

Chapter 24

Electoral Counts; Selection of President and Vice President

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Research References

U.S. Const. amend. XII
3 Hinds §§ 1911-1980
6 Cannon §§ 438-441
Deschler Ch 10
Manual §§ 219-223

§ 1. In General; Election of President and Vice President

Both the House and Senate formally participate in the process by which the President and Vice President are elected. Congress is directed by the Constitution to receive, and in joint session to count, the electoral votes certified by the states. If no candidate receives a majority of the electoral vote, the House is directed to elect the President, and the Senate is directed to elect the Vice President. U.S. Const. amend. XII; *Manual* § 219.

The House has on two occasions, in 1801 and 1825, proceeded to elect a President where no candidate had a majority of electoral votes. 3 Hinds §§ 1983, 1985. Both Thomas Jefferson and John Quincy Adams were chosen after prolonged debate in the House, and, in the case of Adams, after repeated ballots. Under both the original constitutional provision and the 12th amendment, balloting was by states, with each state having one vote.

There have been instances in which the result of the electoral vote has differed from the result of the popular vote. 3 Hinds §§ 1953-1956; 107-1, Jan. 6, 2001, pp 115, 136; 115-1, Jan. 6, 2017, pp 348, 359. Generally, however, the electoral vote has followed the popular vote because of the manner in which electors are chosen under state law. Deschler Ch 10 § 1.

Under the procedures governing the electoral count (as enacted in 1887, revised substantially in 2022, and codified in chapter 1 of title 3 of the United States Code), certificates identifying the electors are prepared and transmitted to the Archivist. 3 USC § 5. The electors of each state meet and

vote on the first Tuesday after the second Wednesday in December at a place designated in accordance with state law enacted prior to election day. 3 USC § 7. The electors prepare certified lists of all persons receiving votes for President or Vice President. The certificates are transmitted to the seat of government and directed to the President of the Senate. U.S. Const. amend. XII; 3 USC § 11.

Under earlier procedure (before the 1887 act), bills relating to the electoral vote count were considered of high constitutional and parliamentary privilege. 3 Hinds § 2578. Resolutions relating to the method of examining the electoral votes, or to procedural irregularities or fraud in connection therewith, also were considered as privileged. 3 Hinds §§ 2573, 2576, 2577. The procedures established in later statutes rendered these precedents largely obsolete. 3 USC §§ 1-18.

§ 2. Joint Session to Count the Electoral Vote

The electoral count occurs in a joint session of the two Houses in the Hall of the House at 1 p.m. on the sixth day of January succeeding every meeting of electors (or an alternate day set by law). 3 USC § 15; *Manual* § 220; 3 Hinds § 1819; Deschler Ch 10 § 2. Sections 15-18 of title 3 of the United States Code prescribe in detail the procedure for the count. Nevertheless, the two Houses traditionally adopt a concurrent resolution providing for the meeting in joint session to count the vote, for the appointment of tellers, and for the declaration of the state of the vote. 3 Hinds § 1961; Deschler Ch 10 § 2.1. This concurrent resolution is privileged. 3 Hinds §§ 2573-2577. Sections 15-18 of title 3 of the United States Code are in effect joint rules of the two Houses for the occasion and govern the procedures both in the joint session and in each House in the event the two Houses divide to consider an objection. Deschler Ch 10 § 2.6.

Under clause 12 of rule I, the Speaker may declare a recess in connection with the joint session. The Speaker may decline to recognize for one-minute speeches or extensions of remarks before recessing for the joint session. Deschler Ch 10 § 2.3.

§ 3. Consideration of Certificates of Electors

Generally

A joint session to count the electoral votes is presided over by the President of the Senate. 3 USC § 15. In the absence of the President of the Senate, the President pro tempore of the Senate presides and calls the session to order. Deschler Ch 10 § 2.5. As clarified by the Electoral Count Re-

form Act of 2022, the presiding officer has only the specific role prescribed by statute and otherwise has a “solely ministerial” role. 3 USC § 15.

No debate is allowed in the joint session. 3 USC § 18; *Manual* § 220.

Counting of Certificates

The electoral votes are counted by tellers who have been appointed on the part of the House by the Speaker and on the part of the Senate by the Vice President. Deschler Ch 10 §§ 3.1-3.4.

The certificates and other papers relating to the electoral count are presented and acted on in alphabetical order by states. 3 USC § 15. The certificates of votes given by the electors are opened by the President of the Senate and handed to the tellers, who read them in the presence and hearing of the two Houses. Deschler Ch 10 § 1. Traditionally, the reading of each certificate is dispensed with by unanimous consent after the first state has been read. However, on one occasion, no attempt was made to dispense with the reading of the certificates. On that occasion, the tellers read only a sufficient part of each certificate to reveal that it was signed by the pertinent electors, duly attested, regular in form, and authentic. *Manual* § 220; 107-1, Jan. 6, 2001, pp 101-15.

Objections

An objection to the counting of any electoral vote must be in writing and signed by at least one-fifth of the Members of the House and one-fifth of the Senators. 3 USC § 15. Prior to the 2022 statutory revisions, an objection could be entertained if signed by one Member and one Senator, and thus an objection not signed by a Senator would be invalid. 107-1, Jan. 6, 2001, p 104; 115-1, Jan. 6, 2017, pp 345-48. Objections are not debatable in the joint session. 3 USC § 18; 107-1, Jan. 6, 2001, p 104; 115-1, Jan. 6, 2017, pp 345-48. In the event that a timely objection in proper form is raised in connection with the count, the joint session divides, and the objection is considered by each House in separate session. Deschler Ch 10 § 3.6; 109-1, Jan. 6, 2005, p 199; 117-1, Jan. 6, 2021, p _____. The Act, as amended, prescribes the procedure to be followed in debate after the two Houses have separated, which includes an overall limit of two hours of debate (equally controlled by the Majority and Minority Leaders of each House) and a limit of five minutes of debate time per Senator or Representative. 3 USC § 17. On only three occasions (in 1969, 2005, and 2021) has an objection been perfected, requiring the two Houses to separate and consider the objection pursuant to the Act of 1887. 91-1, Jan. 6, 1969, p 146; 109-1, Jan. 6, 2005, p 199; 117-1, Jan. 6, 2021, p _____. In the House a motion to lay the objection on the table is not in order. Deschler Ch 10 § 3.7. The

Senate has agreed by unanimous consent to modify the terms set by the statute with respect to the division of time for debate. Deschler Ch 10 § 3.8; 117-1, Jan. 6, 2021, p ____.

The statute authorizes either House to declare a recess when acting separately to consider an objection or other question arising in the matter, and sets restrictions on the length of such recess. 3 USC § 16. On one occasion, during separate consideration of an objection in the House, the Chair declared an emergency recess subject to the call of the Chair pursuant to clause 12(b) of rule I in response to a breach of the Capitol building, and the House resumed proceedings within the time period provided by the statute. 117-1, Jan. 6, 2021, p ____.

If either the House or the Senate rejects the objection, the presiding officer of the joint session directs the tellers to record the votes as submitted. Deschler Ch 10 § 3.6; 109-1, Jan. 6, 2005, p 242; 117-1, Jan. 6, 2021, p ____.

Other Questions Arising in the Matter

In addition to the joint session dividing to consider an objection to the counting of any electoral vote, the joint session divides to consider an “other question arising in the matter.” 3 USC §§ 15-18; *Manual* § 220. Such a question also must be in writing and signed by at least one-fifth of the Members of the House and one-fifth of the Senators (under the current form of the statute; under the prior form, one Member and one Senator). *Manual* § 220; 107-1, Jan. 6, 2001, p 104. Examples of an “other question arising in the matter” include: (1) an objection for lack of a quorum; (2) a motion that either House withdraw from the joint session; and (3) an appeal from a ruling by the presiding officer. *Manual* § 220. Such questions are not debatable in the joint session. 3 USC § 18.

§ 4. Presidential Disability; Filling Vice Presidential Vacancies

In addition to its responsibilities in ascertaining and counting the electoral votes cast for President and Vice President, Congress has the duty under the Constitution to resolve disputes as to Presidential disability. U.S. Const. amend. XXV §§ 3, 4. Messages relating to Presidential incapacity are laid before the House. The Speaker has laid before the House two communications from the President of the United States (1) advising of the President’s temporary incapacity to discharge the constitutional powers and duties of the Office of President and directing that the Vice President discharge those duties in his stead and (2) subsequently advising of the President’s determination that he was able to resume those powers and duties. *Manual* § 256.

The House and Senate also act on the nomination of a Vice President to fill a vacancy. The Constitution provides that in such cases the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses. U.S. Const. amend. XXV § 2. Messages from the President transmitting the nomination of a Vice President under this provision are laid before the House by the Speaker. The nomination is referred to the Committee on the Judiciary, which has jurisdiction over matters relating to Presidential succession. Deschler Ch 10 §§ 4.1, 4.2. The House and Senate consider the nomination by acting separately on simple resolutions. Deschler Ch 10 § 4.3.

