

The Breakfast Club

Constitutional Minute for 23 November 2024

The Electoral Vote Count

On February 11, 1801, the sitting Vice President, as President of the Senate, began to count the electoral votes from the previous Fall's presidential election, as required by the U.S.

Constitution. Thomas Jefferson already knew his fledgling Democrat Republican party had gained enough electors in enough states to assure he and Aaron Burr a victory. He had been told that two South Carolina electors would withhold their votes from Burr, avoiding a tie vote and assuring Jefferson the presidency. As Jefferson proceeded to open Georgia's Certificate of Votes, he noticed an irregularity, the certificate did not seem to conform to the constitutional requirement that:

"The Electors shall ... shall make a List of all the Persons voted for, and of the Number of Votes for each; ..."

Instead, Georgia's certificate simply listed the names of the four electors who had voted for Thomas Jefferson and Aaron Burr. Jefferson knew that had he disallowed the four votes based on this "irregularity" he and Burr would fall one vote of the majority (70) needed to win the election. Instead of asking whether there were objections to Georgia's certificate, as John Adams had done four years earlier when he faced a similar situation, Jefferson simply allowed the votes to be tallied to him and Burr.

As journalist Holly Brewer convincingly argues, the envelope in which Georgia's certificate came in contained the missing information and should have been accepted without controversy. Approaching the electoral count of the 2020 election, Brewer's arguments helped to convince Vice President Pence he did not have the inherent power to accept or reject electoral vote certificates based on their form, a point subsequently made crystal clear the following year when the *Electoral Count Reform and Presidential Transition Improvement Act of 2022* was passed.

On January 6th 2025, at 1pm, all TVs in America will be tuned to CSPAN as it covers, live, the electoral vote count of the 2024 election. Well, maybe that's a bit optimistic, perhaps not ALL Americans are going to tune into this historic event. OK, maybe only a few more than the 47 million reported C-SPAN viewers¹ will tune in. But I'm willing to bet that some of, perhaps all of the mainstream channels will pick up CSPAN's broadcast. Democrats announced prior to the election that if Trump won, they were going to object during the count.

But let's not get ahead of ourselves, several other events must happen before we get to January 6th, and problems in one or more of them could throw a very real monkey wrench in the works.

Most of the following timeline comes from [United States Code Title 3](#), Chapter 1, but if you have not yet encountered the [Congressional Research Service](#), you should bookmark their webpage; they have a plethora of very well-researched reports to choose from on this and related topics.

November 5th, 2024 — The 51 separate state elections took place (and some votes are STILL being counted two weeks later as I write this!) The amazing results produced a feeling on the Right is that this election could be revolutionary.

NLT 11 December 2024 — “Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.”²

How do we know what day is “fixed” for the electors to render their votes? That’s found two sections later in Section 7 of Chapter 1, which reads:

“The electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December³ next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day.”

Prior to 2022, all these procedures were set by the *Electoral Vote Count Act of 1887*. Note that it took Congress a hundred years to get around to codifying these procedures. Following the 2020 election, the *Electoral Count Reform and Presidential Transition Improvement Act of 2022* (ECRA) was passed and tightened the procedures considerably.⁴

The first Tuesday after the second Wednesday in December is December 17th and according to [Virginia law](#), the Electors meet at noon that day at the Capitol in Richmond. Since Kamala Harris received 2,334,86 votes (51.03%) to Donald Trump’s 2,074,901 votes (46.06%) the thirteen lucky electors will all be Democrats.

What’s a Certificate of Ascertainment look like? The U.S. Archivist posts these important documents [here](#) on a page dedicated to each presidential election. The [2020 Election documents](#) are all posted, but obviously it is too early for any [2024 documents](#). They will come.

December 17th — On December 17th:

“The electors shall make and sign six 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 of votes one of the certificates of ascertainment of appointment of electors which shall have been furnished to them by direction of the executive of the State.”

As you’ll see by comparing the documents from different elections and across several states, each state formats their certificates, both of ascertainment and votes, however they wish, as long as they satisfy the minimal requirements stated in the 12th Amendment.

Section 11, *Transmission of certificates by electors*, covers what happens next.

After being sealed, one set of these documents is sent to the President of the Senate (Kamala Harris), two sets are sent to the chief election officer of the State (the Commissioner of Elections, Susan Beals), two sets are sent to the Archivist of the United States (which happens to be [Dr. Colleen J. Shogan](#)) and one final set is sent to the judge of the district in which the electors shall have assembled (Richmond General District Court, the Hon. David Eugene Cheek Sr., Presiding). Section 11 contains further details about what each recipient must do with the documents.

December 25th — If any state's documents are not received by the President of the Senate or the Archivist by the fourth Wednesday in December, the President of the Senate must ask the Chief Election Officer of the state (Commissioner Beals) to send one of their two copies, post haste. A similar request may be made of the District Court.

The certificates of votes remain sealed until the Vice President opens them on the day of the count and hands them to "tellers" to read out and tally, so once they leave the state capitol there is no opportunity to "cure" any defects. I don't know whether the copies sent to the Commissioner of Elections, or the Court are made available for public inspection.

January 3rd — The newly elected (or reelected) members of Congress take their oath of office in a joint session. The oath they take (since 1884) is as follows:

"I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God."

January 6th — And then, the main event: the pièce de resistance, the crowning moment (without the crown of course), i.e., the actual electoral vote count and declaration of the new President and Vice President.

For the first one hundred years under the new Constitution, there were few set procedures for the actual counting of electoral votes. It was mostly conducted by custom. After some breath-taking irregularities in the [1876 election](#) (which you simply must read to believe), the Electoral Count Act was passed in 1887 and finally established procedures and responsibilities for this event. The actual Act of Congress, as it appeared in the Congressional Record, can be found [here](#).

It's an orderly process that, barring objections, takes about 30-45 minutes, certainly less than an hour: Each set of electoral vote certificates is opened by the President of the Senate, in alphabetical order of the states -- beginning with Alabama and ending with Wyoming -- and then handed to two sets of "tellers," one set from the House and one from the Senate. The tellers read the votes as contained on the certificates in such a manner that the votes can be heard by all present and then they record the votes in a log. At that moment the President of the Senate will ask if there are any objections to the votes as read. As you might imagine, here's where it gets interesting.

Objections must be submitted in writing, and must contain information that forms the substance of the objection. This can't therefore be a "spur of the moment" thing, it must be pre-planned, so there must be foreknowledge of any "irregularities." Prior to 2022, the objection had to be signed by one Representative and one Senator and objections; objections from a House member often failed because no Senator would sign them. Today, an objection must contain the signatures of 1/5th of the members of each chamber: 20 Senators and 87 Representatives. Note: this will be the first electoral vote count conducted under the 2022 procedures.

Objections can only be made on two grounds: The votes were not "lawfully certified," or they were not "regularly given." "Lawfully certified" deals with the process of appointing and certifying electors; "regularly given" deals with the votes themselves.

Improper certification could occur if a Governor submits the votes from two different slates of electors, or the wrong electors, leaving Congress to sort things out (as has happened), or electors do not meet the criteria to be electors (ex: they are a member of Congress, work for the federal government or are not a registered voter).

"Regularly given" is a term of art not well defined or understood, particularly by members of Congress, as [this Georgia Law Review article](#) makes clear. Congressmen and women have often entered "not regularly given" objections that dealt with certification problems or irregularities in the election itself. Objections over the election should be ruled out of order, but might not be.

The author of the Law Review article sees five circumstances that he believes would satisfy the "not regularly given" condition:

First, the elector may have cast a vote for a candidate who is ineligible to be President (Donald Duck?); a dead candidate (ex: the candidate died just before or after the election, as has happened, see [1872](#) or [1912](#)). Some states have laws binding electors to vote for the winner of the election, whether dead or alive, others do not). Voting for a candidate who had been impeached and barred from holding further office; or one who had been disqualified under the Fourteenth Amendment would be grounds for objection. Despite the Supreme Court's decision in [Trump v Anderson](#) (whether a state can unilaterally remove a candidate from their ballot), some Congressman may still try this objection in the upcoming count, I wouldn't put it past them.

Second, the elector may have cast a vote at the wrong time or in the wrong place (not very likely given the formality of the event).

Third, the elector cast a vote in the wrong manner (again, not very likely given the ceremonial aspect of the event).

Fourth, the electors did not report their votes to Congress according to law (ditto).

Fifth, the elector's vote was the product of duress, bribery, corruption, or other improper influence (obviously only if it was discovered).

Here's where we must discuss "faithless electors." If an elector entered a vote for "Donald Duck," the vote would not be properly given because Donald Duck was not a candidate on the ballot (nor did Mr. Duck, not being a "person," meet the qualifications for President). If an elector voted for a different party's candidate and not the candidate he was pledged to, I think the objection would not be sustained and the vote would be counted, but it's not entirely clear.

If you consult the official electoral count of the [2016 election](#) you'll see Donald Trump is credited with 304 electoral votes and Hillary Clinton with 227. This adds up to 531, not 538. The missing seven electoral votes were the result of "faithless electors" and the particulars are discussed [here](#).

Wikipedia discusses the general topic of "faithless electors" [here](#).

If all the aforementioned conditions are met, the Senators will retire to the Senate chamber to debate the validity of the objection while the House remains to do likewise in the House chamber. A maximum of two hours of debate is permitted and each member is entitled to speak once, for no more than five minutes, in favor of or opposing the objection. At the conclusion of the two hours of debate (or sooner if it ends), each chamber will vote, by individual, and a majority vote will be necessary to sustain the objection. If the objection is sustained, the disputed electoral votes will not be counted for the intended candidate. Both Democrats and Republicans have objected to electoral votes during previous vote counts. Here's [a list of Democrat attempts](#).

A total of 42 electoral votes would have to be objected to and sustained in order to jeopardize Trump's victory. Keep in mind that it is the incoming Congress that conducts this Count. With new Republican majorities in both chambers, it is difficult to conceive of any objection being sustained.

Title 3, Chapter 1 of the US Code contains other administrative provisions that do not concern us today, such as where chairs for certain officials are to be positioned. For our purposes today the Code concludes by saying:

"The tellers shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses." (Emphasis added)

Two weeks later Donald Trump will take his oath as the 47th President of the United States and get to work, on Day 1, making America great, once again.

For further reading:

[Why We Need the Electoral College, by Tara Ross, 2019](#)

[Supreme Court Clarifies Rules for Electoral College: States May Restrict Faithless Electors](#), Congressional Research Service.

[Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress](#), Congressional Research Service.

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¹ <https://en.wikipedia.org/wiki/C-SPAN>

² USC Title 3 Chapter 1 Section 5.

³ This used to state: “the first Monday after the second Wednesday” -Public Law 117–328 changed the day to the first Tuesday. If you are interested, I’m sure the [Congressional Record](#) would tell you why the change of one day was so important.

⁴ The ECRA was attached to a 4000-page “must pass” appropriations bill intended to avert a government shutdown. Many of its provisions were intended to forestall another January 6th, 2021 event.