OFFICE OF THE VICE PRESIDENT

Information Memorandum

TO: VICE PRESIDENT PENCE

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SUBJECT: JANUARY 6 PROCESS FOR ELECTORAL VOTE COUNT

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The counting of the votes of the Electoral College will occur on January 6, 2021, in a Joint Session of Congress that will be held in the House chamber. The process for counting electoral votes is prescribed by the Twelfth Amendment to the United States Constitution and—to the extent that it is constitutional—by the Electoral Count Act of 1887.

As President of the Senate, it is clear that the sitting Vice President plays a prominent role in the counting of electoral votes, including resolving objections to those votes. There is disagreement, however, whether the text of the Twelfth Amendment privileges the Vice President to play a decisive role in resolving objections to electoral votes on their merits, or whether (pursuant to the Electoral Count Act) the role of the Vice President in resolving dispute is largely ministerial. Absent an assertion of constitutional privilege by the Vice President, the parliamentarian will follow the process that is prescribed by the Electoral Count Act, which is described in the second section below.

The Twelfth Amendment

The Twelfth Amendment provides: "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." U.S. CONST. Amend. XII. Identical text appeared in the original Constitution, and was carried forward into the Twelfth Amendment when the Jeffersonians amended the Electoral College process in 1803-04 in response to Aaron Burr's contest to the results of the election of 1800. The constitutional text that governs the counting of electoral votes has thus remained the same since the Founding.

When the Electoral College votes, each State's electors "seal up" the certificates containing their votes in envelopes, and send them by registered mail to the President of the Senate and to specified additional individuals. 3 U.S.C. §§ 9-11. It is undisputed that the Constitution mandates that on January 6, it is the job of the Vice President to "open all the certificates." Scholars disagree, however, whether the text of the Constitution also dictates that it is the job of the Vice President to count the electoral votes, as the Twelfth Amendment switches to the passive voice, and further fails to clearly identify a specified actor, when stating that "the votes shall then be counted."

Prior to 1887, there was no statute that purported to govern the counting of electoral votes, and the Vice President and Congress had only the text of the Constitution to rely on. A letter that was appended to the Constitution by the Framers when it was sent to the States for ratification makes it clear that they envisioned the President of the Senate would both open the electoral vote certificates and personally count the votes. The very first Senate accordingly elected a temporary President of the Senate (there being no sitting Vice President at that time) who filled the role of the Vice President in both opening and counting the electoral votes in the presence of the Senate and the House. Thereafter, a practice developed that is followed to this day whereby the House and the Senate each appoint two "tellers" who sit at the clerk's desk in the House chamber and who assist the Vice President with verifying and counting the electoral votes.

The text of the Constitution is silent as to any process for raising and resolving objections to electoral votes, and until the passage of the Electoral Count Act of 1887, no firm protocol was established for resolving disputes over the validity of electoral votes. Some scholars argue that under the text of the Twelfth Amendment, it is the sole responsibility of the Vice President to count electoral votes, and that it is accordingly also the Vice President's sole responsibility to determine whether or not disputed electoral votes should be counted. There is some historical evidence that Adams and Jefferson both resolved issues over the validity of electoral votes in their own favor, and in 1857 the President of the Senate (a roll filled by Senator John Crittenden, as the Vice Presidency was then vacant) personally overruled an objection to the counting of Wisconsin's electoral votes, and asserted that it was his responsibility to make the validity determination in the first instance, while suggesting that the House and Senate might thereafter jointly overrule him. In a handful of other instances, on the other hand, the House and the Senate played a more active role in resolving objections to electoral votes, and the overall record of historical practice on the point is accordingly muddy.

Following the hotly disputed election of 1876, in which the validity of several States' electoral votes was strongly contested, thus provoking a significant constitutional crisis, Congress passed the Electoral Count Act of 1887 to govern the future counting of electoral votes and the resolution of electoral vote disputes. A number of scholars have argued that the Electoral Count Act's dispute resolution mechanism is unconstitutional because it relegates the Vice President, as President of the Senate, to a purely ministerial role in resolving such disputes. Each of the last three times that a Republican President was elected, however—in 2000, 2004, and 2016—Democrats have raised objections to the counting of electoral votes, and in each instance the process that the Electoral Count Act prescribes for resolving electoral vote disputes was followed. Indeed, it appears that the only time the Electoral Count Act's prescribed process for resolving disputes was not been followed since its enactment was in 1961, when Vice President Nixon magnanimously resolved against himself a dispute over three competing slates of electors that had been submitted by the State of Hawaii. Because there are only a few instances of historical practice under the Electoral Count Act, however, the question of its constitutionality remains muddy, and scholars continue to this day to debate the constitutionally appropriate role of the Vice President in resolving objections to electoral votes.

Modern Practice and the Electoral Count Act

Although the Constitution states that the President of the Senate shall open the envelopes containing the electoral vote certificates in the presence of the Senate and the House, in practice on January 6 the already-opened certificates will be brought into the House chamber in boxes and laid upon the clerk's desk. The Vice President will then enter the chamber and proceed to the dais, where the Speaker of the House will be seated. The tellers that have been appointed by the House and the Senate will take their seats immediately below the Vice President and the Speaker, and the Vice President will preside, standing, over the counting of the votes.

In alphabetical order, each State's electoral vote certificate will be handed to the Vice President, who will verify the certificate's regularity and then hand it to one of the tellers. The teller will also verify the certificate's regularity, and then announce that state's electoral votes. At that point, members of the House or Senate may rise to State any objections to the counting of that State's electoral votes. As of the date of this memorandum, it does not appear that any State will have submitted a competing slate of electors (this could occur for example, if one slate of electors was submitted by a State's Secretary of State, and another slate was submitted by the State's legislature). This memorandum accordingly describes the process that is prescribed for resolving objections to counting a State's votes, rather than the process for choosing between competing slates of electors.

The Electoral Count Act states that objections cannot be considered unless they are in writing, and are signed by both a member of the House and a Senator. 3 U.S.C. § 15. In both 2000 and 2016, Vice Presidents Gore and Biden applied the Electoral Count Act to overrule all of the objections that were raised to counting the electoral votes, because no Senator had signed the objections. The process was as follows. First, a member of the House would rise and state an objection to counting a State's votes. Second, the Vice President would inquire whether the objection was in writing and was signed by a Senator. Upon confirmation by the House member that no Senator had signed the objection, the Vice President would overrule it. The Electoral Count Act prohibits any debate during the Joint Session, so the Vice President would also overrule any attempt to debate an invalid objection. 3 U.S.C. § 18.

In 2004, on the other hand, Senator Barbara Boxer signed the written objection of a House member, thus satisfying the requirements for a valid objection established by the Electoral Count Act. At that point, the Electoral Count Act dictates that the House and Senate must separate into their respective chambers to debate the objection, with speeches limited to five minutes, and total debate on the objection limited to two hours. *Id.* § 17.

The Electoral Count Act prescribes the standard that the House and Senate are supposed to apply in resolving a dispute after they divide, as well as the effect of their determinations. The Act states that so long as a State's disputed electoral votes "have been regularly given by electors whose appointment" was lawfully certified by the State's Executive, the electoral votes shall not be rejected. *Id.* § 15. For this reason, challenges to electoral votes typically allege that the disputed votes were not "regularly given," a phrase laden with ambiguity. Following up to two hours of debate, the House and the

Senate may "concurrently… 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." *Id.* § 15. Thus—presuming that the dispute resolution process prescribed by the Electoral Count Act is constitutional—the House and the Senate must both agree to sustain an objection for a State's electoral votes not to be counted.[1]

"When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted." *Id.* § 15. This process will be repeated separately for each State to which any objections are validly raised, until the counting of the electoral votes of all 50 States and the District of Columbia has been completed.[2]

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[1] If an objection is sustained by the House and the Senate, and a State's electoral votes are thus disqualified, the whole number of electors that is required to attain the Presidency (270) typically is not recalculated, although there is some mixed historical practice on this question.

[2] If no candidate has obtained 270 electoral votes at the conclusion of the counting process, then it falls to the House of Representatives to select the President, with each State delegation having one vote, and an absolute majority of 26 votes being required to attain the Presidency. The Vice President would be selected by the Senate.