
OFFICE OF THE VICE PRESIDENT

Information Memorandum

TO: VICE PRESIDENT PENCE

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SUBJECT: JANUARY 6 FLOW CHART OF LEGAL PROVISIONS

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Article II, Section 1 of the Constitution provides:

“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... .”

This clause is widely understood to give State legislatures primacy in determining State electors. State legislatures may directly designate electors (which last occurred in 1876), or they may through laws enacted prior to Election Day provide for the choice of electors through the popular vote. Some Supreme Court Justices have suggested this clause provides a legal basis for federal courts to invalidate attempts by rogue State executives to depart from the plain terms of State election laws.

The original language of Article II, Section 1 further provided:

“Electors shall meet in their respective States, and vote by Ballot for two Persons And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and the House of Representatives, open all the Certificates, and the Votes shall then be counted.”

The Twelfth Amendment (1804) responded to the Jefferson/Burr dispute of 1800 by requiring separate votes for President and Vice President, but it otherwise incorporated without change Article II’s language about counting electoral votes:

“Electors shall meet in their respective States, and vote by Ballot for President and Vice President ... [a]nd they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and the House of Representatives, open all the Certificates, and the Votes shall then be counted.”

In 1876, three different States submitted multiple slates of electors, provoking a constitutional crisis.

In 1876, three states (Florida, Louisiana, and South Carolina) returned two or more slates of electors amidst allegations of fraud and malfeasance, and a fourth state (Oregon) had the validity of one of its electors challenged. Republican Rutherford Hayes needed every one of the 20 disputed electoral votes in order to achieve a razor-thin 185-184 electoral vote win over Democrat Samuel Tilden.

A politically divided House and Senate, presided over by a Republican Vice President, were unable to agree on a procedure for resolving the dispute, resulting in a significant constitutional crisis. A statute was passed on January 29, 1877 creating a 15-member Electoral Commission to decide the electoral disputes. The Commission consisted of five Democrat Members of the House, five Republican Senators, and five Supreme Court Justices (two Democrats and three Republicans). Through a series of party-line 8-7 votes, all 20 electors were awarded to Hayes, who thus became President.

Enacted ten years later, the Electoral Count Act of 1887 provided for the first time a specific statutory process for counting electoral votes, and for determining objections.

For present purposes, the most important provisions of the Electoral Count Act are as follows:

- 3 U.S.C. § 5 (the “Safe Harbor” provision): If a State provides “by laws enacted prior to [Election Day] for its final determination of any controversy or contest concerning the appointment of . . . electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors,¹ such determination . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.”
- 3 U.S.C. § 6 (the “certificate of ascertainment” provision): “It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed. . . .”
- 3 U.S.C. § 15-18 (these provisions, which govern the counting of electoral votes and the resolution of disputes, are set forth below in the order of expected chronological events, rather than in the order that the relevant text appears within the statute):

¹ In the 2020 election, all 50 States and the District of Columbia provided certificates of ascertainment for their electors on or before December 8, which was six days before the electors voted on December 14. All thus qualified for the Section 5 safe harbor.

Basic Rules of the Joint Session

- “The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.”
- “Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o’clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.” (3 U.S.C. § 16)
- “While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.” (3 U.S.C. § 18)
- “Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A.”

Procedures for Resolving Objections to Validity

- “Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received.
- “No 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.”
- “When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision.”

- “When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.” (3 U.S.C. § 17)
- In deciding upon objections, “no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.”
- “When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted.”

Procedures for Choosing Between Competing Slates

- “If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made... .”
- “[B]ut in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law;
- “[I]f there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.”
- “But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

- “When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted.”

Announcement of the Final State of the Vote

- “[S]aid tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.”