



Memorandum

November 17, 2000

SUBJECT : **Overview of Electoral College Procedure and the Role of Congress**

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This memorandum responds to numerous congressional requests for information on the presidential electoral vote process and the role of Congress in that process. The memorandum identifies the primary stages, requirements, and procedures for casting and counting electoral votes for the election of the President and Vice President. This process in most cases has been uneventful and noncontroversial. In the context of the 2000 presidential election, however, there has been speculation about a number of possibilities for which there may be no judicial or congressional precedent.

Because of the absence of specific and persuasive authority on some issues, and in light of the time frame in which this information has been requested to be presented, this memorandum attempts to at least identify and present some of the possible issues and questions which have been raised, even when not necessarily resolving them by reference to authoritative source material or decisions. The topics presented are arranged in the approximate order of their occurrence.

Much of what follows in this memorandum is based on the United States Constitution and on a federal law enacted in 1887 and amended in 1948, now codified in Title 3 of the United States Code. Reference is also made to congressional precedent and practice. Early congressional precedents on the counting of electoral votes, which may be found in *Hinds' and Cannon's Precedents of the House of Representatives*, are sometimes inconsistent with each other and with more recent practice. This record, coupled with the events of 1877, provided the impetus for codifying procedure in the 1887 law. Precedents which pre-date the 1887 Act may be primarily of historical significance, particularly to the extent that they are inconsistent with express provisions of the 1887 Act, as amended.

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Appointment of Electors: Election Day. The United States Constitution provides that each state “shall appoint” electors for President and Vice President in the manner directed by its state legislature (Art. II, Sec 1, cl. 2), on the day which may be determined by Congress (Article II, Sec. 1, cl. 3). Congress has determined in Federal law that the “electors of President and Vice President shall be appointed, in each State” on election day, that is, the “Tuesday next after the first Monday in November” every fourth year (this year, on November 7, 2000). (3 U.S.C. § 1).

Final State Determination of Election Contests and Controversies. Congress has, since 1887, sought to place the responsibility for resolving election contests and challenges to presidential elections in a state upon that state itself. Federal law provides that if a state, under its established statutory procedure, has made a “final determination of any controversy or contest” relative to the presidential election in that state, and if that determination is completed under this procedure at least six days before the electors are to meet to vote (six days prior to December 18 is December 12, 2000), such determination is to be considered “conclusive” as to which electors were appointed on election day (3 U.S.C. § 5).

Certification by the Governor. The Governor of a state is required by federal law “as soon as practicable” after the “final ascertainment” of the appointment of the electors, or “as soon as practicable” after the “final determination of any controversy or contest” concerning such election under its statutory procedure for election contests, to send to the Archivist of the United States by registered mail and under state seal, “a certificate of such ascertainment of the electors appointed,” including the names and numbers of votes for each person for whose appointment as elector any votes were given (3 U.S.C. § 6).

Duplicate Certificates to Electors. On or before December 18, 2000, the Governor of the state is required to deliver to the electors of the state six duplicate-originals of the certificate sent to the Archivist of the United States under state seal. (3 U.S.C. § 6)

Meeting of Electors to Cast Votes for President and Vice President. The electors of a state are to meet at the place designated by that state, on the first Monday after the second Wednesday in December (December 18, 2000), to cast their votes for President and Vice President of the United States. (United States Constitution, Amendment 12; 3 U.S.C. §§ 7,8).

Electors’ Certifications of Votes. At the time of the meeting of the electors, after their votes, the electors are to make and sign certificates of their votes containing two distinct lists, one being the votes for President and the other the votes for Vice President; they are instructed to attach to these lists the certificate furnished to them by the governor; to seal those certificates and to certify on them that these are all of the votes for President and Vice President; and then to send one certificate to the President of the Senate, and two certificates to the secretary of state of their state (one to be held subject to the order of the President of the Senate). On the day after their meeting (December 19, 2000), the electors are to forward by registered mail two of the certificates to the Archivist of the United States (one to be held subject to the order of the President of the Senate), and one to the judge in the district where the electors have assembled (3 U.S.C. §§ 9,10,11).

Congressional Demand for Certificates. If no certificate of vote or lists have been received by the President of the Senate or the Archivist from electors by the fourth Wednesday in December (December 27, 2000), then the President of the Senate (or the Archivist if the President of the Senate is not available) shall request the secretary of state of the state to immediately forward the certificates and lists lodged with the secretary of state, and shall send a special messenger to the judge of the district to transmit the lists lodged with that judge (3 U.S.C. §§ 12,13).

Transmittal of Governors' Certificates from Archivist to Congress. At the first meeting of the Congress, January 3, 2001, the Archivist of the United States shall transmit to the two houses every certificate received from the Governors of the states (3 U.S.C. § 6).

Date for Counting Electoral Votes. The date for counting the electoral votes is fixed by law. At present, that date is January 6 following each presidential election (3 U.S.C. §15). In 2001, January 6 falls on a Saturday. On October 24, 2000, the Senate passed S.J.Res. 55, changing the date to January 5, 2001 (and reiterating some of the provisions of law discussed below). As of the date of this memorandum, the joint resolution awaits House and presidential action.

Venue for Counting Electoral Votes. The electoral votes are counted at a joint session of the Senate and the House of Representatives, meeting in the House chamber. (The United States Code refers to the event as a joint meeting; it also has been characterized in the *Congressional Record* as a joint convention.) The joint session convenes at 1:00 p.m. on that day. The President of the Senate is the presiding officer (3 U.S.C. §15). The President pro tempore of the Senate has presided in the absence of the President of the Senate (*Deschler's Precedents of the United States House of Representatives* [hereafter *Deschler's Precedents*], v. 3, Ch. 10, §2.5, recording that, in January 1969, Vice President Humphrey "declined to preside over the joint session to count the electoral votes.").

Opening of the Votes for Each State and the District of Columbia. Under 3 U.S.C. §15, the President of the Senate opens and presents the certificates of the electoral votes of the states and the District of Columbia in alphabetical order. (As discussed above, under 3 U.S.C. §§9-10, the electors in each state, having voted, are to sign, seal, and certify the certificates. Under §11 of the same title, they are to mail one such certificate to the President of the Senate and mail two others to the Archivist of the United States.)

Reading of the Votes by House and Senate Tellers. The certificate or equivalent paper from each state and the District of Columbia then is to be read by tellers previously appointed from among the membership of the House and Senate. Before the joint session convenes, each house appoints two of its members to be the tellers.

Counting the Votes and Announcing the Result. After the votes of each state and the District of Columbia have been read, the tellers record and count them. When this process has been completed, the President of the Senate announces whether any candidates have received the required majority votes for President and Vice President. If so, that "announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States" (3 U.S.C. §15).

Expediting the Process of Opening and Reading Votes. The joint session may agree to expedite this process when no controversy is anticipated. In the 1997 joint meeting, for example, the Vice President announced: "Under well-established precedents, unless a motion shall be made in any case, the reading of the formal portions of the certificates will be dispensed with. After ascertainment has been had that the certificates are authentic and correct in form, the tellers will count and make a list of the votes cast by the electors of the several States." (*Congressional Record* [daily edition], January 9, 1997, p. H77) The Vice President proceeded to open the certificates in alphabetical order and passed to the tellers the certificates showing the votes of the electors in each state and the District of Columbia. In each case, the tellers then read, counted, and announced the result for each state and the District of Columbia. According to the *Congressional Record*, the joint session consumed precisely 24 minutes.

The Majority Required for Election. The 12th Amendment requires the winning candidate to receive "a majority of the whole number of Electors appointed." That number normally becomes the same as a majority of the number of electoral votes counted by the tellers. The one exception we have identified occurred in 1873 when the Vice President announced that President Grant had received "a majority of the whole number of electoral votes," even though the Vice President also indicated that not all of those electoral votes had been counted. In that case, the two houses, under procedures similar to those described below, had decided not to count the electoral votes from Arkansas and Louisiana. Nonetheless, the number of electoral votes allocated to Arkansas and Louisiana evidently were included in "the whole number of electoral votes" for purposes of determining whether President Grant had received the majority required for election. (*Congressional Globe*, February 12, 1873, pp. 1305-1306) It should be noted that President Grant also won a majority of the electoral votes counted. If electoral votes from a state or the District of Columbia were not available to be counted during the joint session (and if the question were raised in a timely fashion), the joint session might be called upon to address the effect of this situation on what number of votes would constitute the "majority of the whole number of Electors appointed." In 1865, only two of the three Nevada electors cast their electoral votes. In the joint session, only two Nevada votes were counted and included in the "whole number of electoral votes." 69 *Congressional Globe* 668-669, 38th Cong., 2d Sess. (February 8, 1865). We are not aware of instances in which this issue has become a source of contention.

Procedures During Joint Session. Title 3 includes provisions governing the conduct of the joint session. The seating of Senators, Representatives, and officials is governed by §16. Under §18, the President of the Senate is to preserve order. This authority *may* encompass the authority to decide questions of order, but the statute is not explicit on this point. Also, no debate is to be allowed and no question is to be "put by the presiding officer except to either House on a motion to withdraw." (The statute provides for the Senate to withdraw automatically under circumstances discussed below. However, the statute makes no other explicit reference to a *motion* to withdraw.)

Continuity of the Joint Session. Section 16 is intended to ensure that the joint session conducts and completes its business expeditiously. As just noted, §18 prohibits debate and almost all questions. Section 16 provides that the joint session is to continue until the count

is completed and the result announced, and limits recesses if the process of counting the votes and announcing the results becomes time-consuming.

Objecting to the Counting of One or More Electoral Votes. 3 U.S.C. §15 includes a procedure for making and acting on objections to the counting of one or more of the electoral votes from a state or the District of Columbia. When the certificate or equivalent paper from each state (or the District of Columbia) is read, "the President of the Senate shall call for objections, if any." Any such objection must be presented in writing and must be signed by at least one Senator and one Representative. The objection "shall state clearly and concisely, and without argument, the ground thereof...." When an objection is received, each house is to meet and consider it separately. The statute states that "[n]o votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of." However, in 1873, before enactment of the law now in force, the joint session agreed, without objection and for reasons of convenience, to entertain objections with regard to two or more states before the two houses met separately to consider any of them.

Disposing of Objections. The joint session does not act on any objections that are made. Instead, the joint session is suspended while each house meets separately to debate the objection and vote whether, based on the objection, to count the vote or votes in question. Both houses must vote separately to agree to the objection. (This is the form in which the question was put in 1969; *Deschler's Precedents*, v. 3, Ch. 10, §3.6.) Otherwise, the objection falls and the vote or votes are counted. (3 U.S.C. §15, provides that "the two Houses concurrently may reject the vote or votes") These procedures have been invoked once since enactment of the 1887 law. In 1969, a Representative and a Senator objected in writing to counting the vote of an elector from North Carolina who had cast his vote for George Wallace and Curtis LeMay. Both houses, meeting and voting separately, rejected the objection, so when the joint session resumed, the challenged electoral vote was counted as cast. (This episode is discussed in *Deschler's Precedents*, v. 3, Ch. 10, §3.6.) In that instance the elector whose vote was challenged was from a state that did not by law "bind" its electors to vote only for the candidates to whom they are pledged. The instance of an elector voting for a different candidate (the so-called "faithless elector"), from a state which does, in fact, bind by law the elector to vote for the candidate to whom listed or pledged (see *Ray v. Blair*, 343 U.S. 214 (1952) in which the Court upheld the permissibility of such state limitations but did not address their enforceability), has not as yet been expressly addressed by the Congress or the courts.

Procedures for Considering Objections. 3 U.S.C. §17 lays out procedures for each house to follow in debating and voting on an objection. (As these procedures affect either house, however, they presumably are rule-making provisions of law which that house can decide unilaterally to alter.) These procedures limit debate on the objection to not more than two hours, during which each member may speak only once and for not more than five minutes. Then "it shall be the duty of the presiding officer of each House to put the main question without further debate." Under this provision, the presiding officer in each house held in 1969 that a motion to table the objection was not in order (*Deschler's Precedents*, v. 3, Ch. 10, §3.7). On the other hand, the Senate agreed, by unanimous consent, during the same

proceeding to a different way in which the time for debate was to be controlled and allocated (*Deschler's Precedents*, v. 3, Ch. 10, §3.8).

Basis for Objections. The general grounds for an objection to the counting of an electoral vote or votes would appear from the federal statute and from historical sources to be that such vote was not “regularly given” by an elector, and/or that the elector was not “lawfully certified” according to state statutory procedures. The statutory provision first states in the negative that “no electoral vote ... regularly given by electors whose appointment has been lawfully certified ... from which but one return has been received shall be rejected” (3 U.S.C. § 15), and then reiterates for clarity (see *Conference Report* on 1887 legislation, 18 *Congressional Record* 668, 49th Cong., 2d Sess., January 14, 1887) that both houses concurrently may reject a vote when not “so regularly given” by electors “so certified.” 3 U.S.C. § 15. It should be noted that the word “lawfully” was expressly inserted by the House in the Senate legislation (S. 9, 49th Cong.) before the word “certified” (*Conference Report, supra*, 18 *Congressional Record* at 668). Such addition arguably provides an indication that Congress thought it might, as a grounds for an objection, question and look into the lawfulness of the certification under state law. While the first objection of “regularly given” may, in practice, subsume the latter (as a vote may arguably be other than “regularly given” if it were given by one who was not “lawfully certified”), the two objections are not necessarily the same. In the case of the so-called “faithless elector” in 1969, described above, the elector was apparently “lawfully certified” by the state, but the objection raised was that the vote was not “regularly given” by such elector.

Receipt of Two Certificates from the Same State. Because of the recent historical experience prior to 1887, Congress was particularly concerned in the statute of 1887 with the case of two lists of electors and votes being presented to Congress from the same state. There appear to be three different contingencies provided for in the statute for two lists being presented. In the first instance, there would be two lists proffered, but the assumption presented in the law is that only one list would be from electors who were determined to be appointed pursuant to the state election contest statute (as provided for in 3 U.S.C. § 5), and then in such case, only those electors should be counted. In the second case, when there are two lists proffered as being from two *different* state authorities who arguably made determinations provided for under 3 U.S.C. § 5 (a state statutory election contest determining, at least 6 days prior to December 18, the winner of the state presidential election), the question of which state authority is “the lawful tribunal of such State” to make the decision (and thus the acceptance of those electors’ votes), shall be done only upon the concurrent agreement of *both* houses “supported by the decision of such State so authorized by its law....” In the third instance, if there is *no* determination by a state authority of the question of which slate was lawfully appointed, then the two houses must agree concurrently to accept the votes of one set of electors; but the two houses may also concurrently agree not to accept the votes of electors from that state.

When the two houses disagree, then the statute states that the votes of the electors whose appointment was certified by the Governor of the state shall be counted. It is not precisely clear whether this contingency for split votes in the House and Senate applies only to the last two scenarios, that is, only (a) where the House and Senate cannot decide between *two* determinations allegedly made under the state contest law, or (b) where *no*

determinations have been made under state law; or rather, whether the contingency applies even where there is only *one* determination under a state election contest law and procedure. This section of the statute, however, through its structure and its relationship to § 5 (and to give effect to § 5), although it is not free from doubt, seems to indicate that when there is only *one* determination by the state made in a *timely* fashion under the state's election contest law and procedures (even when there are two or more lists or slates of electors presented before the Congress), then the Congress shall accept that state determination (3 U.S.C. § 15) as "conclusive" (3 U.S.C. § 5), and that the "split" decision procedure as being decided in favor of the choice certified by the governor, may not have been intended to be applicable to that first clause in the statute where only one slate or group has been found to have been determined, in a timely fashion, to be the electors through the state's determination procedures for election contests and controversies. *Hinds' Precedents of the House of Representatives* suggests that when a state has settled the matter "in accordance with a law of that state six days before the time for the meeting of electors," then a controversy over the appointment of electors in that state "shall not be a cause of question in the counting of the electoral vote by Congress." (*Hinds' Precedents*, vol 3, § 1914, referring only to the 1887 statute.) It should be noted that *Hinds* cites no precedent or ruling, but merely paraphrases the statute, and it seems likely that this issue of the lawfulness of the determination and certification by a state, could be raised and dealt with in the joint session.

Precedent subsequent to the statute's original enactment in 1887 has been sparse. There appears only to have been one example, in 1961, when the Governor of the State of Hawaii first certified the electors of Vice President Nixon as having been appointed, and then, due to a subsequent recount which determined that Senator Kennedy had won the Hawaii vote, certified Senator Kennedy as the winner. Both slates of electors had met on the prescribed day in December, cast their votes for President and Vice President, and transmitted them according to the federal statute. This was the case even though the recount was apparently not completed until a later date, that is, not until December 28 (*Facts on File, Weekly World News Digest*, Vol. XX, No. 1052, p. 469 (December 22-28, 1960)). The presiding officer, that is, the President of the Senate, Vice President Nixon, suggested "without the intent of establishing a precedent" that the latter and more recent certification of Senator Kennedy be accepted so as "not to delay the further count of electoral votes." This was agreed to by unanimous consent. (See discussion in *Deschler's Precedents*, at vol.3, Ch. 10, § 3.5, pp. 12-13).

Composition of the Joint Session. Unless the law is changed to provide for the joint session to take place before January 3, 2001, the members of the 107th Congress will participate in the joint session and in any separate meetings of the House and Senate that are required to dispose of objections. Unless the conclusion of such a separate meeting is delayed beyond January 20, 2001, the date for inaugurating the new President and Vice President, the sitting Vice President would remain the President of the Senate during any separate meeting of the Senate.