

Chapter LVIII.

PROCEDURE OF THE ELECTORAL COUNT.

1. Provisions of the Constitution for election of President and Vice-President. Sections 1911–1913.
 2. Statutes governing the casting and transmittal of electoral votes. Sections 1914–1917.
 3. Statutes governing the two Houses in the electoral count. Sections 1918–1922.
 4. Practice as to the count. Sections 1923–1927.¹
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1911. The provisions of the Constitution relating to the appointment of presidential electors.

No Senator or Representative or person holding an office of trust or profit under the United States may be appointed an elector.

The Constitution, in section 1 of Article II, 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;² but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

¹A proposition relating to the electoral count presents a question of privilege. Sections 2573–2575 of this volume.

²The Revised Statutes provide as follows:

“SEC. 131. Except in case of a presidential election prior to the ordinary period, as specified in sections one hundred and forty-seven to one hundred and forty-nine, inclusive, when the offices of President and Vice-President both become vacant, the electors of President and Vice-President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice-President.

“SEC. 132. The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice-President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

“SEC. 133. Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.

“SEC. 134. Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”

1912. Section 1 of Article II of the Constitution provides:

The Congress may determine the time of chusing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.¹

1913. Provisions of the Constitution for the choice of President and Vice-President by the electors; for the electoral count, and for elections in House and Senate in default of choice by the electors.—The twelfth amendment to the Constitution, proclaimed as ratified September 25, 1804, provides:

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and 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 presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.²

The Revised Statutes provide:

“SEC. 135. The electors for each State shall meet and give their votes upon the first Wednesday in December in the year in which they are appointed, at such place, in each State, as the legislature of such State shall direct.”

²Originally the Constitution provided as follows:

“The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. 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 House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately chuse by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner chuse the President. But in chusing the President, the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall chuse from them by ballot the Vice-President.”

This paragraph was superseded in 1804 by the twelfth amendment.

1914. The statutes designate the time for the choice of electors of President and Vice-President, and the time for their meeting to give in their votes.

A controversy in any State over the appointment of Presidential electors settled in accordance with a law of that State six days before the time for the meeting of the electors shall not be a cause of question in the counting of the electoral vote by Congress.

The act ¹ approved February 3, 1887,² provides:

That the electors of each State shall meet and give their votes on the second Monday in January next following their appointment,³ at such place in each State as the legislature of such State shall direct.

SEC. 2. That if any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the 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, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, 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.

1915. The executive of each State is charged with the duty of transmitting to the Secretary of State of the United States a certificate of the appointment of electors and the names and votes; and of delivering a similar certificate to the electors.

It is the duty of the executive of any State wherein there may be a controversy as to the appointment of electors to transmit to the Secretary of State of the United States a certificate of the determination thereof.

The Secretary of State is required to transmit to Congress copies of certificates received from the State executives relating to the appointment of Presidential electors.

The act approved February 3, 1887² provides:

That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors⁴ in such State, by the final ascertainment under and in pursuance of the

¹This is the act providing for the conduct of the electoral count. For the debates and proceedings on its adoption see first session Forty-ninth Congress, Record, pp. 815, 863, 1019, 1057, 2387, 2427; second session, pp. 29, 45, 74, 668.

²24 Stat. L., p. 373.

³The law of 1845 (5 Stat. L., p. 721) provided a uniform day of election for appointment of electors, "the Tuesday next after the first Monday in November, in every fourth year." An old law of 1792 (1 Stat. L., p. 240) provided for a special election in case of vacancies in both offices, but this was repealed by the act of 1886 (24 Stat. L., p. 1), which provided for succession down through the cabinet, and the calling of an extra session of Congress.

⁴"The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice-President to be chosen come into office; except that when no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives." (Sec. 132, R. S.) The States may provide by law for filling vacancies; and the electors for each State meet at such place as the legislature may direct and give their votes on the first Wednesday in December in the year in which they are appointed. (Secs. 133-135, R. S.)

laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice-President; and section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department.

1916. The statutes provide for transmitting the certificates of the action of the electors in each State to the President of the Senate.

Section 138 of the Revised Statutes provides:

The electors shall make and sign three certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice-President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.

Sections 139 and 140 provide for the sealing, certifying, and transmitting of these certificates, two of the three copies being sent to the President of the Senate, one by messenger and the other by mail, while the third is delivered to the judge of the district in which the electors assemble.

1917. Certificates of the votes of the electors in the several States for President and Vice-President are transmitted to the President of the Senate, who may in case of delay send for them.—The act of October 19, 1888,¹ provides:

That the certificates and lists of votes for President and Vice-President of the United States, mentioned in chapter one of title three of the Revised Statutes of the United States, and in the act to which this is a supplement,² shall be forwarded, in the manner therein provided, to the President of the Senate forthwith after the second Monday in January, on which the electors shall give their votes.

SEC. 2. That section one hundred and forty-one of the Revised Statutes of the United States is hereby so amended as to read as follows:

“SEC. 141. Whenever a certificate of votes from any State has not been received at the seat of Government on the fourth Monday of the month of January in which their meeting shall have been held the Secretary of State shall send a special messenger to the district judge in whose custody one certificate of the votes from that State has been lodged, and such judge shall forthwith transmit that list to the seat of Government.”

1918. The electoral count occurs in the Hall of the House at 1 p.m. on the second Wednesday of February succeeding every meeting of electors.

¹25 Stat. L., pp. 613, 614.

²See section 1916 of this volume.

The President of the Senate is the presiding officer of the joint meeting for the count of the electoral votes.

Two tellers are appointed on the part of each House to tabulate the votes in the electoral count.

At the conclusion of the electoral count the President of the Senate merely announces the state of the vote, which, with the list of the votes, is entered on the Journals of the two Houses.

The certificates of electoral votes are presented to the joint meeting in alphabetical order of States, and on being read are subject to objection in writing signed by at least one Member and one Senator.

In case of objection to an electoral certificate, or in case of conflicting certificates, the Senate retires and the two Houses consider the matter separately.

The act approved February 2, 1887,¹ provides:

SEC. 4. That Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors.²

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.³

Two tellers⁴ 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; and said 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 in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote,⁵ 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.

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. 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, and 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 3 of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they

¹ 24 Stat. L., pp. 373, 374.

² From act of 1792, 1 Stat. L., p. 240.

³ From the temporary act of January 29, 1877, to govern the electoral count of that year. (19 Stat. L., p. 227.) Also from the joint rule of 1865. (See sec. 1951, footnote, of this work.)

⁴ From act of 1877 and joint rule of 1865; but there had been tellers from the earliest count. (See sec. 1928 et seq. of this work.)

⁵ In the law of 1877 the words "state of the vote" were followed by the words "and the names of the persons, if any, elected." These words were also included in the bill of 1887 as it passed the Senate, but were stricken out in the House. (Second session Forty-ninth Congress, Record, pp. 29, 76.) These words were in the joint rule of 1865 and in earlier joint rules. (See sec. 1951 of this volume.)

agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

If more than one return or paper purporting to be a return¹ 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 2² of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but 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 2 of this act, 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 laws, and in such case of more than one return or paper purporting to be a return from a State, if 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. 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.

1919. The statutes give directions for seating the officers and Members of the two Houses at the counting of the electoral vote.

The statutes prescribe directions as to recesses and adjournments of the joint meeting and the two Houses during the count of the electoral vote.

The act approved February 2, 1887,³ providing the method of conducting the electoral count, prescribes:

That at such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform.⁴

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 act, 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.⁵

¹The act of 1877 provided the electoral commission for decision in such cases. (19 Stat. L., p. 228.) The joint rule of 1865 and prior joint rules had not made definite provision in this respect.

²See section 1914 of this chapter.

³24 Stat. L., p. 375.

⁴This provision as to the seating of the two Houses is taken from the act of 1877 (19 Stat. L., p. 229) and the joint rule of 1865 (see sec. 1951, footnote, of this work), which in turn continued prior usage.

⁵The provision as to recesses is a more specific provision than that of the law of 1877 or the joint rule of 1865, from both of which it is adopted.

1920. The rule for the seating of officers and Members at a joint session of the two Houses for counting the electoral vote.—The former joint rule of the House and Senate No. 22,¹ dating from February 6, 1865, provided that at the joint session of the two Houses in the Hall of the House for counting the electoral vote seats should be provided as follows:

For the President of the Senate, the Speaker's chair; for the Speaker, a chair immediately upon his left; for the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not occupied by the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon either side of the Speaker's platform.

The electoral act of 1877² embodied the above provisions, as does also the existing electoral law in substantially identical language with the above.³

1921. The President of the Senate preserves order in the joint meeting for the count of the electoral vote.

In the joint meeting for the count of the electoral vote no debate is allowed, and no question is put by the presiding officer except to either House on a motion to withdraw.

The act approved February 2, 1887,⁴ providing for the conduct of the electoral count, specifies:

SEC. 5. That while the two Houses shall be in meeting as provided in this act 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.⁵

1922. When the two Houses separate to pass on a question arising during the electoral count, there may be two hours of debate, each Member or Senator being confined to five minutes.—The act approved February 2, 1887,³ establishing a rule for the electoral count, provides:

SEC. 6. That 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.⁶

1923. When the two Houses separate to pass on an objection to counting an electoral vote, the message that the House is ready to receive the Senate again is sometimes sent by the Clerk without special direction.—On February 12, 1873,⁷ during proceedings in the House incident to the determination of objections made in the joint convention to the electoral votes of

¹ Journal, second session Forty-fourth Congress, p. 723.

² Second session Forty-fourth Congress House Report No. 108, p. 6; 19 Stat. L., p. 229.

³ 24 Stat. L., p. 375.

⁴ 24 Stat. L., p. 374.

⁵ This is a modified form of the provision of the temporary act of 1877 (19 Stat. L., p. 229). The joint rule of 1865 had provided that the President of the Senate should be the presiding officer. (See section 1951, footnote, of this work.)

⁶ This provision is taken from the temporary law of 1877 (19 Stat. L., p. 229); but that act provided ten minutes as the limit of debate, instead of five. The joint rule of 1865, while providing for separate action, did not prescribe a rule as to the method of action. (See sec. 1951, footnote, of this work.)

⁷ Third session Forty-second Congress, Globe, p. 1301.

the State of Texas, Mr. Henry L. Dawes, of Massachusetts, moved that copies of the resolutions adopted by the House be communicated forthwith to the Senate.

And to this Mr. James A. Garfield, of Ohio, suggested the additional provision that the Senate be informed that the House was ready to receive them.

The Speaker¹ said:

The Clerk intimates that there is no necessity for the order suggested by the gentleman from Ohio. The Clerk makes that notification as a matter of course. * * * If the House has acted on all the business coming from the joint convention the presumption is that the House is ready to receive the Senate.²

1924. The House, by formal resolutions, declared that there was no power in Congress or elsewhere to revise or change the result arrived at in the joint meeting for counting the electoral vote of 1877.—On June 14, 1878³ Mr. Horatio C. Burchard, of Illinois, offered the following preamble and resolution, which were agreed to under suspension of the rules, there being yeas 216, nays 21:

Whereas, at the joint meeting of the two Houses of the Forty-fourth Congress, convened pursuant to law and the Constitution, for the purpose of ascertaining and counting the votes for President and Vice-President, for the term commencing March 4, 1877, upon counting the votes, Rutherford B. Hayes was declared to be elected President and William A. Wheeler was declared elected Vice-President for such term: Therefore,

Resolved, That no subsequent Congress and neither House has jurisdiction to revise the action of such joint meeting, and any attempt by either House to annul or disregard such action, or the title to office arising therefrom, would be revolutionary, and is disapproved by this House.

1925. On June 14, 1878⁴ the House, by a vote of 235 yeas to 14 nays, agreed to the following resolution reported from the Committee on the Judiciary:⁵

Resolved, That the two Houses of the Forty-fourth Congress, having counted the votes cast for President and Vice-President of the United States, and having declared Rutherford B. Hayes to be elected President and William A. Wheeler to be elected Vice-President, there is no power in any subsequent Congress to reverse that declaration, nor can any such power be exercised by the courts of the United States or any other tribunal that Congress can create under the Constitution.

1926. The copies of the electoral votes transmitted to House and Senate in accordance with the law are not among the papers essential at the count.—On December 6, 1888⁶ the Senate discussed the disposition of the

¹James G. Blaine, of Maine, Speaker.

²Earlier in the proceedings the House had by vote directed these things to be done. *Globe*, p. 1299.

³Second session Forty-fifth Congress, *Journal*, pp. 1305, 1306; *Record*, p. 4618.

⁴Second session Forty-fifth Congress, *Journal*, p. 1307; *Record*, p. 4619.

⁵On June 14, 1878 (second session Forty-fifth Congress, *Record*, pp. 4618, 4619), the Judiciary Committee reported unanimously that, as the electoral vote had been counted by the two Houses of the Forty-fourth Congress, and had declared Hayes and Wheeler elected, "there is no power in any subsequent Congress to reverse that declaration, nor can any such power be exercised by the courts of the United States, or any other tribunal that Congress can create under the Constitution."

This was agreed to by the House, yeas 235, nays 14.

J. Proctor Knott, of Kentucky, dissented from the views of the Judiciary Committee, and submitted his views in the form of a long constitutional argument (second session Forty-fifth Congress, *Record*, p. 4682). B. F. Butler also dissented in a long argument (second session Forty-fifth Congress, *Record*, p. 4826).

⁶Second session Fiftieth Congress, *Record*, pp. 56, 1368.

copies of the official ascertainments of the electors of President and Vice-President, which in accordance with the law are transmitted to the Senate and House. The subject was referred to the Committee on Privileges and Elections, which, on January 31, 1889, through Mr. William M. Evarts, of New York, reported that these certificates had been transmitted in accordance with the law, the requirements of which were completely satisfied by the proceeding. The documents—

form no part of those that are by law provided for in respect of the transaction of the count of the votes.

The committee therefore recommended that the papers be deposited in the archives of the Senate.

1927. During the prolonged proceedings of the electoral count of 1877 the House and Senate caused each calendar day to be journalized as a legislative day.—On February 13, 1877,¹ the House and Senate agreed to the following:

Resolved by the Senate (the House of Representatives concurring), That during the sessions of the Commission appointed under the act to provide for and regulate the casting of votes for President and Vice-President and the decision of questions arising therefrom, for the term commencing March 4, A. D. 1877, each calendar day when legislative business shall have been transacted shall, by each House, when in session, be considered a day for legislative purposes, and the Journals of the two Houses shall be so kept and dated.

¹Second session Forty-fourth Congress, Journal, p. 437; Record, pp. 1509, 1544.