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DESCHLER'S PRECEDENTS

OF THE

United States

House of Representatives

INCLUDING REFERENCES TO PROVISIONS
OF THE CONSTITUTION AND LAWS, AND
TO DECISIONS OF THE COURTS

By
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CHAPTER 10

Presidential Elections; Electoral College

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Commentary and editing by John R. Graham, Jr., J.D. and Roy Miller, LL.B.

Presidential Elections; Electoral College

§ 1. In General; Electoral Certificates

Under the U.S. Constitution, both the House and Senate formally participate in the process by which the President and Vice President are elected. Congress is directed by the 12th amendment to receive and, in joint session, count the electoral votes certified by the states. And if no candidate receives a majority of the electoral vote, the House of Representatives is directed to elect the President, while the Senate is directed to elect the Vice President.[1]

This method of selecting a President, later to become known as the "electoral college," came about as the result of a compromise after lengthy debate at the Constitutional Convention of 1787. The debate centered on whether the President should be chosen by popular vote, by the Congress, or by some other method. Election by direct popular vote was rejected because it was believed that the people would have insufficient knowledge of the various candidates, and because it was assumed that the people would be unable to agree on a single candidate. A plan that would give Congress the power to select the President was also rejected, because of its potential threat to executive independence. Finding itself in disagreement on both plans, the convention adopted a compromise under which each state was given the power to appoint electors to be chosen in a manner specified by each state legislature. The electors in each state, who were to be equal to the total number of that state's Representatives and Senators, would then meet and cast votes for President and Vice President.

Historically, the counting of electoral votes has been for the most part a mere formality, because the result of the electoral vote has

1. In the Presidential election of 1800, the electors produced a tie vote by casting an equal number of votes for Thomas Jefferson and Aaron Burr. Thus the election had to be determined by the House of Representatives, which ultimately voted for Jefferson. See 3 Hinds' Precedents § 1931. For a general discussion of early electoral-count procedures, see 3 Hinds' Precedents §§ 1911–1980 and 6 Cannon's Precedents §§ 438–446.

almost invariably been the same as the result of the popular vote.[2]

The electoral vote has generally followed the popular vote because electors came to be chosen merely as representatives of the political parties and because the state legislatures adopted a unit-rule system under which all of a state's electoral votes are to be cast for the party which wins a plurality of popular votes statewide.

The 12th amendment states in part:

> The Electors shall meet in their respective states, and vote by ballot for President and Vice-President . . . 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 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; [t]he 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.

On the sixth day of January after the electors of the several states have met to cast votes for President and Vice President, the Congress, in accordance with the provisions of law,[3] convenes in joint session,[4] the Senate and House of Representatives meeting in the Hall of the House, to exercise its constitutional responsibility for counting the electoral vote.

At one o'clock in the afternoon on that day, the joint session of the two Houses is called to order by the President of the Senate,[5] the individual designated by statute[6] to serve as the joint session's presiding officer. Thereupon, the tellers,[7] who have previously been appointed on the part of each House,[8] take their respective places at the Clerk's desk. According to the alphabetical order of the states, all the previously transmitted certificates and papers pur-

2. There have been rare instances in which the result of the electoral vote has differed from the result of the popular vote. For example, in the Hayes-Tilden election of 1876, determinations by the House and Senate with respect to certain disputed electoral votes resulted in the election of Hayes, although Tilden had received a majority of the popular vote. See 3 Hinds' Precedents §§ 1953–1956.

3. 3 USC § 15.
4. See § 2.4, infra.
5. See § 2.5, infra.
6. 3 USC § 15.
7. See §§ 3.1–3.4, infra, for appointment of tellers.
8. See § 2.1, infra.

porting to be certificates of votes given by the electors are then opened by the President of the Senate and handed to the tellers.[9] Each certificate so received is read by the tellers in the presence and hearing of the two Houses. After the reading of each certificate, the President of the Senate calls for objections, if any.

In the event that a written objection should be raised, properly signed by at least one Senator and one Member of the House of Representatives, and when all objections so made to any vote or paper from a state have been received and read, the joint session divides, the Senate repairing to the Senate Chamber, and all such objections are submitted to and considered by each House meeting in separate session.[10]

Pursuant to the provisions of the U.S. Code, which govern the procedures in both Houses in the event they divide to consider an objection, each Senator and Representative may speak to such objection for five minutes, and not more than once; and after such debate has lasted two hours, the presiding officer of each House is required to put the main question without further debate.[11] When the two Houses have voted, they immediately again meet in joint session, and the presiding officer then announces the decision on the objections submitted.

Once all objections to any certificate or paper from a state have been so decided, or immediately following the reading of such certificate or paper when no objections thereto are raised, the tellers make a list of the votes as they appear from the certificates.[12] The result of the count is then delivered to the President of the Senate who thereupon announces the state of the vote. This announcement is deemed by law a sufficient declaration of the persons, if any, elected President and Vice President of the United States. The announcement, together with a list of the votes, is then entered in the Journals of the two Houses.[13]

In addition to its responsibilities in ascertaining and counting the electoral votes cast for President and Vice President, the Congress has been delegated a further constitutional duty relative to the selection of the Vice President. Pursuant to section 2 of the 25th amendment to the U.S. Constitution, whenever

9. See § 2.1, infra.
10. See § 3.6, infra.
11. 3 USC §§ 15, 17.
12. See 3 USC § 15.
13. 3 USC § 15.

there is a vacancy in the Office of Vice President the President nominates a Vice President to take office upon confirmation by a majority vote of both Houses.[14]

The House and Senate also have important responsibilities under the 20th and 25th amendments of the U.S. Constitution with respect to Presidential succession and disability. The 20th amendment sets forth the procedure to be followed when the President-elect and Vice President-elect fail to qualify at the commencement of their terms. Congress also has the duty, under the 25th amendment, of determining disputes as to Presidential disability.

Transmittal and Presentation of Certificates

§ 1.1 Copies of the certificates identifying the electors appointed in a state forwarded by the Governor of each state to the Administrator of General Services are, pursuant to 3 USC § 6, transmitted in turn to the House; on one occasion, where a certificate was received on the day reserved for the counting of the electoral votes, the Speaker, in order that the receipt of the certificate would appear in the Record before the proceedings of the joint session to count the electoral votes, laid the communication before the House at the beginning of the session.

On Jan. 6, 1961,[15] the Speaker[16] laid before the House the following communication which was read and, with accompanying papers, referred to the Committee on House Administration:

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., January 6, 1961.
Hon. SAM RAYBURN,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: Transmitted herewith is a copy of the certificate of ascertainment received today from the State of Hawaii, in conformity with the final clause of section 6, title 3, United States Code.

Sincerely yours,
FRANKLIN FLOETE,
Administrator.

STATE OF HAWAII.
TO THE ADMINISTRATOR OF GENERAL SERVICES, PURSUANT TO THE LAWS OF THE UNITED STATES.

I, William F. Quinn, Governor of the State of Hawaii, do hereby certify that the returns of votes cast for electors of President and Vice President of the United States of America, for the State of Hawaii, at an election held therein for that purpose, on the Tuesday after

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14. See §§ 4.1–4.3, infra.

15. 107 CONG. REC. 288, 87th Cong. 1st Sess.

16. Sam Rayburn (Tex.).

the first Monday in November, in the year of our Lord 1960, agreeably to the provisions of the laws of the said State, and in conformity with the Constitution and laws of the United States, for the purpose of giving in their votes for President and Vice President of the United States, for the respective terms prescribed by the Constitution of the United States, to begin on the 20th day of January in the year of our Lord 1961, were, ascertained by judgment of the circuit court of the first judicial circuit, State of Hawaii, in proceedings entitled *Herman T. F. Lum et al.*, v. *Gavien A. Bush et al.* (Civil No. 7029), entered on the 30th day of December A.D. 1960, and that the list of persons voted for and the number of votes cast for each, pursuant to said judgment, respectively, is as follows:

Republican Party: Gavien A. Bush, 92,295; J. Howard Worrall, 92,295; O. P. Soares, 92,295.

Democratic Party: William H. Heen, 92,410; Delbert E. Metzger, 92,410; Jennie Wilson, 92,410.

And I further certify that: William H. Heen, Delbert E. Metzger, and Jennie Wilson were appointed electors of President and Vice President of the United States of America, for the State of Hawaii, at said election.

Given under my hand and the seal of the State, this 4th day of January, in the year of our Lord 1961.

WILLIAM F. QUINN,
Governor of Hawaii.

§ 1.2 Where certificates of electoral votes had been received from different slates of electors from a state, and each slate purported to be the duly appointed electors from that state, the Vice President presented the certificates, with all attached papers, in the order in which they had been received.

On Jan. 6, 1961,[17] during proceedings in the joint session of the two Houses incident to the opening of the certificates and ascertaining and counting of the votes of the electors of the several states for President and Vice President, the presiding officer[18] handed to the tellers, in the order in which they had been received, certificates of electoral votes, with all attached papers thereto, from different slates of electors from the State of Hawaii. Without objection, the Chair instructed the tellers to count the votes of those electors named in the certificate of the Governor of Hawaii dated Jan. 4, 1961 (discussed more fully in § 3.5, infra).

§ 2. Joint Sessions to Count Electoral Votes

Concurrent Resolution Providing for Joint Session

§ 2.1 A concurrent resolution providing for a joint session to count

17. 107 CONG. REC. 288–91, 87th Cong. 1st Sess.
18. Richard M. Nixon (Calif.).

the electoral votes for President and Vice President may be originated by the Senate.

On Jan. 3, 1973,[19] Mr. Thomas P. O'Neill, Jr., of Massachusetts, called up and asked for the immediate consideration of a Senate concurrent resolution:

S. CON. RES. 1

Resolved by the Senate (the House of Representatives concurring), That the two Houses of Congress shall meet in the Hall of the House of Representatives on Saturday, the 6th day of January 1973, at 1 o'clock postmeridian, pursuant to the requirements of the Constitution and laws relating to the election of President and Vice President of the United States, and the President of the Senate shall be their Presiding Officer; that two tellers shall be previously appointed by the President of the Senate on the part of the Senate and two by the Speaker 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 by law 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.

The Senate concurrent resolution was agreed to.

Recesses

§ 2.2 The Speaker may be authorized to declare a recess in connection with the convening of the two Houses in joint session to count the electoral vote for President and Vice President.

On Jan. 3, 1973,[20] the House considered and agreed to a Senate concurrent resolution[1] providing for the convening on Jan. 6,

19. 119 CONG. REC. 30, 93d Cong. 1st Sess. For additional recent examples see 115 CONG. REC. 36, 91st Cong. 1st Sess., Jan. 3, 1969; 111 CONG. REC. 26, 89th Cong. 1st Sess., Jan. 4, 1965; and 107 CONG. REC. 26, 87th Cong. 1st Sess., Jan. 3, 1961.

20. 119 CONG. REC. 30, 93d Cong. 1st Sess. For further illustrations see 115 CONG. REC. 36, 91st Cong. 1st Sess., Jan. 3, 1969; 111 CONG. REC. 26, 89th Cong. 1st Sess., Jan. 4, 1965; and 107 CONG. REC. 26, 87th Cong. 1st Sess., Jan. 3, 1961.

1. S. Con. Res. 1.

1973, of a joint session of the two Houses to count the electoral vote. Mr. Thomas P. O'Neill, Jr., of Massachusetts, then made a unanimous-consent request, as follows:

MR. O'NEILL: Mr. Speaker, I ask unanimous consent that on Saturday, January 6, 1973, it may be in order for the Speaker to declare a recess at any time subject to the call of the Chair.

THE SPEAKER:[2] Is there objection to the request of the gentleman from Massachusetts?

There was no objection.

Parliamentarian's Note: The Speaker declares a recess of the House to enable the Members to reconvene in joint session with the Senate in the House Chamber.

§ 2.3 On the day fixed by law and concurrent resolution for the convening of the joint session to count the electoral votes for President and Vice President, the Speaker declined to recognize for one-minute speeches or extensions of remarks before recessing the House subject to the call of the Chair.

On Jan. 6, 1973,[3] the Speaker[4] made an announcement to the House:

THE SPEAKER: The Chair desires to make a statement.

The Chair desires deferment of unanimous-consent requests and also 1-minute speeches until after the formal ceremony of the day, which is the counting of the electoral votes for President and Vice President. Therefore, pursuant to the order adopted on Wednesday, January 3, 1973,[5] the Chair declares the House in recess until approximately 12:45 o'clock p.m.

Accordingly (at 12 o'clock and 3 minutes p.m.), the House stood in recess subject to the call of the Chair.

Convening of the Joint Session

§ 2.4 The two Houses convene in joint session to open the certificates and ascertain and count the votes cast by the electors of the several states for President and Vice President.

On Jan. 6, 1973,[6] the President of the Senate[7] called to order a joint session of the Senate and the House of Representatives, convened

2. Carl Albert (Okla.).
3. 119 CONG. REC. 378, 93d Cong. 1st Sess. For an additional example see 115 CONG. REC. 145, 91st Cong. 1st Sess., Jan. 6, 1969.
4. Carl Albert (Okla.).
5. 119 CONG. REC. 30, 93d Cong. 1st Sess.
6. 119 CONG. REC. 378, 93d Cong. 1st Sess. For other examples of joint sessions convened to count the electoral vote cast in recent elections see 115 CONG. REC. 145, 91st Cong. 1st Sess., Jan. 6, 1969; 111 CONG. REC. 136, 89th Cong. 1st Sess., Jan. 6, 1965; and 107 CONG. REC. 288, 87th Cong. 1st Sess., Jan. 6, 1961.
7. Spiro T. Agnew (Md.).

pursuant to the provisions of a Senate concurrent resolution[8] to carry out Congress' constitutional and statutory responsibilities relative to opening the certificates and ascertaining and counting the votes of the electors of the several states for President and Vice President.

Presiding Officer

§ 2.5 In the absence of the President of the Senate, the President pro tempore of the Senate presides over the joint session to count the electoral votes for President and Vice President.

On Jan. 6, 1969,[9] in the absence of the President of the Senate,[10] the President pro tempore of the Senate[11] presided over the joint session to count the electoral votes for President and Vice President of the United States.

Procedure

§ 2.6 Where the two Houses meet to count the electoral vote, a joint session is convened pursuant to a concurrent resolution of the two Houses which incorporates by reference the applicable provisions of the United States Code; and the procedures set forth in those provisions are in effect constituted as a joint rule of the two Houses for the occasion and govern the procedures in the joint session and in both Houses in the event they divide to consider an objection.

On Jan. 6, 1969,[12] the two Houses convened in joint session to count the electoral vote. The joint session was convened pursuant to a Senate concurrent resolution[13]

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8. S. Con. Res. 1, agreed to by the House at 119 CONG. REC. 30, 93d Cong. 1st Sess., Jan. 3, 1973. For additional examples of House agreement to concurrent resolutions providing for joint sessions to count electoral votes, see 115 CONG. REC. 36, 91st Cong. 1st Sess., Jan. 3, 1969; 111 CONG. REC. 26, 89th Cong. 1st Sess., Jan. 4, 1965; and 107 CONG. REC. 26, 87th Cong. 1st Sess., Jan. 3, 1961.
9. 115 CONG. REC. 145, 91st Cong. 1st Sess. See also 111 CONG. REC. 136, 89th Cong. 1st Sess., Jan. 6, 1965.
10. On Jan. 6, 1969, the President of the Senate, Hubert H. Humphrey, (Minn.), who was the incumbent Vice President and the losing candidate for President in the 1968 election, declined to preside over the joint session to count the electoral votes. On Jan. 6, 1965, the office of the President of the Senate was vacant, the former Vice President, Lyndon B. Johnson (Tex.), having ascended to the Presidency upon the death of his predecessor, Nov. 22, 1963.
11. Richard B. Russell (Ga.).
12. 115 CONG. REC. 145–47, 169–72, 91st Cong. 1st Sess.
13. S. Con. Res. 1.

which incorporated the vote-counting procedures set forth in 3 USC §§ 15–18. A written objection was made to the count of North Carolina's electoral vote. Thereupon, pursuant to the provisions of 3 USC §§ 15–18, the joint session divided, the Senate repairing to the Senate Chamber, and the objection was submitted to and considered in each House convened in separate sessions.

§ 3. Counting Votes; Objections to Count

House Tellers

§ 3.1 Tellers on the part of the House to count the electoral vote are appointed by the Speaker.

On Jan. 3, 1973,[14] the House had considered and agreed to a Senate concurrent resolution[15] providing for the convening of a joint session of the two Houses to count the electoral votes. The Speaker,[16] pursuant to the provisions of the concurrent resolution, appointed Mr. Wayne L. Hays, of Ohio, and Mr. Samuel L. Devine, of Ohio, as tellers on the part of the House to count the electoral votes.

§ 3.2 The Speaker has appointed the Chairman and ranking minority member of the Committee on House Administration as tellers on the part of the House to count the electoral votes.

On Jan. 3, 1969,[17] the Speaker[18] appointed as tellers on the part of the House to count the electoral votes Mr. Samuel N. Friedel, of Maryland, and Mr. Glenard P. Lipscomb, of California, who were, respectively, the Chairman and ranking minority member of the Committee on House Administration.

§ 3.3 Where a Member designated as a teller for counting the electoral ballots was unavoidably detained, the Speaker designated another Member to take his place.

On Jan. 6, 1949,[19] prior to the announcement of the arrival of the Senate for the meeting of the joint session of the two Houses to count

14. 119 CONG. REC. 30, 93d Cong. 1st Sess. For further illustrations see 115 CONG. REC. 36, 91st Cong. 1st Sess., Jan. 3, 1969; 111 CONG. REC. 26, 89th Cong. 1st Sess., Jan. 4, 1965; and 107 CONG. REC. 27, 87th Cong. 1st Sess., Jan. 3, 1961.
15. S. Con. Res. 1.
16. Carl Albert (Okla.).
17. 115 CONG. REC. 36, 91st Cong. 1st Sess.
18. John W. McCormack (Mass.).
19. 95 CONG. REC. 89, 81st Cong. 1st Sess.

the electoral vote, the Speaker[20] made an announcement to the House:

> THE SPEAKER: The gentleman from New York [Mr. Ralph A. Gamble] is unavoidably detained and is unable to serve as teller.
>
> The Chair designates the gentleman from Pennsylvania [Mr. Louis E. Graham] to act as teller in his stead.

Senate Tellers

§ 3.4 Tellers on the part of the Senate to count the electoral votes are appointed by the Vice President.

On Jan. 3, 1973,[1] following the Senate's consideration of and agreement to a concurrent resolution[2] providing for the convening of a joint session of the two Houses to count the electoral votes, the Vice President,[3] in accordance with the provisions of the concurrent resolution, appointed the Senator from Kentucky, Marlow W. Cook, and the Senator from Nevada, Howard W. Cannon, as the tellers on the part of the Senate to count the electoral votes.

Conflicting Electoral Certificates

§ 3.5 The two Houses, meeting in joint session to count the electoral votes, may by unanimous consent decide which of two conflicting electoral certificates from a state is valid; and the tellers are then directed to count the electoral votes in the certificate deemed valid.

On Jan. 6, 1961,[4] during proceedings in the joint session of the two Houses incident to the opening of the certificates and counting of the votes of the electors of the several states for President and Vice President, the President of the Senate[5] handed to the tellers, in the order in which they had been received, certificates of electoral votes, with all attached papers thereto, from different slates of electors from the State of Hawaii. The certificates were received and considered by the tellers, whereupon, the following proceedings occurred:

> THE VICE PRESIDENT: . . . The Chair has knowledge, and is convinced that he is supported by the facts, that

20. Sam Rayburn (Tex.).
1. 119 CONG. REC. 8, 93d Cong. 1st Sess. For other recent examples see 115 CONG. REC. 8, 91st Cong. 1st Sess., Jan. 3, 1969; 111 CONG. REC. 15, 89th Cong. 1st Sess., Jan. 4, 1965; and 107 CONG. REC. 72, 87th Cong. 1st Sess., Jan. 4, 1961.
2. S. Con. Res. 1.
3. Spiro T. Agnew (Md.).
4. 107 CONG. REC. 288–91, 87th Cong. 1st Sess.
5. Richard M. Nixon (Calif.).

the certificate from the Honorable William F. Quinn, Governor of the State of Hawaii, dated January 4, 1961, received by the Administrator of General Services on January 6, 1961, and transmitted to the Senate and the House of Representatives on January 6, 1961, being Executive Communication Number 215 of the House of Representatives, properly and legally portrays the facts with respect to the electors chosen by the people of Hawaii at the election for President and Vice President held on November 8, 1960. As read from the certificates, William H. Heen, Delbert E. Metzger, and Jennie Wilson were appointed as electors of President and Vice President on November 8, 1960, and did on the first Monday after the second Wednesday of December, 1960, cast their votes for John F. Kennedy of Massachusetts for President and Lyndon B. Johnson of Texas for Vice President.

In order not to delay the further count of the electoral vote here, the Chair, without the intent of establishing a precedent, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii.

If there be no objection in this joint convention, the Chair will instruct the tellers—and he now does—to count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961—those votes having been cast for John F. Kennedy, of Massachusetts, for President and Lyndon B. Johnson, of Texas, for Vice President.

Without objection the tellers will accordingly count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961.

There was no objection.

The tellers then proceeded to read, count and announce the electoral votes of the remaining States in alphabetical order.

Parliamentarian's Note: A recount of ballots in Hawaii, which was concluded after the Governor of that state had certified the election of the Republican slate of electors, threw that state into the Democratic column; the Governor then sent a second communication to the Administrator of General Services which certified that the Democratic slate of electors had been lawfully appointed. Both slates of electors met on the day prescribed by law, cast their votes, and submitted them to the President of the Senate pursuant to 3 USC § 11. When the two Houses met in joint session to count the electoral votes, the votes of the electors were presented to the tellers by the Vice President, and, by unanimous consent, the Vice President directed the tellers to accept and count the lawfully appointed slate.

Objections

§ 3.6 A formal objection was made to the counting of the electoral vote of a state, and the House and

Senate divided to separately consider the objection before proceeding with the counting.

On Jan. 6, 1969,[6] the President pro tempore of the Senate[7] called to order a joint session of the House and Senate for the purpose of counting the electoral votes for President and Vice President. When the tellers appointed on the part of the two Houses[8] had taken their places at the Clerk's desk, the President pro tempore handed them the certificates of the electors and the tellers then read, counted, and announced the electoral votes of the states in alphabetical order. The vote of North Carolina was stated to be 12 for Richard M. Nixon and Spiro T. Agnew for President and Vice President respectively and one for George C. Wallace and Curtis E. LeMay for President and Vice President respectively. Mr. James G. O'Hara, of Michigan, thereupon rose and sent to the Clerk's desk a written objection signed by himself and Edmund S. Muskie, the Senator from Maine, protesting the counting of the vote of North Carolina as read. The President pro tempore directed the Clerk of the House to read the objection, which stated:[9]

> We object to the votes from the State of North Carolina for George C. Wallace for President and for Curtis E. LeMay for Vice President on the ground that they were not regularly given in that the plurality of votes of the people of North Carolina were cast for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and the State thereby appointed thirteen electors to vote for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and appointed no electors to vote for any other persons. Therefore, no electoral vote of North Carolina should be counted for George C. Wallace for President or for Curtis E. LeMay for Vice President.
>
> JAMES G. O'HARA, M.C.
> EDMUND S. MUSKIE, U.S.S.

Following the President pro tempore's finding that the objection complied with the law[10] and his subsequent inquiry as to whether there were any further objections to the certificates from

6. 115 CONG. REC. 145, 146, 91st Cong. 1st Sess. For further discussion and excerpts from the debate, see §§ 3.7, 3.8, infra.
7. Richard B. Russell (Ga.).
8. Senator Carl T. Curtis (Neb.) and Senator B. Everett Jordan (N.C.) on the part of the Senate; Mr. Samuel N. Friedel (Md.) and Mr. Glenard P. Lipscomb (Calif.) on the part of the House.
9. 115 CONG. REC. 146, 91st Cong. 1st Sess., Jan. 6, 1969.
10. 3 USC § 15.

the State of North Carolina, the two Houses separated to consider the objection, the Senate withdrawing to the Senate Chamber.

The legal basis for the objection was contained in 3 USC § 15, which provided in relevant part:

> . . . [A]nd 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.

Those supporting the objection in the House and Senate contended that the votes of one North Carolina elector had not been "regularly given" and should therefore be rejected.

The background of the objection was explained by Senator Muskie during his opening remarks in the Senate debate on the objection:[11]

> In this case, a North Carolina elector was nominated as an elector by a district convention of the Republican Party in North Carolina. He did not reject that nomination. His name was not placed on the ballot because under North Carolina law, as in the case of 34 other States, only the names of the party's presidential and vice-presidential candidates appear, and electors are elected for the presidential and vice-presidential candidates receiving the plurality of the vote in North Carolina.
>
> Dr. Bailey and 12 other North Carolina Republican electors were so elected on November 5. The election was certified. Dr. Bailey did not reject that election or that certification. So up to that moment, so far as the people from North Carolina understood, he was committed as an elector on the Republican slate, riding under the names of Richard M. Nixon and Spiro T. Agnew, to vote for that presidential and vice-presidential ticket.
>
> On December 16, the electors of North Carolina met in Raleigh to cast their votes. . . . It was at that point that Dr. Bailey decided to cast his vote for the Wallace-LeMay ticket instead.

In the House, Mr. Roman C. Pucinski, of Illinois, made a similar presentation.[12]

During debate on the objection in both the House and the Senate, proponents of the objection focused on several key arguments in support thereof. It was argued that the elector had at least a moral commitment to vote for the Republican candidates—a commitment made more compelling in the light of custom and practice since the

11. 115 CONG. REC. 211, 91st Cong. 1st Sess., Jan. 6, 1969.

12. *Id.* at pp. 159, 160.

adoption of the Constitution,[13] and reliance by the voters on the elector's conduct and apparent intentions.[14] Senator Muskie stated:[15]

> [A]s I understand it, the Constitution, as interpreted by the debates in the Constitutional Convention, clearly makes an elector a free agent. However, from the beginning of the country's history, political parties developed, and the political parties arranged for slates of electors assigned to their presidential and vice-presidential candidates. That political party slate of candidates has always been regarded, with but five other exceptions, as binding upon those who are electors on that slate.
>
> So I argue that in the light of that tradition, when an elector chooses to go on a party slate, he is indicating his choice for President.
>
> I say, secondly, that in the case of North Carolina and this statute, which is found also in 34 other States, the fact that only the presidential and vice-presidential names appear on the ballot is confirmation of this tradition; that when an elector accepts a place on a slate under these circumstances, in the light of this tradition, he knows that to the public at large he is saying, by his action, "I am for Nixon for President." He is saying implicitly, in my judgment, "If I am elected an elector under these circumstances, I will vote for Richard Nixon for President."
>
> I believe that is the tradition. I believe that this undergirds the responsibility of an elector; and once he has set that train of understanding in motion, he cannot, after election day, when it is too late for the voters to respond to any change of mind on his part, say, "I changed my mind, and I am going to vote for somebody else." It is in the nature of estoppel.

Those opposed to the objection argued that the electors were "free agents" [16] under the Constitution,[17] permitted to vote for whomever they pleased. According to such view, Congress, under the Constitution and 3 USC § 15, exercised only a ministerial function in counting the electoral ballots, and such ballots could be discounted only if the certificates were not in regular form or were not authentic.[18]

13. See remarks of Mr. Edward P. Boland (Mass.), *id.* at pp. 165, 166, and remarks of Mr. O'Hara, *id.* at p. 169.
14. See, for example, the remarks of Senator Frank Church (Idaho), *id.* at p. 214.
15. *Id.* at p. 212.
16. See the remarks of Mr. William M. McCulloch (Ohio), *id.* at p. 148; Mr. Richard H. Poff (Va.), *id.* at p. 158; Senator Ralph W. Yarborough (Tex.), *id.* at p. 217; Senator Robert C. Byrd (W. Va.), *id.* at p. 245.
17. Relevant provisions are art. II, § 1, clause 3; and the 12th amendment.
18. See remarks of Mr. John B. Anderson (Ill.), 115 CONG. REC. 151, 91st Cong. 1st Sess., Jan. 6, 1969; Mr. Bob Eckhardt (Tex.), *id.* at p. 164; Senator Curtis, *id.* at pp. 219, 220;

It was also noted that North Carolina had not adopted a law, as had a majority of states, requiring the electors to pledge to support their party's nominee;[1] this raised, in the view of some, an implication that North Carolina did not intend its electors to be bound to support particular party nominees. Senator Edward M. Brooke, of Massachusetts, made the following remarks:[2]

> In a system of constitutional government matters of procedure often become vital issues of substance. I submit that such a case is now before us. There are strong constitutional grounds for the authority of a State to bind its electors to vote as they are pledged. If a State has so bound its electors, I would contend that the Congress can properly act to see that the State's legal requirements are fulfilled. This would be a reasonable construction of the 1887 statute which provides that Congress can reject an elector's vote which has not been regularly given.
>
> But it is my considered opinion that, unless the State chooses to bind its electors, Congress cannot do so after the fact.
>
> Among the many serious implications of this situation, one lesson in particular stands out:
>
> No official should ever be granted discretionary authority unless the people clearly understand that, under some circumstances, he may actually use it. And if such authority, once granted, is deemed excessive or unwise, the people should explicitly and promptly rescind it.
>
> As I understand the relevant constitutional guidelines, the power to remedy this particular problem lies with the people of North Carolina acting through their representative institutions at the State level. . . .
>
> In addition, however, there is a national interest in removing so critical a loophole in our constitutional system. If the electoral college is to remain an element in our political life, surely we should move to design a constitutional amendment which, once and for all, binds electors to vote for the candidates to whom they are pledged. I hasten to add that this possible change in our electoral system will certainly not suffice. Indeed, one of the paramount tasks of this Congress will be to examine the full range of constitutional proposals to create a fair and secure procedure for presidential elections.

In addition to the views stated above by Senator Brooke, several of those speaking to the objection expressed support for a constitutional amendment to reform the electoral system, a remedy which,

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Senator Herman E. Talmadge (Ga.), *id.* at p. 223.

1. See remarks of Mr. Alton A. Lennon (N.C.), *id.* at pp. 149, 150. The Supreme Court in *Ray* v *Blair,* 343 U.S. 214 (1952), upheld the constitutionality of state laws requiring an elector to pledge to support the nominee of his political party.
2. *Id.* at p. 213.

it was argued, would be preferable to "piecemeal" changes to be achieved under present law.[3]

At the conclusion of debate in each House, the yeas and nays were ordered and the House and Senate respectively rejected the objection.[4] Thereupon, the Senate reassembled in the Chamber of the House in joint session.[5] The President pro tempore called the meeting to order and directed the Secretary of the Senate and the Clerk of the House to report the action taken by the two Houses. Following the report, the President pro tempore directed the tellers to record and announce the vote of the State of North Carolina, and the counting of the electoral votes proceeded.

§ 3.7 Under the statute prescribing the procedure for consideration by the respective Houses of an objection to a state's electoral vote count, a motion to lay the objection on the table is not in order.

On Jan. 6, 1969,[6] following the raising of an objection to the count of North Carolina's electoral vote, the joint session of the two Houses divided (the Senate repairing to the Senate Chamber), so that the objection could be considered by each House meeting in separate session. The House was called to order by the Speaker[7] and debate on the objection ensued, at the conclusion of which a motion was made by Mr. Gerald R. Ford, of Michigan, to lay the objection on the table.

A point of order against the motion was made by Mr. James G. O'Hara, of Michigan, asserting that the motion to table such an objection was inconsistent with the

3. See, for example, the remarks of Mr. Hamilton Fish, Jr. (N.Y.), *id.* at p. 168.

Among those Members and Senators who favored a constitutional amendment to revise the electoral system were Mr. Hale Boggs (La.), *id.* at p. 151; Mr. Emanuel Celler (N.Y.), *id.* at p. 149; Mr. Phillip Burton (Calif.), *id.* at p. 160; Mr. Charles A. Vanik (Ohio), *id.* at p. 168; Senator Karl E. Mundt (S.D.), *id.* at p. 216; Senator Birch Bayh (Ind.), *id.* at p. 218; Senator Harry F. Byrd, Jr. (Va.), *id.* at p. 221; and Senator Robert C. Byrd (W.Va.), *id.* at pp. 244, 245. It was pointed out by Senator Muskie, however, that over 500 resolutions had been introduced to reform the electoral system by constitutional amendment during the history of the Republic. *Id.* at p. 220.

4. See § 3.7, infra.

5. 115 CONG. REC. 171, 91st Cong. 1st Sess., Jan. 6, 1969.

6. 115 CONG. REC. 145–47, 169–72, 91st Cong. 1st Sess.

7. John W. McCormack (Mass.).

requirement of 3 USC § 17, that after two hours of debate in each House on the objection to the count of a state's electoral vote, "it shall be the duty of the presiding officer of each House to put the main question without further debate."

After further debate, the Speaker sustained the point of order. He stated:

> It seems to the Chair that the law [3 USC § 17] is very plain with respect to the 5-minute rule and time of debate. With respect to the problem, the section states, and I quote:
>
> > It shall be the duty of the presiding officer of each House to put the main question without further debate.
>
> In the opinion of the Chair the main question is the objection filed by the gentleman from Michigan (Mr. O'Hara) and the Senator from Maine, Senator Muskie.
>
> The Chair is of the opinion that the law plainly governs the situation; that the Chair must put the main question and that the motion to table is not in order.
>
> Accordingly, the Chair sustains the point of order.

The question on agreeing to the objection was taken; the objection being rejected—yeas 170, nays 228, not voting 32, not sworn 4. A motion to reconsider was laid on the table.

A similar situation arose in the Senate, during proceedings relating to the objection to the North Carolina vote. The Senate had been called to order by President pro tempore Richard B. Russell, of Georgia, who then directed the Clerk to read the objection, as follows:[8]

> We object to the votes from the State of North Carolina for George C. Wallace for President and for Curtis E. LeMay for Vice President on the ground that they were not regularly given in that the plurality of votes of the people of North Carolina were cast for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and the State thereby appointed 13 electors to vote for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and appointed no electors to vote for any other persons. Therefore, no electoral vote of North Carolina should be counted for George C. Wallace for President or for Curtis E. LeMay for Vice-President.

Following a statement by the President pro tempore that this was an unusual parliamentary situation in that it was the first time an objection to an electoral vote had been filed,[9] and a reading by the

8. 115 CONG. REC. 210, 91st Cong. 1st Sess.

9. According to Minority Leader Everett McK. Dirksen (Ill.), this was also the first time the Senate had operated under the five-minute rule. *Id.* at p. 223.

Clerk of the provisions of 3 USC § 17, the Senate agreed to a unanimous-consent request by Edmund S. Muskie,[10] the Senator from Maine, that the time be divided equally between proponents and opponents of the objection, with time for the proponents to be allotted under the direction of the Majority Leader, Michael J. Mansfield, of Montana, and time for the opponents to be allotted under the direction of Senator Dirksen. Debate on the objection then proceeded.

During the debate on the objection, Edward M. Kennedy, the Senator from Massachusetts, inquired as to whether a motion to lay the objection on the table would be in order:[11]

> MR. KENNEDY: Mr. President, may I propound a parliamentary inquiry whether the motion to table is in order or is not in order?
>
> THE PRESIDENT PRO TEMPORE: The Chair would rule that it is not in order. The statute under which we are now proceeding states the main question shall be put. Let the Chair read the last clause of section 17 of title 3:
>
> 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.

10. *Id.* at p. 211.
11. *Id.* at p. 223.

At the conclusion of the two hours of debate, the question on agreeing to the objection was taken; and the objection was rejected (yeas 33 and nays 58). A motion to reconsider was laid on the table.[12] Subsequently, at the resumption of the joint session, the Presiding Officer directed the tellers to announce and record the electoral votes of North Carolina as submitted.

§ 3.8 During consideration of an objection to the electoral vote count of a state, unanimous consent was sought for purposes of modifying the procedures prescribed by statute for consideration of such objections; after discussion and rejection of such request, a subsequent unanimous-consent request was agreed to which qualified the terms of the statute.

During proceedings arising from an objection to the count of electoral votes of North Carolina,[13] the following statutory provision[14] was read in the Senate:[15]

12. *Id.* at p. 246.
13. See § 3.6, supra.
14. 3 USC § 17.
15. 115 CONG. REC. 210, 91st Cong. 1st Sess., Jan. 6, 1969.

> 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.

Senator Edmund S. Muskie, of Maine, then made the following unanimous-consent request:

> . . . I ask unanimous consent that debate on objections to the electoral vote of North Carolina for George C. Wallace and Curtis LeMay shall be limited to 2 hours, as provided by law in section 17, title 3, United States Code, and that the time be equally divided and controlled by the majority leader and the minority leader.

Discussion ensued as to the effect of the request and the appropriateness of adopting procedures that, in the view of some Senators, would constitute a departure from the terms of the statute.

As background to the discussion, it may, of course, be noted that, under the Constitution,[16] "Each House may determine the Rules of its Proceedings," so that there was no absolute legal obstacle to the Senate's adoption of whatever procedures seemed appropriate at the time. It may also be noted that the terms of the unanimous-consent request did not on their face necessarily contravene the statute. But it will be observed that the Chair declined to pass upon the effect or legality of the unanimous-consent request, and stated that a single objection to the request would preserve procedures under the statute.

The Chair did remark that unanimous-consent requests are entertained that are seemingly "in conflict with" both statutes and the Constitution. Citing the constitutional requirement of the quorum, he said:

> . . . We see suggestions of the absence of a quorum made several times during the day and withdrawn by unanimous consent. . . .

It may perhaps be implied from the Chair's remarks here and throughout the debate that a proposed departure from statutory provisions such as those in question is in any event permissible if no point of order or objection is raised.

16. U.S. Const. art. I, § 5.

The proceedings relating to Senator Muskie's unanimous-consent request were in part as follows:[17]

MR. [CARL T.] CURTIS [of Nebraska]: Is a unanimous-consent request in order which, by its terms, is not in accord with a duly enacted statute?

THE PRESIDENT PRO TEMPORE:[18] The Chair will state that unanimous-consent requests can also be received and entertained here that are in conflict with the statutes. Sometimes they are in conflict with the Constitution.

We have three sets of rules in the Senate. Some of them are spelled out in the Constitution, others are spelled out in the Senate rule book, and the great majority of them are embraced in the precedents of the Senate.

For example, one of the constitutional rules had to do with ascertaining the presence of a quorum. We see suggestions of the absence of a quorum made several times during a day, and withdrawn by unanimous consent. That can be done only by unanimous consent. If the proposal of the Senator from Maine can be made only by unanimous consent, any single Senator who thinks it is improper, and that we should follow the statute in this particular case—has a right to destroy it completely by uttering two words—"I object," and the proposal will fall.

MR. [EDWARD W.] BROOKE [of Massachusetts]: Mr. President, reserving the right to object, do I understand the only difference between the unanimous-consent request and the statute to be that the time would be controlled by the Chair and not by the majority and minority leaders, under the statute?

MR. MUSKIE: As the unanimous-consent request is worded, time would be under the control of the majority and minority leaders.

MR. BROOKE: That is the only thing that was intended to be achieved by the unanimous-consent agreement?

MR. MUSKIE: Plus liberalizing the 5-minute requirement. The statute requires that each Senator may speak for 5 minutes, and not more than once. This was discussed quite extensively, and it was felt that the ideal arrangement would be to have full and free debate, with the time controlled and free exchange between Senators. It was felt that this could be done, unless a Senator objected; so we decided to make the effort. . . .

MR. [FRANK] CHURCH [of Idaho]: Mr. President, I have no desire to object, but I do not understand how this can be a proper proceeding.

THE PRESIDENT PRO TEMPORE: The Chair is not permitted to enter any ruling that purports to pass upon the legality of a unanimous-consent request, any more than is any other Member of this body.

Is there objection?

MR. BROOKE: Mr. President, it seems to me that the intent of the statute is to give as many Senators as possible an opportunity to be heard on this important issue. As I understand the distinguished Senator from Maine, under the unanimous-consent request, conceivably the distinguished Senator might use 1 hour of the time, and one

17. 115 CONG. REC. 210, 211, 91st Cong. 1st Sess., Jan. 6, 1969.
18. Richard B. Russell (Ga.).

Senator from the minority side use 1 hour of the time, which in my opinion would certainly frustrate the intent of the statute. I feel so strongly about it, Mr. President, that as much as I dislike to do so, I hereby object.

THE PRESIDENT PRO TEMPORE: The Senator from Massachusetts objects. The Chair, having tolerated considerable discussion and parliamentary inquiries, now asks of the Senate unanimous consent that that time not be charged against the 2 hours. If there is no objection, it will not be charged; and that leaves the matter open for the Chair to recognize Senators who wish to speak on this subject.

The Chair recognizes the Senator from Maine for 5 minutes.

MR. MUSKIE: Mr. President, I anticipated that this might result, and I fully understand the reservations expressed by Senators. I have another unanimous-consent request to propose. I ask unanimous consent that debate be limited to 2 hours, as provided by statute, that the time be equally divided and controlled by the majority leader and the minority leader, and that the statutory limitation of 5 minutes per Senator be included, but that the 5 minutes available to any Senator may be used to ask or answer questions.

The purpose of this request, Mr. President, is to do two things: First, to insure that both sides of the debate shall have equal access to the attention of the Senate; second, that the use of the 5 minutes shall not be so rigid that there cannot be the kind of exchange that would permit the answering of questions on the minds of Senators. The Parliamentarian has advised me that, in his judgment, this is consistent with the statute. It touches upon points not covered by the statute, and it embraces the limitations of the statute. . . .

THE PRESIDENT PRO TEMPORE: Is there objection to the unanimous-consent request? The Chair hears none, and the request is agreed to.

§ 4. Presidential Nominations for Vice President

Transmittal Message

§ 4.1 When the President, pursuant to section 2 of the 25th amendment to the Constitution, nominates a Vice President to take office upon confirmation by a majority vote of both Houses, a message transmitting his nomination is laid before the House by the Speaker.

On Oct. 13, 1973,[19] the Speaker[20] laid before the House the following

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19. 119 CONG. REC. 34032, 93d Cong. 1st Sess. For proceedings incident to the Senate's receipt of a similar message see 119 CONG. REC. 34111, 93d Cong. 1st Sess., Oct. 13, 1973.

See 120 CONG. REC. 29366, 93d Cong. 2d Sess., Aug. 20, 1974, for similar proceedings relating to the nomination of Nelson A. Rockefeller as Vice President.

20. Carl Albert (Okla.).

message from the President of the United States:

> *To the Congress of the United States:*
> Pursuant to the provisions of Section 2 of the Twenty-fifth Amendment to the Constitution of the United States, I hereby nominate Gerald R. Ford, of Michigan, to be the Vice President of the United States.
>
> RICHARD NIXON,
> THE WHITE HOUSE,
> *October 13, 1973.*

Referral to Committee

§ 4.2 The Speaker referred the President's nomination of a Vice President to the Committee on the Judiciary, which has jurisdiction over matters relating to Presidential succession.

On Oct. 13, 1973,[1] the Speaker[2] referred to the Committee on the Judiciary a message from the President of the United States nominating a Vice President.

1. 119 CONG. REC. 34032, 93d Cong. 1st Sess. See 119 CONG. REC. 34111, 93d Cong. 1st Sess., Oct. 13, 1973, where, in the Senate, the nomination was referred to the Senate Committee on Rules and Administration.
   Similarly, on Aug. 20, 1974, the nomination by President Gerald R. Ford of Nelson A. Rockefeller as Vice President was referred in the House to the Committee on the Judiciary. See 120 CONG. REC. 29366, 93d Cong. 2d Sess.
2. Carl Albert (Okla.).

Confirmation

§ 4.3 The House agreed to a resolution confirming a Presidential nomination for Vice President of the United States and then received a message from the Senate announcing that body's confirmation of the nomination.

On Dec. 6, 1973,[3] pursuant to a special order,[4] the House considered and agreed to a resolution (H. Res. 735) reported from the Committee of the Whole House on the state of the Union confirming a Presidential nomination for Vice President of the United States:

> *Resolved,* That the House of Representatives confirm the nomination of Gerald R. Ford, of the State of Michigan, to be Vice President of the United States.

A motion to reconsider was laid on the table.

Thereupon, the House received a message from the Senate an-

3. 119 CONG. REC. 39899, 39900, 93d Cong. 1st Sess.
4. See 119 CONG. REC. 39807, 39812 39813, 93d Cong. 1st Sess., Dec. 6, 1973, for proceedings incident to the House's agreement to a resolution, H. Res. 738, making in order consideration of the confirmation resolution.

nouncing that body's confirmation[5] of the nomination.

Similarly, on Dec. 19, 1974,[6] pursuant to a special order, House Resolution 1519,[7] the House considered and agreed to a resolution (H. Res. 1511) reported from the Committee of the Whole House on the state of the Union confirming a Presidential nomination for Vice President of the United States:

> *Resolved,* That the House of Representatives confirm the nomination of Nelson A. Rockefeller, of the State of New York, to be Vice President of the United States.

A motion to reconsider was laid on the table.

Thereupon, the House received a message from the Senate announcing that body's confirmation[8] of the nomination.

5. For proceedings incident to the Senate's confirmation of the nomination see 119 CONG. REC. 38224, 38225, 93d Cong. 1st Sess., Nov. 27, 1973.
6. 120 CONG. REC. 41516, 41517, 93d Cong. 2d Sess.
7. See *id.* at pp. 41419–516, for text of H. Res. 1519 and debate on H. Res. 1511.
8. For proceedings incident to the Senate's confirmation of the nomination, see 120 CONG. REC. 38918–36, 93d Cong. 2d Sess., Dec. 10, 1974.