that way. But there is a kind of connection between the beginning of the month and the end of the month, in part because people were speculating whether or not Trump became infected at a White House gathering to announce the nomination of Amy Coney Barrett to the United States Supreme Court. So that gathering has now been sort of deemed a super spreader event because at least something like ten or 11 people who attended the event ended up getting positive, including members of Trump's inner circle. And of course, now we're very close to Election Day. Barrett is now Justice Barrett; she has been confirmed by the Republican led Senate.

Amy Coney Barrett [00:02:09] Thank you all for being here tonight. And thank you, President Trump, for selecting me to serve as an associate justice of the United States Supreme Court.

Elizabeth Joh [00:02:19] And she is soon going to be taking part in a number of cases. So why don't we talk about what's going to happen next?

Roman Mars [00:02:25] Let's do it. This is What Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length... I really didn't think it would last this long... Where we take the tweets and voter suppressive actions of the 45th President of the United States and his party and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow remote learning student and host, Roman Mars.

Elizabeth Joh [00:03:17] So, Roman, what's your general sense of the Electoral College? Like, how does it work? What are the basics?

Roman Mars [00:03:24] Well, so you have a number of electors. They're equal to the number of representatives in Congress. There's 538 of them. They're apportioned based off of census data. And they're the things that actually vote for the president.

Elizabeth Joh [00:03:40] Yeah, that's a pretty good synopsis of how the Electoral College works. We choose the president through the Electoral College. And it's actually the electors who cast the state's votes for president. And that means when you vote, you're actually voting for a slate of electors appointed by your state's political parties to support that party's candidate. So maybe the better way to think of an American presidential election is a collection of actually 51 elections--50 state and one District of Columbia election--for presidential electors held on the same day at the same time. But actually, it's a little bit more complicated than that. So, if you look at the Constitution itself--Article II plus the 12th Amendment--it tells us how the president of the United States is chosen. And Article II says that the states shall appoint electors in such a manner as the legislature thereof may direct. Now, what does that mean? It means that state legislatures have the power to decide how it chooses its electors. So, you might think that as an average voter, you have the absolute right to directly choose the president. But the Constitution doesn't actually say that. Ordinary Americans only have any say at all because their own state legislatures have decided--and every state does today--that they can help pick electors for their state. And November 3rd, Election Day, is only one of the important days in picking the president. So, after Election Day, November 3rd, each state's electors have to meet, and then those votes have to be counted by Congress. And this is spelled out in federal law going back to the 19th century. This year, the Electoral College is supposed to meet in each state capitol on December 14th, 2020. And then both houses of Congress then have to meet in a joint session to certify the results of the Electoral College. And this is supposed to take place on January 6th, 2021. Assuming we have a winner, the Constitution's 20th Amendment sets the date of inauguration for the new president and the vice president on January 20th, 2021. But federal law also says that if there's any dispute within a state about its election results, the state has used its own procedures to settle the dispute, and all of this takes place six days before the electors meet, then the vote count is considered conclusive. So, this is sometimes called the "federal safe harbor clause." This year, that final date is December 8th, 2020. Why does that matter? Because if a state's internal election dispute isn't resolved by the state by that deadline, it doesn't mean that the votes somehow go away. It means that Congress now has discretion over how to consider those states electoral votes. So, for example, if there's some dispute--let's say a secretary of state certifies one result, and the governor certifies another--if that's not all resolved by the safe harbor deadline, then Congress can say, "Well, we'll decide what to do about it." So, are you familiar with these deadlines?

Roman Mars [00:06:55] I mean, I've heard them a little bit more bandied about recently because there's this notion of things being contentious. But heretofore, no, I have never heard of these deadlines. We've only talked about Election Day being Election Day. But, like, even the certification by Congress of who's the president in January is not something that was all that notable in sort of civics history, you know, up to this point.

Elizabeth Joh [00:07:22] Yeah, that's right. Most of the time, no one pays any attention to these deadlines. They're really not meaningful, they just seem ceremonial, and they just put a rubber stamp on results everybody is comfortable with. So now let's go back 20 years. In the year 2000, we lived through more than a month of uncertainty. It wouldn't be

clear who the winner of the presidential election of 2000 was for 36 days. So, if you remember, on Election Night 2000, just before 8 p.m. on the East Coast, the major TV networks projected that Vice President Al Gore had won the state of Florida, which would get him over the line to win enough electoral votes to win the presidency.

Newscaster #2 [00:08:03] A big call to make. CNN announces that we call Florida in the Al Gore column. This is a state both campaigns desperately wanted to win...

Elizabeth Joh [00:08:13] But then at 2 a.m.--around then--the TV networks said, "Wait a minute. It's actually former Texas Governor George W. Bush."

Newscaster #3 [00:08:22] George Bush, governor of Texas, will become the 43rd president of the United States. At 18 past 2:00 Eastern Time, CNN declares that George Walker Bush has won Florida's 25 electoral votes...

Elizabeth Joh [00:08:37] And then Gore calls Bush to concede. But it turned out that the margin of the winning vote in Florida was so narrow that under Florida law there was an automatic machine recount. So, the concession's retracted. So, it's not really clear who's the winner right now. We don't know. And the margin was so small, or at the time it appeared so small--just a couple of hundred votes--that Gore asked for a recount by hand in a couple of crucial counties. So, Bush tries to stop the hand recount by going to court, and he loses at first. And then Gore wanted to keep Florida from certifying--making official its election results--until all of these hand recounts were done. And the big problem here was a design problem. So, you probably remember what the issue was, right? What was the problem with the ballot?

Roman Mars [00:09:24] Yeah, well, one of the issues was the butterfly ballots. It was hard to tell who you were voting for because the way that the ballot was kind of spread open and what line went to what was pretty complicated. And a lot of people assert that because of this, people who thought they were voting for Al Gore voted for Pat Buchanan instead.

Elizabeth Joh [00:09:43] Right. And there were also these issues of the little punch card ballots, where a little piece of paper had to be punched all the way through clearly or cleanly in order for your vote to be counted. But sometimes they didn't totally punch through, and sometimes they didn't even punch; they're just, like, a little dimple or a dent near your choice. So, in all those cases, it's like, "Well, is that a valid vote or not? Whose job is it to certify Florida's election results?" At the time, it's the Florida secretary of state. And that was Katherine Harris, who had been the co-chair of Bush's Florida campaign. She happens to be in charge of overseeing the elections. So, Harris announces on November 15th, "Look, I'm going to certify the results"--and Bush had a narrow lead at that time--"and I'm not going to accept any more hand recounts." On November 21st, the Florida state Supreme Court decides unanimously, "Nope. We want the hand recounts of the ballots to go on. You guys have five days to finish up." The Bush campaign decides, "Look, we're going to go to the United States Supreme Court and challenge what the Florida state Supreme Court has decided." And the Supreme Court agrees to hear the case. Keep in mind, at this point, we're three weeks after Election Day. Nobody still has any idea what the results are going to be. Two days later, after the Supreme Court agrees to hear the case, the secretary of state, Katherine Harris, certifies that Bush has won Florida by 537 votes. On December 9th, the United States Supreme Court orders an immediate halt to the ongoing hand recount, hears argument on December 11th, and at 10:00 at night on December 12th, the Supreme Court issues a decision in Bush versus Gore. It's a 5-4 case with the Justices split along political lines. So, what does the majority

say in Bush versus Gore? To decide the case, they say two things. So, remember these punch card votes, right? Different counties were using different standards to figure out whether a one kind of not very clear punch card should be counted as a valid vote or not. That difference in standards violated the equal protection clause. That's a constitutional problem, according to the majority. And actually, even some of the liberal Justices agreed with that. So, if there's a constitutional problem, there's what's called a "remedy." What should we do about it? At this point, remember, the state Supreme Court in Florida had said, "Just keep recounting." And the United States Supreme Court actually said just earlier, "No, stop temporarily while we decide the case." In Bush versus Gore, the majority says, "Look. You just don't have enough time." So, you remember that federal safe harbor clause? The state's electoral count is considered conclusive if it's done by a particular date. In 2000, it was December 12th. The Supreme Court's opinion is made public at 10:00 at night on Tuesday, December 12th. This explains why the opinion is so rushed. The Supreme Court says, "Look, according to our reading of federal law and Florida election law, you guys have run out of time. There's nothing else you can do." And with that, the United States Supreme Court definitively stops the recount process. And George W. Bush remains the winner of Florida's electoral votes. Al Gore concedes the race the very next day.

Newscaster #4 [00:13:11] Good evening. Just moments ago, I spoke with George W. Bush and congratulated him on becoming the 43rd president of the United States. And I promised him that I wouldn't call him back this time. I offered to meet with him as...

Elizabeth Joh [00:13:26] But there are also two other things in the opinion in Bush versus Gore that are worth noting. You know, we spent so much time talking about the Supreme Court in all of our conversations. Why are they so important? They don't just resolve one person's case, right? They're important because there you set precedent. Here you have a case, and everybody's supposed to read the case. Lower courts are supposed to cite the case. In Bush versus Gore, the Supreme Court says, "Our consideration is limited to the present circumstances." So, it's kind of like, "This ticket is good for one day only. Don't rely on this again." That never really became the case because, you know, it's been cited lots of times by lawyers.

Roman Mars [00:14:08] Yeah, can you do that? I mean, like, really? Can you just say, like, "This just applies in this specific case, and that's just the way it is?" I mean, that doesn't seem realistic.

Elizabeth Joh [00:14:17] It wasn't. And it wasn't realistic the moment they wrote it down. I mean, they tried really hard to say, "We're only deciding the Bush versus Gore dispute." But of course, because it's a Supreme Court opinion, it has been cited multiple times by lower courts. It was just a silly thing to say--to say that this only applies here. And, in fact, you know, it's one of the reasons the opinion has been criticized--being really just naked partisanship that the conservative majority just wanted one specific result for one time only.

Roman Mars [00:14:45] Right.

Elizabeth Joh [00:14:46] But then there's another part of the opinion where the majority says in Bush versus Gore, "Look, the individual citizen has no federal constitutional right to vote for electors for the president unless and until the state legislature chooses." So that's the same part of the Constitution that I've mentioned earlier--that we don't have an absolute right to choose the president. It's up to the state legislature. And they have, in

modern times, decided that the voters can have a say. So, some of the other Justices in Bush versus Gore also write separate opinions, but one is worth special mention. Three of the conservative Justices--that's Chief Justice Rehnquist, Justice Scalia, and Justice Thomas--say, "There's actually a different problem here. When the Florida state Supreme Court ordered a hand recount based on its interpretation of Florida law, that itself was unconstitutional." Why? Because these three Justices go even further than the majority does in Bush versus Gore. They say, "It's not just that the state legislatures have power." They're saying that when state Supreme Courts are trying to expand voting rights in a way that the state legislature disagrees with--that actually violates the Constitution. Remember, they're going back to this idea that the state legislature is, like, virtually supreme--that they have an all-powerful authority here in choosing electors. So, in any event, Bush versus Gore happens. It is not a unanimous Supreme Court by far. And Justice John Paul Stevens famously writes an often-quoted sentence in his dissent. Maybe, Roman, you could read it for us.

Roman Mars [00:16:27] Okay, here it is. "Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law."

Elizabeth Joh [00:16:48] So it's not until December 12th, 2000, that we know definitively who the 43rd president of the United States is. And the Supreme Court plays a direct role in the election. So, I thought it was important for us to talk about it because if you think about it, there are voters in this election this year who were not alive at the time of Bush versus Gore. It's important to remember we live through a period of intense uncertainty. I mean, granted, this was before the existence of Facebook and Twitter and Instagram and TikTok, but we were all pretty much glued to the TV for this entire period of time.

Roman Mars [00:17:27] Yeah. Yeah. For sure. I mean, it felt a whole lot different. There was never a question of the peaceful transfer of power, you know, and all that sort of thing. Like, there was no notion of that. The temperature was much lower in the nation, even though it was a lot of anxiety and I was extremely upset.

Elizabeth Joh [00:17:46] I think that's right. But we've been really anxious and upset before, I think.

Roman Mars [00:17:51] Yeah. And much since.

Elizabeth Joh [00:17:57] So let's get to 2020. Because of not just the election and the kind of White House that we've witnessed over the past four years--there's also the pandemic--and so there have been something like 300 lawsuits addressing all of the different ways that the election has been affected by the pandemic and the kinds of accommodations some groups have asked for to make voting a little bit easier when people don't necessarily want to go in person to the polls. These are usually the kind of voting accommodations that Democrats have asked for and that often Republicans have typically opposed. So, what might happen after November 3rd? Two recent moves from the United States Supreme Court give us a little bit of a preview. The Republican controlled state legislature in Pennsylvania said that absentee ballots--mail in ballots--had to arrive by 8:00 p.m. on Election Day. And the Democrats sued. The state Supreme Court--the one in Pennsylvania--decided that ballots arriving up to three days after Election Day could be counted because of the pandemic, post office delays, and things like that. Pennsylvania Republicans then asked the U.S. Supreme Court to halt that court order.

And in order to grant this kind of emergency stay, the Supreme Court needs five votes. On October 19th, the Supreme Court deadlocked in a 4-4 split. Remember, there were only eight Justices at the time. And the effect of that kind of split is to let the lower court decision stand. So, the lower court decision here is the Pennsylvania Supreme Court. So practically speaking, what does that mean in Pennsylvania? That for now, absentee ballots in Pennsylvania can be accepted for up to three days after Election Day. But the fact that four Justices would have voted to grant the request by Pennsylvania Republicans means they would have stopped the receipt of those ballots, and they just needed one more vote.

Roman Mars [00:19:55] Yeah.

Elizabeth Joh [00:19:56] Then there's a case that came out of Wisconsin. The Wisconsin case started as a federal case. A federal district court said that in Wisconsin, absentee ballots could be received up to six days after the election. The federal appeals court put a stop to that, and the Democrats asked the U.S. Supreme Court to reverse the stop basically. So late on October 26--that's just this week--the Supreme Court refused to allow the extension. So, again, practically speaking, what does that mean for Wisconsin voters? It means that if you have an absentee ballot, it has to be received by 8 p.m. on November 3rd. And so, of course, now, because of this late decision, the Wisconsin Democrats are on a massive voter education campaign, trying to make sure people get their votes in.

Roman Mars [00:20:41] Right. Of course. Yeah.

Elizabeth Joh [00:20:42] There is no majority opinion in this case, but there are several pages of individual opinions. And Justice Kavanaugh's solo opinion has gotten a lot of attention, and I think for good reason. So, Justice Kavanaugh says a couple of surprising things. Number one, he says, "Look, if you allow late ballots, it's a serious problem. That could create a situation where one candidate's ahead and then the result changes and then," quote, "flips the election." But of course, that's not the way elections work. It doesn't flip the election. That's not illegitimate changing. It's what happens when you count every ballot in a, you know, very close race. So, it's kind of just a bad description of the way elections work. And then second, he drops a kind of "by the way" footnote--like, "I just want to put this out there" footnote. And what does he say? He says, "State legislatures have almost total absolute power when it comes to presidential elections, and therefore," says Justice Kavanaugh, "state courts are limited in extending voting rights--even if they rely on state law--if the state legislature disagrees." What does he point to? That part of the Constitution that says it's up to the state legislatures to decide how they want to pick electors. And he also cites the opinion of those three conservative Justices from the Bush versus Gore case. So then on October 27th this week, the Supreme Court issues another decision. Those Pennsylvania Republicans--the one who lost--had asked the Court to reconsider. This time they ask a kind of different-- They take up a different avenue. They say, "You know, we're not asking for a stay or anything like that. We want you to take up the entire case with, you know, legal briefs and lawyers having arguments but on an emergency basis--before November 3rd." The Supreme Court refuses to do so. But three Justices say, "Not so fast." Alito writes an opinion and says, "We want to make clear what is happening and what isn't happening." So, Alito says, "Look. Fine. We're not going to hear this on an emergency basis before November 3rd, but we might decide to hear this case after Election Day because there may be problems. And we're just warning you, this may not be the end of the case." So, remember, the issue in Pennsylvania is what about those mail in ballots that come in for a couple of days after Election Day? They were mailed before Election Day, but because of COVID and the post office delays, they don't get received right on Election Day by 8:00 p.m. So now this creates some uncertainty. And

the Pennsylvania secretary of state has ordered the separation of ballots received by 8:00 pm on Election Day and after just in case.

Roman Mars [00:23:27] Oh, my goodness. Okay. So, what are some scenarios here in these states and sort of beyond when it comes to the voting and how they're counted?

Elizabeth Joh [00:23:37] So what to watch out for on November 3rd? Remember, on Election Day, if you've seen networks in previous presidential elections say, "This person is the winner," that is always a projection based on their models. It's never an official result. And that's why Trump's tweet from not too long ago is just plain wrong. He tweets on October 26th, "Must have final total on November 3rd." That's just plain wrong. No state officially certifies their Electoral college votes on November 3rd. Remember, there's this federal safe harbor deadline; that's not until December 8th. Lots of time in case there's a very close election. So, it's just plain wrong. So, you've got to watch out for, you know, anyone who is going to say, if the results seem to be close, that there's going to not be an absolute, definitive winner.

Roman Mars [00:24:25] This is the person who relies on TV for news. I mean, that's it. And no understanding of actually how things are operating behind the scenes.

Elizabeth Joh [00:24:32] Right. And social media, of course. And there have been some attempts, you know, by the big social media giants to tamp down misinformation on Election Day, but I'm not terribly confident that that's going to work so well. Well, what if the election is really, really close? I mean, we don't really know right now what's happening. The polls seem to be favoring Biden. But if the election is really close, let's play out one scenario. Let's go back to Pennsylvania, right? In Pennsylvania right now, the state of things is it looks like you can have your ballot received by Pennsylvania three days after Election Day and it should count. Although there's still this chance that the Supreme Court will take up the case. Let's say the vote margin in Pennsylvania, for example, is really, really small and maybe it's the difference of considering mail in ballots that are received after Election Day. And time is ticking, right? Let's say there's a lawsuit in state court trying to resolve these disputes and then that state Supreme Court rules in a way that the state legislature disagrees with. So, this could be the kind of thing that might happen in Pennsylvania. So, what if the Republican legislature in Pennsylvania says, "It doesn't matter what the Pennsylvania State Supreme Court said. It's unconstitutional for them to interfere with our right." That kind of sounds like reasoning from the three conservative Justices in the Bush versus Gore decision, which is the very same thing Justice Kavanaugh cited in the Wisconsin case this very week. You know, that could happen. All of this depends on Pennsylvania being a critical state, late arriving ballots being enough to make a difference, and the Supreme Court deciding to get involved. You know, there's a lot of contingencies here. They may not happen at all, but it's certainly a possibility.

Roman Mars [00:26:19] Yeah. So independent of all this, what if Trump just comes on TV or on Twitter and says, "The vote count is a fraud"?

Elizabeth Joh [00:26:28] Could a state legislature say, "You know, things are so disputed, let's just ignore the popular vote in our state and award our electors the way we want"? Maybe that sounds crazy, but remember, the Constitution says that state legislatures have the power to choose the manner of choosing presidential electors. And no state in modern times has ever done this--taken it away from the voters--but it's at least possible to read the Constitution to allow for this. I mean, certainly there would be lawsuits, but this is within the realm of crazy scenarios.

Roman Mars [00:27:02] Yeah, yeah, for sure. For sure. So, in Bush v. Gore, there was this race to get it done before the safe harbor deadline. And so even if there's all this chaos that's going to happen during this election, does that mean it's done when the safe harbor deadline hits, or is there more room for more chaos?

Elizabeth Joh [00:27:25] All right. Bad news for you. There's another possibility. Congress meets in January, and they're supposed to count the Electoral College votes. Well, it's also possible to consider a dispute about the Electoral College vote within Congress. Federal law has a provision for that. So as the votes are called out, members of Congress can raise objections. But federal law says it has to be in writing and it has to be signed by at least one senator and one representative. So, if there's an objection, Congress stops their joint session that they're having, they go their separate ways, they consider it, and then, you know, if both houses agree, they sustain the objection about something's wrong with this state's votes. Ultimately, though, this is all about norms and legitimacy. The president of the Senate presides over this joint session of Congress that will happen in January to count the Electoral College votes. So Roman, who was the vice president in January of 2001?

Roman Mars [00:28:24] In January of 2001 it was Al Gore.

Elizabeth Joh [00:28:27] It was Al Gore. That's right. So, in January of 2001, it was Vice President Al Gore who presided over the vote counting for the winner of the 2000 presidential election. And about 20 House members objected to the inclusion of Florida's electoral votes. This time, Gore, who was acting as the president of the Senate, ruled against each motion. They were procedurally out of order because you needed one senator and one representative for the objection, and no senator would speak up about it. So, without a senator and support... Remember, the objections aren't valid under federal law. So, Gore certified the election of George W. Bush for president. He read out the numbers of his defeat--271 to 266--and said, "May God bless our new president and new vice president. And may God bless the United States of America."

Al Gore [00:29:26] George W. Bush of the state of Texas has received for president of the United States 271 votes. Al Gore of the state of Tennessee has received 266 votes. This announcement of the state of the vote by the president of the Senate shall be deemed a sufficient declaration of the persons elected president and vice president of the United States--each for the term beginning on the 20th day of January 2001--and shall be entered together with a list of the votes on the journals of the Senate and the House of Representatives. May God bless our new president and our new vice president. And may God bless the United States of America.

Roman Mars [00:30:16] I think it's safe to say with all this back and forth about mail in absentee ballots, that you should only hand deliver them to a polling station at this point or cast your vote in person on November 3rd. It is time for this show to evolve into something new. What Trump Can Teach Us About Con Law is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.