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## Electoral Vote Counts in Congress: Survey of Certain Congressional Practices

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# Electoral Vote Counts in Congress: Survey of Certain Congressional Practices

## Summary

This report surveys certain aspects of the historical congressional practice in counting the presidential electoral votes in Congress. The particular focus of the survey is upon the questions that have arisen as to the practice in the Congress of rejecting electoral votes from electors in a state, the kinds of objections that have been raised to electoral votes, the disposition of such objections, and if electoral votes are rejected by Congress, or are not given by the electors in a state, whether those votes not given or not counted are then to be deducted from the “whole number of Electors appointed,” such that a different, and lesser “majority” of the remaining electors would be necessary to elect a President.

Objections in the Congress to particular electoral votes, or slates of votes from a state have not been frequent occurrences during the congressional vote count. The joint sessions of 1873 and 1877 are the most noteworthy exceptions. Since 1887 and the adoption of codified procedures in federal law concerning the giving and counting of electoral votes, there has been only one objection raised in Congress to an electoral vote (1969), and that objection to the vote of a so-called “faithless elector” was not sustained, and the vote was counted as cast. Even more rare is an objection that is sustained and electoral votes from a state not counted, although this did happen in 1873 with regard to the election of 1872, in the case of the electoral votes from Arkansas and Louisiana (found not to have been given by the electors selected on election day and properly certified), and in the case of three of the votes from Georgia (given for a candidate who had died before the votes were given). Early objections to votes focused on whether a state had not yet completed all the technical requirements for statehood, and also included objections which focused on whether votes were given on the correct day, whether votes from states that had been in insurrection should now be counted, whether electors were the persons elected on election day, whether returns were validly certified, whether substitute electors were properly chosen, or whether electoral votes were properly cast by ballot.

The question of the “majority” necessary to elect when votes are not counted or are not given from a state has never been the subject of an express ruling and decision of the Congress, has never been an issue determinative of the outcome of a presidential election in the vote count in Congress, and was not expressly addressed in the 1887 electoral vote count legislation. The legislative history of the Act of 1887 evidences a divergence of opinion on the question in Congress. The practice in Congress has not been consistent, with evidence of lowering the “whole number” of electoral votes in many of the cases when votes were not received by the Congress from electors, but with some evidence of keeping the “whole number” the same in the instance when Congress rejected votes given from a state in 1872. Even in this case, however, there was inconsistency in reporting the “whole number” used and the “majority” employed, as reported in the *Senate Journal* and at the National Archives and Records Administration, as compared to the reporting in the *Congressional Globe* and in the *Journal of the House of Representatives*.

# Electoral Vote Counts in Congress: Survey of Certain Congressional Practices

This report surveys certain aspects of the historical congressional practice in counting the presidential electoral votes in Congress. The Twelfth Amendment to the United States Constitution, amending Article II, Section 1 of the Constitution, provides for the President of the Senate (the Vice President of the United States), in the presence of the Senate and House of Representatives, to open all of the certificates given by the presidential electors in the various states, and that the “votes shall then be counted.” The person receiving the most votes for President will be elected President if that person receives “a majority of the whole number of Electors appointed ....” A similar procedure is used to elect the Vice President. Subsequent to and pursuant to the constitutional provisions, Congress has enacted statutory provisions further detailing practices and procedures in the giving and in the counting of electoral votes for President and Vice President.<sup>1</sup>

Questions have arisen as to the practice in the Congress of rejecting electoral votes from electors in a state, the kinds of objections that have been raised to electoral votes, the disposition of such objections, and whether, if electoral votes are rejected by Congress, or are not given by the electors in a state, those votes not given or not counted are then to be deducted from the “whole number of Electors appointed,” such that a different, and lesser “majority” of the remaining electors would be necessary to elect a President.

In researching the legislative material for this report, each electoral vote count for President and Vice President conducted in the Congress since the ratification of the 12<sup>th</sup> Amendment in 1804 was examined. The actual floor debates and discussion involved in the electoral vote count were reviewed, as well as the publication of the electoral vote counts in the *Congressional Record*, *Congressional Globe*, *Annals of Congress*, and/or the *Journal of the House of Representatives* or the *Journal of the Senate*, for evidence of the practice of the joint session of Congress in dealing with the electoral vote count. Specific attention was paid to the inclusion or exclusion from both (1) the electoral vote count, and/or (2) the “whole number of Electors appointed,” of those electoral votes that either were not given or were rejected by the joint session. Additionally, the nature and disposition of objections that were made to the counting of particular electoral votes were examined.

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<sup>1</sup> See now, 3 U.S.C. §§ 1 *et seq.* For a brief discussion and “walkthrough” of the role of Congress in the electoral vote count, see “Overview of Electoral College Procedure and the Role of Congress,” CRS Memorandum, CD00785, 7pp., November 17, 2000.

*“Whole Number” and “Majority” Used.* Much of the congressional practice reviewed occurred prior to the passage of the so-called Electoral Count Act of 1887,<sup>2</sup> which sought to codify and regulate procedure for the counting of electoral votes in the Congress. It should be noted that the particular issue of the necessary “majority” to be used when certain electoral votes were not given or were not counted was *not* specifically addressed in the 1887 Act. Contemporaneous analysis and commentary on the 1887 Act, in fact, expressed criticism of the law precisely for failing to resolve this particular question. In an article in the noted journal, *Political Science Quarterly*, published in 1888, a year after the passage of the Electoral Count Act, John W. Burgess provided the following criticism, among several others, of the law:

Furthermore, no provision is made in the law as to whether, when the vote of a state is rejected, it is to be deducted from the whole number of electoral votes to which all the states are entitled, in determining the majority necessary to choose the President.<sup>3</sup>

As discussed in that article, and as evident from the legislative history of the 1887 law, there was no clear answer to that question in the legislation, and there existed differing and conflicting views expressed during its enactment by Members of Congress as to whether the so-called denominator (in determining the “majority” of electors appointed) stayed the same or was reduced when electoral votes were not given and/or not counted. One Senator believed the provision allowing the houses of Congress concurrently to reject electoral votes given, was subject to abuse and manipulation, since the “whole number” of electors would remain the same upon rejecting some electoral votes, preventing any candidate from receiving a majority, and thus allowing the House of Representatives, rather than the people through their electors chosen, to select the President:

When the bill was in the Senate, Mr. Evarts, pointed out the fact that this provision would enure to the undue advantage of the House whenever the loss of the vote of the state affected the election, since the House could, by throwing out the vote of the state, bring the election into its own hands. This condition of things could easily be manufactured of course; and a House so disposed could easily be enabled to defeat an election by the electors and substitute its own choice therefor.<sup>4</sup>

This view, and the perceived potential for manipulation was challenged, however, by Senator Hoar, who believed that the whole number of electors would not stay the same, but would be decreased when electoral votes given were not counted by the Congress, thus effectuating an election of the President without resorting to the contingent election in the House of Representatives. This view, of course, could present its own opportunity for possible “manipulation” and mischief, as Congress’ action in decreasing the number needed for a majority could elect a different person President than if all the votes were counted and included:

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<sup>2</sup> 24 Stat. 373, ch. 90, February 3, 1887.

<sup>3</sup> John W. Burgess, “The Law of the Electoral Count,” *Political Science Quarterly*, Volume 3, Issue 4, 633- 653, at p. 651 (December 1888).

<sup>4</sup> *Id.* at 650, citing 17 *Congressional Record* 820 (January 21, 1886).

Mr. Hoar suggested that this [contingent election in the House] could not happen, since if the votes from a state should be thrown out, they must be deducted from the whole number of electoral votes in calculating the majority necessary to a choice. The result of this might be the election of another candidate by the electors, but it could not be to bring the election into the House of Representatives.<sup>5</sup>

As noted by the author in 1888, however, the issue was far from resolved at that time, either from the law passed by Congress or by prior practice in Congress:

But the assertion of Mr. Hoar that, when the votes of a state are thrown out, they are to be deducted from the whole number of the electoral votes in calculating the majority necessary for a choice was not at the moment, and is not now, the fixed and certain law of the land. It was only his conjecture, while Mr. Evarts, an equally weighty authority in the interpretation of constitutional law, held, as we have seen, the contrary view.<sup>6</sup>

It is thus apparent that there existed a lack of authoritative precedent for Congress to consider as “fixed” law or practice before 1887. Similarly, it appears that the Congress itself, in adopting the 1887 Act, did not have a unified sense or understanding concerning this question, and did not definitively decide the issue of which “majority of the whole number” to use when electoral votes were not accepted or received. Furthermore, the actual history and practice in Congress *subsequent* to the passage of the 1887 Act provides no further answer to the particular question of the “majority” used, as this question has not arisen in the 20<sup>th</sup> Century counts of electoral votes.

This report purports only to record the *practice* in the Congress regarding such questions as which “majority” was used, as well as the questions of the nature and disposition of objections to electoral votes. The decision not to count an electoral vote given, that is, to sustain an objection to an electoral vote and to reject that vote, appears to be very rare in congressional practice. Additionally, it is uncommon, although not without precedent, for an elector to fail to give a vote because of illness or other absence or incapacity at a time when a replacement elector could not be appointed. There are thus few instances from which to determine a consistent pattern of congressional practice. Further complicating the task of attempting to glean some congressional precedent out of past practice is the fact that the issue of which “whole number of Electors appointed” is to be used to determine the necessary “majority” when votes are not counted or not given, has apparently never been one on which the outcome of the Presidency was determinative, nor was it ever an issue specifically in contention and ruled upon by the Congress.

In practice, in the congressional electoral vote count, the electoral votes “counted” usually corresponded to the number used as the “whole number” of electors appointed. This was because in most cases they were actually the same, since no electoral votes were missing and no electoral votes were rejected.

In several instances, however, the total number of electoral votes “counted” was considered, announced, or recorded as the “whole number” of electors, even though some electoral votes were not given. Electoral votes from time-to-time have not been presented

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<sup>5</sup> *Id.* at 650, citing 17 *Congressional Record*, *supra* at 821.

<sup>6</sup> *Id.* at 650.

to the Congress from an elector who, for one reason or another, did not show up at the prescribed state location at the prescribed statutory time to cast his vote. In many of those instances of votes “not given” by an elector, in 1809, 1813, 1817, and 1865, for example, it appears that Congress did *not* include the missing (or “potential”) electoral vote in the “whole number” of electors appointed, and thus reduced the so-called denominator, lowering the number of the “majority” needed to be elected. This, however, was not a consistent pattern even with respect to votes not presented to Congress by electors. In 1820, three electors did not give their vote for President because they had died. Although it is not apparent from the official record in Congress what “whole number of electors appointed” was used,<sup>7</sup> Congress in the joint session “counted” only 232 electoral votes (including disputed votes from Missouri),<sup>8</sup> while the recorded “whole number of electors” published by the National Archives and Record Administration included the three electors who had died and did not vote, thus indicating that Congress kept the whole number of electors at the higher number of 235 (of which 118 was the “majority” needed to elect).<sup>9</sup>

In the one instance that we have identified where both houses of Congress concurrently *rejected* votes that were given from a state’s electors, in 1873, the “whole number” of electors of which a majority was needed, appeared not to have been reduced, as announced in the joint session.<sup>10</sup> Interestingly, even in this instance there was not consistency, since the tally in the *Senate Journal* reflects that the “whole number” was reduced.<sup>11</sup> While the *Congressional Globe* indicates that the presiding officer in the joint session, the Vice President, expressly announced the “whole number” of electors as the higher number (366),<sup>12</sup> the published records of the National Archives and Records Administration uses the lower number of votes counted (352) similar to the *Senate Journal*.<sup>13</sup> The question of which “majority” to use did not appear to be an issue in public, recorded contention at this time, nor was it subject to any specific ruling on the public record, and in any event, Grant would have been elected by either measurement. Finally, it may be noted that in 1881, so-called “alternative” language was adopted for the 1880 election count, whereby if the votes from a state in which the electoral votes were being questioned were allowed, one total would be reported, and if they were not allowed, another total would be reported. The language adopted in 1881 and the table of the

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<sup>7</sup> The announcement in the joint session in 1820 was different than normally given because of a “contingency” in the vote count and an “alternative” vote count, with respect to a controversy over the electors from Missouri (see discussion of the 1821 vote count, below).

<sup>8</sup> *Journal of the House of Representatives*, 234 - 235 (February 14, 1821).

<sup>9</sup> United States Government, National Archives and Records Administration, Electoral College web-site, [<http://www.nara.gov/fedreg/elctcoll/ecfront.html#general>] (for 1820); compare to *reduced* “whole number” and “majority” needed in 1816 election. It is not precisely clear which congressional documents and records the Archives used as the basis for publishing these numbers.

<sup>10</sup> *Congressional Globe*, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. 1306 (February 12, 1873).

<sup>11</sup> *Journal of the Senate*, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. 345 (February 12, 1873).

<sup>12</sup> See, note 10, *supra*.

<sup>13</sup> United States Government, National Archives and Records Administration, *supra* (1872 election). As noted in note 9, *supra*, it is not clear which congressional documents were the basis for the National Archives reporting of these numbers.

electoral votes published in the *Congressional Record* might provide an inference that, if the votes of the one state which were cast on the wrong date were rejected, the “whole number” of electors, and thus the “majority” needed to elect, would have remained the same. That is, there was no specific indication made by Congress in the table published, or in the result announced, that if the votes of that state were rejected, that such action would have lowered the required “majority.”<sup>14</sup>

*Objections to Votes Raised.* As noted above, objections in the Congress to particular electoral votes, or slates of votes from a state have not been frequent occurrences during the congressional vote count. The joint sessions of 1873 and 1877 are the most noteworthy exceptions. Since 1887 and the adoption of codified procedures in federal law for the giving and the counting of electoral votes, there has been only one objection raised in Congress to an electoral vote, in 1969. The objection raised in 1969 to counting the vote of a so-called “faithless elector” was not sustained in the House and Senate, and the vote was accepted and counted.

Even more rare than an objection to an electoral vote, is an objection that is sustained, resulting in electoral votes from a state not being counted. This, however, did happen in 1873 with regard to the election of 1872, in the case of all of the electoral votes from Arkansas and Louisiana, and with regard to three of the votes from Georgia.

Early objections to votes focused on the fact that a state had not yet completed all the technical requirements for statehood, and thus its electoral votes should not be counted. This was the objection in 1817 to the votes from Indiana, and in 1821 to the votes in Missouri. Since their electoral votes would not change the outcome of the election, however, they were counted. In 1837 the same issue arose with regard to Michigan, when it was decided to tally its electoral votes in “alternative” totals, and to count the votes from Michigan if they did not change the result of the election.

Another objection in 1837 was noted, this was, that certain electors should be disqualified because of federal employment. However, clear evidence was not before the Congress regarding these individuals, and it was decided to count their votes. In 1857 the electoral votes from Wisconsin were objected to because they were given on the wrong day (because of a severe snow storm on the day appointed for giving the votes), but those votes were eventually counted. In 1869 issues arose over whether states that had been in insurrection against the Union were now qualified to vote under reconstruction requirements, and objections to the votes from Louisiana on those grounds were not sustained (and the votes were counted); while votes from Georgia, objected to on the same grounds, were allowed in an “alternative” tally.

In 1873 objections to votes in three states were sustained, while objections regarding two others were not. Objections to three votes from Georgia which were given for a candidate after that candidate had died were sustained, and those votes were rejected. Additionally, the electoral votes of Arkansas were rejected, where it was found that the electors were not the persons elected on election day, and that the returns were not validly certified. Similarly, the votes from Louisiana, where it was alleged that the electors were not chosen according to law, and not properly certified, were rejected. Objections to the

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<sup>14</sup> 11 *Congressional Record* 1386 - 1387, February 9, 1881.

votes from Mississippi, as not properly given by ballot, were not sustained and those votes were accepted. Objections to the electoral votes from Texas, in the nature that the “substitute” electors were not properly chosen and not properly certified by the Governor, were not sustained and those electoral votes were counted.

In the election of 1876, in the wake of post-Civil War reconstruction policies and requirements, several duplicate certificates from competing and different slates of electors were given from a number of states purporting to be from the official state authorities. Because of the confusion, the lack of clear congressional precedent or guidelines in such cases, and the number of objections to both slates of electors from many states, Congress established a “commission” to look at all of the competing claims and to provide a decision on which slates should be accepted. Objections were then entertained with respect to the slate of electors chosen by the commission. It should be noted that in all of the numerous objections made, no electoral votes from a state were rejected or discarded in 1877, and all the states providing presidential electors were included in the count by the Congress.



**Electoral Vote Counts in Congress  
Since the Presidential Election of 1804**

**1805** For the election of 1804 there were 176 electoral votes counted for President and Vice President,<sup>15</sup> which corresponded to the “whole number” of possible electoral votes from the states.<sup>16</sup> No objections to any electoral votes were noted.

**1809** In the election of 1808, the total possible number of presidential electors was 176. The number voted and counted before the joint session of Congress was, however, only 175, as one elector from Kentucky was not able to be present to cast his vote at the statutory time for the meeting of electors.<sup>17</sup> The “whole number” of votes was announced as being 175, “of which 88 make a majority.”<sup>18</sup> The vote not received from Kentucky was thus not counted in the total of electoral votes, nor considered in the “whole number” of electors, lowering the “majority” of electors needed from 89 to 88.

One Member of the House “observed,” after the tellers counted the votes and upon handing them to the presiding officer, that one set of credentials “appeared to be defective, the Governor’s certificate not being attached to it.”<sup>19</sup> No action was taken on this observation, however, and the votes were all included.

Earlier in the House, petitions from several Massachusetts citizens were introduced to examine the way in which the presidential electors were selected in Massachusetts. Consideration of these petitions was strongly objected to by Mr. Randolph, however, who argued that the Constitution prescribes that the states are to appoint electors in the manner prescribed by the state legislatures, “and if we attempt to put our hands on this power, we might as well, in my apprehension, arrogate to ourselves the appointment of President and Vice President. If we do away with the decision of the Electoral body, which is as independent of us as we are of them, the Constitution is in my opinion verging on dissolution.”<sup>20</sup> The matter was then tabled, but taken up again a few days later where, although it was argued that “Congress has no power to act on the

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<sup>15</sup> *Journal of the House of Representatives*, 8<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 136 - 137, February 13, 1805; *Journal of the Senate*, 8<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 452 - 453, February 13, 1805.

<sup>16</sup> Petersen, *A Statistical History of the American Presidential Elections*, at p. 3 (1963).

<sup>17</sup> *Journal of the House of Representatives*, 10<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 515, February 9, 1809. 19 *Annals of Cong.* 1425, February 8, 1809.

<sup>18</sup> *Journal of the Senate*, 10<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 341, February 8, 1809, *see also* 19 *Annals of Congress*, *supra* at 1425.

<sup>19</sup> 19 *Annals of Congress*, *supra* at 1424 (Mr. Hillhouse).

<sup>20</sup> *Id.* at 1303 (February 2, 1809).

subject,”<sup>21</sup> a resolution sending the petitions to the Senate was adopted.<sup>22</sup> The Senate tabled the matter.<sup>23</sup>

- 1813** The total number of electoral votes counted and announced was 217, and the announced majority to be elected was 109.<sup>24</sup> No objections were raised to any electoral votes. Although no notice was taken of any absent electoral votes, a comparison of the votes counted with a statistical study indicates that Ohio was apparently entitled to appoint 8 electors,<sup>25</sup> but cast only 7 electoral votes. Only 7 votes from Ohio were counted and used in the "whole number" of electors (217 as opposed to 218).
- 1817** The total number of electoral votes counted for the 1816 election was 217, and the “whole number of votes” was announced as 217, the necessary "majority" for election being 109.<sup>26</sup> While no mention was made in the formal record of missing electoral votes or electoral votes not given, it appears that 4 electoral votes were not given, as “three Federalist electors chosen in Maryland, and one of the Delaware electors, did not see fit to attend.”<sup>27</sup> The full number of all the electors would thus have been 221, with a majority being 111, but those 4 electoral votes not given were not counted as part of the “whole number” by the Congress, and the majority needed to elect was reduced to 109.

There was an objection raised by Representative Taylor of New York regarding the electoral votes of Indiana, which apparently had not as yet been formally admitted into the Union at the time of giving its electoral votes.<sup>28</sup> The inclusion or omission of the Indiana votes would not have changed the result of the election. The joint session dissolved as the Senate withdrew, and the House proceeded to debate the issue. After a long debate in the House (and in the Senate), the whole matter was indefinitely postponed, and the votes from Indiana were counted.<sup>29</sup>

- 1821** The total number of electoral votes “counted” for the 1820 election was 232 (including the votes from Missouri, discussed below).<sup>30</sup> The “whole number” of electors, and the “majority” of this whole number necessary for election does

<sup>21</sup> *Id.*, at 1376 (February 6, 1809).

<sup>22</sup> *Id.* at 1377.

<sup>23</sup> *Journal of the Senate, supra* at 340 (February 7, 1809).

<sup>24</sup> *25 Annals of Congress* 79 - 80 (February 10, 1813).

<sup>25</sup> Petersen, *A Statistical History of the American Presidential Elections*, at p. 3 (1963).

<sup>26</sup> *30 Annals of Congress* 114 (February 12, 1817).

<sup>27</sup> Stanwood, *A History of the Presidency*, Volume I, From 1788 to 1897, at p. 113 (1975).

<sup>28</sup> *30 Annals of Congress* 944 (February 12, 1817).

<sup>29</sup> *Id.* at 949; *note* also Stanwood, *supra* at 114.

<sup>30</sup> *Journal of the House of Representatives*, 16<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 234 - 235 (February 14, 1821).

not appear to have been specifically announced in the joint session, as had been done previously. No express mention was made in the formal record of missing electoral votes or of electoral votes not given. However, it appears that 3 electoral votes were not given, as one elector from each of the states of Pennsylvania, Mississippi, and Tennessee had died.<sup>31</sup> Those 3 electoral votes not given, while not "counted" by Congress in its announced vote count, *were* apparently included as part of the "whole number" of electors appointed in the records of the National Archives and Record Administration, keeping the "whole number" of electors appointed at 235, and the "majority" needed to elect at 118.<sup>32</sup>

One elector from a state (New Hampshire) carried by James Monroe cast his electoral vote for another person, John Quincy Adams, while several electors cast votes for a different Vice President than the candidate carrying their state. These so-called "scattering" votes were not objected to and were counted and recorded.<sup>33</sup>

The electoral votes from Missouri were objected to on the grounds that Missouri was not a state at the time of giving its electoral votes, and had not qualified to be a state at the time of counting those votes.<sup>34</sup> Since the counting or the omission of Missouri's votes would not have affected the election of Monroe, a resolution was agreed to in both houses before the vote count that the number of votes received would be one number if Missouri were counted, and would be another number if Missouri were not counted. An objection to the Missouri votes was then raised in the joint session by Representative Livermore of New Hampshire on the same grounds, that Missouri was not a state. In separate sessions of the House and the Senate the objection was not carried, and the vote count reported in Congress reflected the "alternative" or contingent counts agreed upon earlier.<sup>35</sup>

**1825** It was announced that the "whole number of electoral votes which had been given for President of the United States, was two hundred and sixty-one," of which none of the four candidates receiving electoral votes had won a majority (131).<sup>36</sup> (Andrew Jackson had 99; John Quincy Adams had 84; William H. Crawford 41; and Henry Clay 37). The election of the President then proceeded

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<sup>31</sup> United States Government, National Archives and Records Administration, Electoral College web-site, [<http://www.nara.gov/fedreg/elctcoll/ecfront.html#general>] (for 1820). See also Petersen, *supra* at 3, noting a total of 235 electors to which the states were entitled in 1820.

<sup>32</sup> National Archives and Records Administration, *supra*; compare to *reduced* "whole number" and "majority" needed in 1816 election.

<sup>33</sup> *Journal of the House of Representatives*, *supra* at 234 - 235.

<sup>34</sup> *37 Annals of Congress* 1153 - 1154, February 4, 1821.

<sup>35</sup> Note discussion in Dougherty, *The Electoral System of the United States*, 42 - 46 (1906).

<sup>36</sup> *Journal of the House of Representatives*, 18<sup>th</sup> Cong., 2d Sess. 220 - 221 (February 9, 1825).

to the House of Representatives between the top three candidates, where thirteen states voted for John Quincy Adams, seven states for Andrew Jackson, and four states for William H. Crawford, electing John Quincy Adams as the President.<sup>37</sup>

As for Vice President, the President of the Senate announced that the "whole number of votes which had been given for Vice President of the United States, was two hundred and sixty" (one elector from Rhode Island did not cast a vote for Vice President), and that John C. Calhoun, having received 182 votes, "received a majority of the whole number of the votes of the electors appointed in the several states," and was therefore elected Vice President.<sup>38</sup>

**1829** It was announced that for the 1828 election "the whole number of electoral votes which had been given for President of the United States was two hundred and sixty one," and that Andrew Jackson "had received a majority of the whole number of votes of the electors appointed in the several states to vote for President," and was elected.<sup>39</sup> There were no objections raised, and no electoral votes that were not given or not counted.

**1833** The Statement of the Votes for the 1832 election published in the *Journal of the House of Representatives* and in the *Register of Debates in Congress* (Gates & Seaton's Register) showed that the number of electors appointed by the states was 288, of which a majority was 145.<sup>40</sup> Only 286 electors voted, however, as two electors from Maryland did not cast votes.<sup>41</sup> While it was announced that the "whole number of electoral votes, which had been given for President of the United States, was 286" (of which Andrew Jackson had received 219), it appears that the use of the higher number of total electors appointed by the states as the necessary "majority" (145 of 288) was arguably contemplated, since that number was published in the chart by the tellers, although it was not expressly "announced," perhaps since Jackson clearly won a majority of either 286 or 288. The Archives shows the "number of electoral votes" given as 286, and the majority of that as 144. There were no objections made to any electoral votes.

**1837** There was an issue of counting the electoral votes from Michigan, since it was not technically a state at the time of its voting for President. The whole number of electors appointed would be 294 if the electors from Michigan were included, making the majority necessary for election 148. If the 3 electoral votes from Michigan were not counted, because it was not a state and thus not entitled to

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<sup>37</sup> *Id.* at 222.

<sup>38</sup> *Id.* at 221.

<sup>39</sup> *Journal of the House of Representatives*, 20<sup>th</sup> Cong., 2d Sess. 273 - 274 (February 11, 1829).

<sup>40</sup> *Journal of the House of Representatives*, 22<sup>nd</sup> Cong., 2d Sess. 329 (February 13, 1833); *Register of Debates in Congress* (Gates & Seaton's Register), 22<sup>nd</sup> Cong., 2d Sess. 1723 (February 13, 1833).

<sup>41</sup> *Id.*

appoint electors, the whole number of electors appointed would be 291, making the majority necessary 146.<sup>42</sup> Since the leading candidate for President, Martin Van Buren, had 170 electoral votes (including Michigan) or 167 (excluding Michigan), he would be the winner regardless of the decision to allow Michigan's 3 electoral votes. The House and Senate thus passed a joint resolution before the joint session, agreeing to state the electoral votes in the "alternative."<sup>43</sup>

The House and Senate also agreed that, because it would not affect the outcome of the presidential election, the fact that five electors (3 in North Carolina, one in New Hampshire and one in Connecticut) were probably not qualified to be electors because they held an employment with the Federal Government, would be disregarded.<sup>44</sup>

- 1841** The "whole number of electoral votes" was 294, of which a majority was 148.<sup>45</sup> The whole number of electors appointed by the states was also 294, and there were no indications of any objections raised to electoral votes, nor any votes not given by an elector.
- 1845** The "whole number of votes given was 275, of which a majority was 138."<sup>46</sup> The whole number of electors appointed by the states was also 275, and there were no indications of any objections raised to electoral votes, nor any votes not given by an elector.
- 1849** The total number of electoral votes counted for the election of 1848 was 290, which was the total number of all electoral votes possible. The majority needed to win was therefore 146.<sup>47</sup> No objections were raised to any of the electoral votes.
- 1853** The total number of electoral votes counted in 1853 for the election of 1852 was reported to be 296, with no electoral votes reported to have been missing. The majority needed to elect was announced at 149.<sup>48</sup> No objections were raised to any of the electoral votes .
- 1857** For the election of 1856, the total number of electoral votes reported by the tellers was 296, making the majority necessary to elect 149.<sup>49</sup> The report from the tellers included all of the electoral votes from all of the states, including 5

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<sup>42</sup> *Congressional Globe*, 24<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 171 - 172 (February 8, 1837).

<sup>43</sup> *Id.* at 154 - 155, 164. See announcement of results in "alternative," at 172.

<sup>44</sup> *Id.* at 154 - 155, 163 - 164.

<sup>45</sup> *Congressional Globe*, 26<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 160 (February 10, 1841).

<sup>46</sup> *Congressional Globe*, 28<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 277 (February 12, 1845.).

<sup>47</sup> *Congressional Globe*, 30<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 534 - 535 (February 14, 1849).

<sup>48</sup> *Congressional Globe*, 32<sup>nd</sup> Cong., 2<sup>nd</sup> Sess. 549 (February 9, 1853).

<sup>49</sup> *Congressional Globe*, 34<sup>th</sup> Cong., 3<sup>rd</sup> Sess. 652 (February 11, 1857).

electoral votes from Wisconsin which held an election on the prescribed election day, but whose electors, because of a severe snow storm, were unable to meet in the state capital to give their votes for President and Vice President on the day prescribed by law, but rather met the next day, on the fourth of December 1856.<sup>50</sup>

The electoral vote count brought forth an objection to the counting of the votes from Wisconsin because they were not provided on the day prescribed by law. This question and the issue raised, it was noted, was not definitive as to the election of the President, since James Buchanan had a large enough majority to win whether or not the votes from Wisconsin for his opponent were counted and included in the whole number of electors. The objection to the Wisconsin electors' vote was raised in the joint session by Representative Letcher, and the Presiding Officer ruled that debate was not then in order.<sup>51</sup> The objection was raised again by Representative Letcher after the tellers reported, and also by Representative Orr.<sup>52</sup> The Presiding Officer ruled that the objection was not in order.<sup>53</sup> After a spirited debate concerning whether votes of the Congress could be taken in the joint session, and on the power of Congress "to decide upon the validity or invalidity of a vote,"<sup>54</sup> the joint session dissolved to discuss the issue of the votes from Wisconsin in each chamber. The opinions on the matter in the Congress have been described as "hopelessly irreconcilable," and a specific, final resolution of the question was never made.<sup>55</sup>

- 1861** The "whole number of votes" announced for the 1860 election by the tellers was 303, and the majority necessary for a choice was 152.<sup>56</sup> The 303 votes corresponded to the actual votes given and to the number of potential electoral votes from all the states, there being no electoral votes objected to and no electoral votes "not given" by electors.
- 1865** The total number of electoral votes counted, and considered the "whole number" of electoral votes was 233, of which the announced majority "necessary to a choice, 117."<sup>57</sup> There were, however, 234 electoral votes entitled to be cast by the states, but an elector in Nevada did not show up to

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<sup>50</sup> *Journal of the Senate*, 34<sup>th</sup> Cong., 3<sup>rd</sup> Sess. 190 - 191 (February 11, 1857).

<sup>51</sup> *Congressional Globe*, *supra* at 652.

<sup>52</sup> *Id.* at 653.

<sup>53</sup> *Id.* at 654.

<sup>54</sup> *Id.* at 652 (Senator Crittenden).

<sup>55</sup> See Stanwood, *A History of the Presidency*, Volume I, From 1788 to 1897, at pp. 275 - 278 (1975); and Dougherty, *The Electoral System of the United States*, at pp. 51 - 57 (1906). In 1865, it should be noted, Congress adopted Joint Rule 22 to avoid, it was noted by Speaker Colfax, a "disastrous repetition" of the events of 1857. III *Hinds' Precedents*, §1951, n.4, at p. 237.

<sup>56</sup> *Congressional Globe*, 36<sup>th</sup> Cong., 2d Sess. 894 (February 13, 1861).

<sup>57</sup> *Congressional Globe*, 38<sup>th</sup> Cong., 2d Sess. 669 (February 8, 1865).

cast his vote.<sup>58</sup> The fact of the “missing” vote from Nevada was expressly recognized by the presiding officer (the Vice President), and the “whole number” of electors appointed, and the corresponding “majority” needed to elect was, as announced, lowered by one vote (the “whole number” lowered from 234 to 233, and the majority necessary to elect from 118 to 117).<sup>59</sup>

The major issue dominating the vote counting in 1865 was the electoral votes from states considered in “insurrection against the Laws, Constitution and Government of the United States,”<sup>60</sup> specifically those of Tennessee and Louisiana. A joint resolution was adopted before the vote count designating that certain states in insurrection were not entitled to representation in the Electoral College for the choice of President and Vice President.<sup>61</sup> The electoral votes of those states, including Louisiana and Tennessee, were not counted as part of the votes given or the whole number of electors.<sup>62</sup>

**1869** The "whole number of electoral votes cast for President and Vice President" was again stated in the "alternative," similar to other occasions in the past, that is, the number of votes cast "including the votes of the State of Georgia, is 294 of which the majority is 148; excluding the votes from the State of Georgia, it is 285, of which the majority is 143."<sup>63</sup> Ulysses S. Grant received 214 electoral votes, and would be President in either case.

The House and Senate had adopted a joint resolution earlier in the year concerning the manner in which states that had been in insurrection could be allowed to participate in the presidential election and appoint electors.<sup>64</sup> Under this scheme, Louisiana was allowed to cast its votes, and the votes of Georgia (whose status as complying with reconstruction was still pending before the Senate) were allowed to be cast in the "alternative" form, whereas Mississippi, Virginia and Texas were not allowed to cast votes.<sup>65</sup> On February 8, 1869, a concurrent resolution was adopted to allow Georgia's votes to be counted in the "alternative" method.<sup>66</sup>

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<sup>58</sup> *Congressional Globe, supra* at 668.

<sup>59</sup> *Congressional Globe, supra* at 669; *note* also National Archives and Records Administration, *supra* (1864 election).

<sup>60</sup> Proclamation of the President, August 16, 1861, pursuant to Act of July 13, 1861, 37<sup>th</sup> Cong., 1<sup>st</sup> Sess.

<sup>61</sup> H.R. 126, 38<sup>th</sup> Congress.

<sup>62</sup> *Congressional Globe, supra* at 669.

<sup>63</sup> *Congressional Globe*, 40<sup>th</sup> Cong., 3<sup>rd</sup> Sess. 1063 (February 10, 1869).

<sup>64</sup> S Res. 139, 40<sup>th</sup> Cong., July 20, 1868.

<sup>65</sup> *See*, Dougherty, *The Electoral System of the United States, supra* at 81.

<sup>66</sup> *Congressional Globe, supra* at 978 (February 8, 1869); *Journal of the House of Representatives*, 40<sup>th</sup> Cong., 3<sup>rd</sup> Sess. 303-305 (February 8, 1869).

During the joint session, an objection was made to receiving the votes from Louisiana by Mr. Mullins. The Senate then withdrew, and the House and the Senate then voted separately and concurrently to allow Louisiana's votes.<sup>67</sup>

An objection was also raised to votes of Georgia, by Mr. Butler, on grounds that the votes were given on the wrong day, and that Georgia's representation in Congress was still pending. While the House voted not to accept Georgia's vote, the Senate found that the objection was out of order, as a resolution had previously been agreed to by the House and Senate treating the electoral votes of Georgia in the "alternative."<sup>68</sup>

An objection to the electoral votes of Nevada, as not being properly made by ballot, was ruled not in order, as it was not timely made.<sup>69</sup>

**1873** In the joint session, as reported in the *Congressional Globe*, the presiding officer, the Vice President, announced for the 1872 election that: "The whole number of electors to vote for President and Vice President of the United States, as reported by the tellers, is 366, of which a majority is 184. Of these votes, 349 have been counted for President ...."<sup>70</sup> The implication from this announcement is that the "whole number" of electors was kept at the higher number, that is, 366 possible electoral votes from the states, even though 17 of those votes (8 for Louisiana, 6 for Arkansas, and 3 electoral votes from Georgia given to Horace Greeley who had died before the vote) were excluded by Congress. It should be noted, however, that the *Senate Journal* reports a different result, and a different "whole number" of electors reported, that is, the lowered number of 352 (excluding only the 14 electoral votes from Louisiana and Arkansas, but including in the whole number the 3 votes from Georgia received for Greeley),<sup>71</sup> while the *Journal of the House of Representatives* represents the higher number of "whole number of electors appointed" at 366,<sup>72</sup> in the same manner as the *Congressional Globe*. The lower number of 352 and the lower "majority" is also published by the National Archives and Records Administration as the number of electoral votes counted and the majority of those needed to elect, apparently from the original *Senate Journal*.<sup>73</sup>

An objection was raised by Representative Hoar to the counting of the three electoral votes from Georgia for Horace Greeley who had died before the time

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<sup>67</sup> *Journal of the House of Representatives*, 40<sup>th</sup> Cong., 2d Sess. 314 - 315, February 10, 1869.

<sup>68</sup> *Id.* at 315, 320 - 321.

<sup>69</sup> *Congressional Globe*, *supra* at 1058 (February 10, 1869).

<sup>70</sup> *Congressional Globe*, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. 1306 (February 12, 1873).

<sup>71</sup> *Journal of the Senate*, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. 345 (February 12, 1873).

<sup>72</sup> *Journal of the House of Representatives*, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. 384 (February 12, 1873).

<sup>73</sup> National Archives and Records Administration, *supra* (1872 election).



of the giving of the electoral votes.<sup>74</sup> The Senate voted to allow the three votes, but the House voted to reject them, and under the joint rule then in operation, the votes were not counted.<sup>75</sup>

An objection was raised by Senator Trumbull to the votes cast from Mississippi, in that the certificate did not indicate that they were given by ballot, as required; and a further objection was raised by Mr. Potter, that there was no indication that one of the electors was properly replaced according to state law. The House and Senate concurred that the votes from Mississippi should be counted.<sup>76</sup>

There were two objections raised to the electoral votes from Texas, one being that substitute electors were improperly chosen (Representative Dickey), and the other that the Governor of the State had not certified the electors (Senator Trumbull). The House and Senate both agreed to accept and count the votes from Texas, notwithstanding the objections raised.<sup>77</sup>

An objection was raised by Senator Rice from Arkansas that the electoral votes of Arkansas not be counted because the persons certified by the Secretary of State were not the persons elected as electors at the presidential election in November, and that the returns were “not certified according to law.”<sup>78</sup> The Senate agreed to the objections to exclude the vote from Arkansas, and while the House voted to accept the votes,<sup>79</sup> under the rule then in force, the votes were not counted.<sup>80</sup>

There were seven objections raised to counting the electoral votes of Louisiana,<sup>81</sup> based on arguments that there was no canvass and counting of the votes in Louisiana, that the certificate was not made according to law, that electors were not chosen according to law, which findings were arguably made earlier by the Senate Committee on Privileges and Elections.<sup>82</sup> Both the House and the Senate agreed not to accept the electoral votes from Louisiana.<sup>83</sup>

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<sup>74</sup> *Congressional Globe*, *supra* at 1285.

<sup>75</sup> *Id.* at 1285 - 1287, 1289.

<sup>76</sup> *Id.* at 1287 - 1288, 1289.

<sup>77</sup> *Id.* at 1289 - 1290; *Journal of the Senate*, *supra* at 339.

<sup>78</sup> *Congressional Globe*, *supra* at 1291.

<sup>79</sup> *Id.* at 1292, 1294.

<sup>80</sup> The rule then in force, Joint Rule 22, differs from the current rules in force under the 1887 Act.

<sup>81</sup> *Id.* at 1292

<sup>82</sup> *See*, *Journal of the Senate*, *supra* at 340-341, *citing* S. Rpt. No. 417, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess.

<sup>83</sup> *Congressional Globe*, *supra* at 1293, 1294.

**1877** In order to facilitate the electoral vote count for the election of 1876, both Houses of Congress agreed to appoint members to a commission to settle disputes over duplicate certificates received from several states.<sup>84</sup> The Commission comprised five members of the House of Representatives, five members of the Senate, and five associate Supreme Court justices. Under the Act establishing the Commission, when more than one return or paper purporting to be a return was received from any state, objections were to be made in writing and then the question as to the validity of the returns was submitted to the Commission. The Commission would make its decision on the returns and then report the decision to each House. The two Houses would then resume the joint session for the counting of electoral votes. Upon objection by at least five Senators and five Representatives, the two Houses could vote to exclude the electoral votes deemed valid by the Commission. If the two Houses failed to concur in doing so, the decision of the Commission stood as reported.

*Florida.* Conflicting certificates were received from Florida, and three objections were made. An objection was made to the certificate signed by M.L. Stearns as Governor, appointing electors for Hayes. The grounds for the objection were as follows: 1) that the electors were not appointed as the legislature directed; 2) that another set of electors were appointed as the legislature directed; 3) that the manner of appointing the electors was by the votes of the qualified electors, which gave title to another set of electors which could not be set aside by any other person; 4) that the pretended certificate signed by M. L. Stearns, as governor, was untrue and obtained by fraud and conspiracy, and 5) was made out and executed in pursuance of the same fraudulent conspiracy; 6) that the Stearns certificate and lists, if they ever had any validity, were annulled by a subsequent lawful certificate of the successor to Governor Stearns by act of the legislature declaring the other slate of electors valid.<sup>85</sup>

A further objection was made to a single elector alleging that he should be disqualified because he held the office of United States shipping commissioner at the time of his alleged election as an elector.<sup>86</sup>

An objection was also made to the certificates received from the Attorney General and Governor Drew, successor to Governor Stearns, appointing electors for Tilden, on the grounds that they were not authenticated properly and that the properly authenticated certificate appointed electors for Hayes. An additional objection alleged that the certificates were not legally certified as they were not issued by a person holding the office of governor at the time the

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<sup>84</sup> *Proceedings of the Electoral Commission and of Congress Relative to the Presidential Electoral Votes Cast December 6, 1876 for the Presidential Term Commencing March 4, 1877*, p. 4.

<sup>85</sup> *Id.* at 24.

<sup>86</sup> *Id.* at 28.

electors were appointed, and that the proceedings certifying the Tilden electors were ex post facto and retroactive.<sup>87</sup>

The certificates and objections were submitted to the Commission.<sup>88</sup> The Commission decided to count the electoral votes certified by M. L. Stearns as governor, appointing electors for Hayes.<sup>89</sup> Mr. Field objected to the decision of the Commission on the grounds that the Commissioners had made a wrong report, had refused to receive competent and material evidence in support of the allegation that the four electors had been appointed fraudulently, had refused to recognize the action of the courts or other departments of government of the State of Florida tending to show that the Stearns certificates were fraudulent, and finally had violated the Constitution of the United States in counting the said certificates.<sup>90</sup>

The two Houses separated to consider the objection to the report of the Commission.<sup>91</sup> The Senate voted to sustain the decision of the Commission and count the Hayes electors, but the House voted to exclude the Hayes electors.<sup>92</sup> The two Houses not concurring in ordering otherwise, the decision of the Commission stood and the State of Florida cast four votes for Hayes.<sup>93</sup>

*Louisiana.* Three certificates were received from the State of Louisiana, two appointing electors for Hayes and one appointing electors for Tilden.<sup>94</sup> An objection was raised to the two certificates certified by William P. Kellogg as governor, appointing electors for Hayes. The objection stated that Kellogg was not the lawful governor and the certificates were objectionable for the reasons that on November 7, 1876, there was no law of Louisiana directing the manner of appointment of electors, that the appointment of the electors certified by Kellogg was fraudulent, and that the electors certified by John McEnery, “the lawful governor” of Louisiana, should be counted.<sup>95</sup> The objection also included references to specific electors who should be disqualified because they held office at the time of their election.<sup>96</sup> A second objection was made to the certificates on the grounds that at the time of the election Louisiana did not have a Republican form of government, that there was no canvass of votes on which the certificates were based, that any alleged canvass was fraudulent, and that a

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<sup>87</sup> *Id.* at 26-28.

<sup>88</sup> *Id.* at 28.

<sup>89</sup> *Id.* at 196, 199.

<sup>90</sup> *Id.* at 200.

<sup>91</sup> *Id.* at 201.

<sup>92</sup> *Id.* at 203.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 205 - 212.

<sup>95</sup> *Id.* at 212 - 215.

<sup>96</sup> *Id.*

number of the electors appointed held other offices at the time of their election.<sup>97</sup> An additional objection was raised on the grounds that the Hayes electors were not appointed in a manner directed by the legislature of the state.<sup>98</sup> The certificate signed by John McEnery as governor was objected to on the grounds that there was no evidence showing that at any time during 1876 he was recognized as governor. Objections were also made to individual electors appointed by McEnery on the grounds that they were not appointed in a manner directed by the legislature.<sup>99</sup>

The certificates and objections were sent to the Electoral Commission, which reported that the electors appointed by William P. Kellogg for Hayes should be counted.<sup>100</sup> Several objections were made to the Commission's decision on the grounds that the Commission excluded evidence offered in support of the original objections to the Kellogg certificates.<sup>101</sup>

The two Houses separated to consider the objections to the Commission's decision.<sup>102</sup> The Senate voted to uphold the decision of the Commission and count the electoral votes certified by Kellogg for Hayes, but the House voted to exclude the Kellogg electors.<sup>103</sup> Since the two Houses did not concur in a contrary opinion, the decision of the Commission was sustained. The State of Louisiana cast eight electoral votes for Hayes.<sup>104</sup>

*Michigan.* An objection was raised to an elector from Michigan on the ground that he had been improperly chosen to replace an elector alleged to be disqualified.<sup>105</sup> The two Houses separated to consider the objection.<sup>106</sup> Both Houses voted to include the elector in the count, and proceeded to count the entire slate of electors from Michigan.<sup>107</sup> The State of Michigan cast eleven votes for Hayes.<sup>108</sup>

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<sup>97</sup> *Id.* at 215.

<sup>98</sup> *Id.* at 216 - 217.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 426.

<sup>101</sup> *Id.* at 426 - 439.

<sup>102</sup> *Id.* at 440.

<sup>103</sup> *Id.* at 441.

<sup>104</sup> *Id.* at 442.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 444. This objection was not referred to the Electoral Commission because it was not a question as to the validity of duplicate certificates from the same state.

<sup>107</sup> *Id.* at 446.

<sup>108</sup> *Id.*

*Nevada.* An objection was made to an elector from Nevada who allegedly held office at the time of his election.<sup>109</sup> The two Houses separated to consider the objection.<sup>110</sup> The House was notified that there was an error in the objection, but as the Senate had already acted upon the objection, no amendment could be made. The Senate voted to count the vote of the elector, and a resolution to do the same was agreed to in the House.<sup>111</sup> The full slate of electors from Nevada was counted, with three votes going to Hayes.<sup>112</sup>

*Oregon.* Two conflicting certificates were received from Oregon, one signed by the Secretary of State and one signed by the Governor.<sup>113</sup> The certificate signed by the Secretary of State appointed electors for Hayes, while the certificate signed by the Governor appointed two electors for Hayes and one for Tilden.<sup>114</sup>

Objections were raised to the electors certified by the Governor on the grounds that 1) they were not appointed in the manner directed by the legislature; 2) a different slate of electors was duly and legally appointed; 3) the certificate signed by the governor was not issued to the electors having the highest number of votes; 4) the certificate signed by the Secretary of State did appear to be issued to the electors receiving the highest number of votes; and 5) the vacancy that was filled by elector Watts was proper.<sup>115</sup> A further objection was filed on similar grounds.<sup>116</sup> An additional objection was raised to the electors certified by the Secretary of State on the grounds that 1) no certificate signed by the Governor was annexed as prescribed by law; 2) elector Watts was ineligible because he held office at the time of the election; 3) Watts was not included on the original list of electors; 4) it was the governor's right to certify the other slate of electors; and 5) if eligible, Watts was not lawfully appointed.<sup>117</sup>

The certificates and objections were sent to the Electoral Commission.<sup>118</sup> The Commission determined that the certificate signed by the Secretary of State, appointing electors for Hayes, was valid and lawfully certified.<sup>119</sup> An objection was then raised to the Commission's decision, and the two Houses separated to

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 452.

<sup>111</sup> *Id.* at 453 - 454.

<sup>112</sup> *Id.* at 454.

<sup>113</sup> *Id.* at 455 - 460.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 460 - 461.

<sup>116</sup> *Id.* at 463.

<sup>117</sup> *Id.* at 461 - 462.

<sup>118</sup> *Id.* at 463.

<sup>119</sup> *Id.* at 643 - 644.

consider it.<sup>120</sup> The Senate voted to sustain the Commission's decision, while the House voted to exclude the vote of elector Watts.<sup>121</sup> The two Houses not concurring in the exclusion of the elector, the entire slate of electors certified by the Secretary of State was counted, and Hayes received Oregon's 3 electoral votes.<sup>122</sup>

*Pennsylvania.* An objection was made to an elector from Pennsylvania on the ground that he was illegally appointed after another elector was disqualified.<sup>123</sup> The two Houses separated to consider the objection, with the Senate voting to include the disputed elector and the House voting to exclude his vote.<sup>124</sup> The two Houses not concurring in the exclusion of the elector, the entire slate of electors from Pennsylvania was counted, casting 29 votes for Hayes.<sup>125</sup>

*Rhode Island.* An objection was raised to an elector from Rhode Island on the ground that he was not duly appointed.<sup>126</sup> The two Houses separated to consider the objection, and each House voted to include the vote of the disputed elector.<sup>127</sup> The State of Rhode Island cast four votes for Hays.<sup>128</sup>

*South Carolina.* Two conflicting certificates were received from South Carolina.<sup>129</sup> One certificate was signed by the Governor and appointed seven electors for Hayes.<sup>130</sup> The other was sent by a different slate of electors, purporting to be lawfully elected, casting seven votes for Tilden.<sup>131</sup>

An objection was made to the certificate signed by the Governor on the grounds that 1) no legal election was held; 2) a Republican form of government did not exist in the state; 3) a legal and free election was prevented by the presence of soldiers of the United States near the polling places; 4) deputy marshals of the United States prevented a fair election; and 5) at the time of the election there was no legal State government in place.<sup>132</sup> An additional objection was made

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<sup>120</sup> *Id.* at 644 - 645.

<sup>121</sup> *Id.* at 646 - 647.

<sup>122</sup> *Id.* at 647.

<sup>123</sup> *Id.* at 647.

<sup>124</sup> *Id.* at 652 - 656.

<sup>125</sup> *Id.* at 656.

<sup>126</sup> *Id.* at 657.

<sup>127</sup> *Id.* at 659.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 659 - 662.

<sup>130</sup> *Id.* at 659 - 660.

<sup>131</sup> *Id.* at 662.

<sup>132</sup> *Id.* at 662 - 663.

the certificate sent by a separate slate of electors on the grounds that they were not lawfully appointed and the certificate was unlawful.<sup>133</sup>

The certificates and objections were sent to the Commission, which reported that the certificate signed by the Governor was to be lawfully counted.<sup>134</sup> An objection to the Commission's decision was raised citing the original objections to the certificate and alleging that the Commission failed to conduct an investigation into the facts and allegations presented to it.<sup>135</sup> A further objection stated that the election itself was unlawful because the votes were given under duress caused by the unlawful exercise of Federal power.<sup>136</sup>

The two Houses separated to consider the objections.<sup>137</sup> The Senate voted to uphold the decision of the Commission, while the House voted to sustain the objections and exclude the votes in question.<sup>138</sup> The two Houses not concurring in ordering otherwise, the decision of the Electoral Commission stood and South Carolina cast seven votes for Hayes.<sup>139</sup>

*Vermont.* The presiding officer read the certificate received from Vermont, but Mr. Hewitt, of New York, claimed to have another paper purporting to be a certificate from Vermont.<sup>140</sup> The presiding officer refused to recognize the second certificate as he had received only one certificate and the additional certificate was not received prior to the prescribed date.<sup>141</sup> Therefore, the issue was not sent to the Electoral Commission for resolution. An additional objection was made to the appointment of an elector from Vermont on the ground that he held public office at the time of the election.<sup>142</sup> The two Houses separated to consider the second objection, with the Senate voting to count the disputed vote and the House voting to exclude it.<sup>143</sup> Without an affirmative vote to exclude the elector from both Houses, the vote was counted, and the State of Vermont cast five votes for Hayes.

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<sup>133</sup> *Id.* at 663 - 664.

<sup>134</sup> *Id.* at 665, 705 - 706.

<sup>135</sup> *Id.* at 707.

<sup>136</sup> *Id.* at 708.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 711.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 712.

<sup>141</sup> *Id.* at 712 - 717.

<sup>142</sup> *Id.* at 715.

<sup>143</sup> *Id.* at 721.

*Wisconsin.* An objection was made to an elector from Wisconsin on the ground that he held an appointed office at the time of the election.<sup>144</sup> The two Houses separated to consider the objection.<sup>145</sup> The House voted to exclude the disputed elector, but the Senate determined that the vote should be included in the count.<sup>146</sup> The two Houses failing to concur in excluding the vote, the vote was included in the final count and the State of Wisconsin cast 10 votes for Hayes.<sup>147</sup>

Having concluded the count of the electoral votes, the presiding officer announced that the whole number of electors appointed was 369, of which a majority is 185.<sup>148</sup> Rutherford B. Hayes received 185 electoral votes, while Samuel J. Tilden received 184.<sup>149</sup>

**1881** In the 1880 election the electoral votes from Georgia “were cast on a day other than that fixed by act of Congress,” and it was determined by joint resolution that the certificates would not be counted until it was determined “whether the counting or omitting to count such votes will essentially change the result of the election.”<sup>150</sup> The tellers reported as follows:

The tellers report that the whole number of electors appointed to vote for President of the United States is 369, of which a majority is 185. Were the votes of electors of the State of Georgia, cast on the second Wednesday of December, 1880, being the eighth day of said month, to be counted, the result would be: For James A. Garfield, of the States of Ohio, for President of the United States, 214 votes, and for Winfield S. Hancock, of the States of Pennsylvania, for President of the United States, 155 votes. If not counted, the result would be: For James A. Garfield, for President of the United States, 214 votes, and for Winfield S. Hancock, for President of the United States, 144 votes. In either event James A. Garfield has received a majority of the votes of the whole number of electors appointed.<sup>151</sup>

The inference from the tellers’ statement, as well as the chart published in the *Congressional Record*, is that the “whole number” of electors would stay the same, that is, at the higher number of 369 of which 185 was the majority, even if the votes from Georgia were not counted, but that in any event, Garfield would have received the majority of either number, and thus was elected. There was no express indication in the *Record* in 1881 that, had the votes from Georgia not counted, the “whole number” and the “majority” of that number would have been reduced accordingly.

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<sup>144</sup> *Id.* at 722.

<sup>145</sup> *Id.* at 725.

<sup>146</sup> *Id.* at 726.

<sup>147</sup> *Id.*

<sup>148</sup> 4 *Congressional Record* 2068, March 1, 1877.

<sup>149</sup> *Id.*

<sup>150</sup> 11 *Congressional Record* 1386 - 1387, February 9, 1881.

<sup>151</sup> *Id.* at 1387.



- 1885** For the election of 1884, it was announced that “the whole number of electors appointed to vote for President and Vice President is 401, of which a majority is 201.”<sup>152</sup> The whole number of electors corresponded to the votes given and the votes to which the states were entitled, as no electoral votes were rejected or failed to have been given by electors.
- 1889** The "whole number of electors appointed to vote for President" was announced at 401, which was also the total number of votes given and counted.<sup>153</sup> The "majority" necessary for election was 201. No objections to votes were raised, and no electoral votes were missing. There were two certificates and papers from the State of Oregon, and, “without objection,” the tellers were instructed to "read those certificates which are authenticated by the signatures of the electors and certified by the governor of Oregon to have been duly appointed in that State,"<sup>154</sup> which votes were then accepted.
- 1893** The "whole number of the electors appointed to vote for President" was announced at 444, which was also the total number of votes given and counted.<sup>155</sup> The "majority" necessary for election was 223. No objections to votes were raised, and no electoral votes were missing.
- 1897** The "whole number of the electors appointed to vote for President" was announced at 447, which was also the total number of votes given and counted.<sup>156</sup> The "majority" necessary for election was 224. No objections to votes were raised, and no electoral votes were missing.
- 1901** The "whole number of the electors appointed to vote for President" was announced at 447, which was also the total number of votes given and counted.<sup>157</sup> The "majority" necessary for election was 224. No objections to votes were raised, and no electoral votes were missing.
- 1905** The "whole number of the electors appointed to vote for President" was announced at 476, which was also the total number of votes given and counted.<sup>158</sup> The "majority" necessary for election was 239. No objections to votes were raised, and no electoral votes were missing.
- 1909** It was announced for the 1908 election that the “whole number of electors appointed to vote for President of the United States is 483, of which a majority

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<sup>152</sup> 16 *Congressional Record* 1532, February 11, 1885.

<sup>153</sup> 20 *Congressional Record* 1860, February 13, 1889.

<sup>154</sup> *Id.*

<sup>155</sup> 24 *Congressional Record* 1340, February 8, 1893.

<sup>156</sup> 29 *Congressional Record* 1715, February 10, 1897.

<sup>157</sup> 34 *Congressional Record* 2371 - 2372, February 13, 1901.

<sup>158</sup> 39 *Congressional Record* 2089 - 2090, February 8, 1905.

is 242.”<sup>159</sup> There were no objections, and there were no electoral votes not given or not counted. One clerical error from the electors of a state, which had listed the wrong state of the presidential candidate, was corrected in the joint session by unanimous consent.<sup>160</sup>

- 1913** It was announced for the 1912 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>161</sup> There were no objections, and there were no electoral votes not given or not counted.
- 1917** It was announced for the 1916 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>162</sup> There were no objections, and there were no electoral votes not given or not counted.
- 1921** It was announced for the 1920 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>163</sup> There were no objections, and there were no electoral votes not given or not counted.
- 1925** It was announced for the 1924 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>164</sup> There were no objections, and there were no electoral votes not given or not counted.
- 1929** It was announced for the 1928 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>165</sup> There were no objections, and there were no electoral votes not given or not counted.
- 1933** It was announced for the 1932 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>166</sup> There were no objections, and there were no electoral votes not given or not counted.
- 1937** It was announced for the 1936 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority

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<sup>159</sup> 43 *Congressional Record* 2149, February 10, 1909.

<sup>160</sup> *Id.* at 2149.

<sup>161</sup> 49 *Congressional Record* 3042, February 12, 1913.

<sup>162</sup> 54 *Congressional Record* 3289, February 14, 1917.

<sup>163</sup> 60 *Congressional Record* 2868, February 9, 1921.

<sup>164</sup> 66 *Congressional Record* 3510, February 11, 1925.

<sup>165</sup> 70 *Congressional Record* 3396, February 13, 1929.

<sup>166</sup> 76 *Congressional Record* 3639, February 8, 1933.

is 266.”<sup>167</sup> There were no objections, and there were no electoral votes not given or not counted.

**1941** It was announced for the 1940 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>168</sup> There were no objections, and there were no electoral votes not given or not counted.

**1945** It was announced for the 1944 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>169</sup> There were no objections, and there were no electoral votes not given or not counted.

**1949** It was announced for the 1948 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>170</sup> There were no objections, and there were no electoral votes not given or not counted.

One elector from the State of Tennessee did not vote for the presidential candidate for whom the elector was listed and who had won a plurality of votes in that state (Harry S. Truman), but rather cast his vote for a different individual. No objection was made to that vote.<sup>171</sup>

**1953** It was announced for the 1952 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>172</sup> There were no objections, and there were no electoral votes not given or not counted.

**1957** It was announced for the 1956 election that the “whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.”<sup>173</sup> There were no objections, and there were no electoral votes not given or not counted.

One elector from the State of Alabama did not vote for the presidential candidate for whom the elector was listed and who had won a plurality of votes

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<sup>167</sup> 81 *Congressional Record* 83, January 6, 1937.

<sup>168</sup> 87 *Congressional Record* 44, January 6, 1941.

<sup>169</sup> 91 *Congressional Record* 91, January 6, 1945.

<sup>170</sup> 95 *Congressional Record* 90, January 6, 1949.

<sup>171</sup> *Id.* at 90.

<sup>172</sup> 99 *Congressional Record* 130, January 6, 1953.

<sup>173</sup> 103 *Congressional Record* 295, January 7, 1957.

in that state (Adlai E. Stevenson), but rather cast his vote for a different individual. No objection was made to that vote.<sup>174</sup>

**1961** It was announced for the 1960 election that the "whole number of electors appointed to vote for President of the United States is 537, of which a majority is 269."<sup>175</sup>

There were three certificates received by the Presiding Officer, the Vice President, "from persons claiming to be the duly appointed electors from the State of Hawaii."<sup>176</sup> In the initial vote count in Hawaii, it appeared that Richard Nixon had won the election by 141 votes (92,505 - 92,364), and that was certified by the Governor. A contest and recount was conducted under Hawaii law, and the recount was not completed until the 28<sup>th</sup> of December. In the meantime, both sets of electors met on the appointed day, December 19, 1960, in the capital of Hawaii, cast their electoral votes, and forwarded their certificates to Washington. After the recount it was "ascertained by judgement of the Circuit Court of the First Judicial District, State of Hawaii," on December 30, 1960,<sup>177</sup> under the Hawaii election contest statute, that Kennedy had won the state's electors by 115 votes. The Governor certified the Kennedy electors on January 4, 1961, and the certificates were received by the Administrator of General Services and by the Senate and House on January 6, 1961. Later that day, in the joint session, Vice President Nixon stated that "The Chair has knowledge, and is convinced that he is supported by the facts" that the later certificate of the Kennedy electors "legally portrays the facts with respect to the electors chosen by the people of Hawaii" and that they should be accepted. Nixon, although "without the intent of establishing a precedent," asked for unanimous consent of the joint session to accept the Kennedy electors, to which there was no objection.<sup>178</sup>

**1965** It was announced for the 1964 election that the "whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270."<sup>179</sup> There were no objections, and there were no electoral votes not given or not counted.

**1969** It was announced for the 1968 election that the "whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270."<sup>180</sup> There were no electoral votes not given or not counted.

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<sup>174</sup> *Id.* at 295.

<sup>175</sup> 107 *Congressional Record* 291, January 6, 1961.

<sup>176</sup> *Id.* at 289.

<sup>177</sup> *Herman T.F. Lum et al. V. Gavien A. Bush et al.* (Civil No. 7029), Circuit Court of the First Judicial District, State of Hawaii, December 30, 1960.

<sup>178</sup> 107 *Congressional Record*, *supra* at 290.

<sup>179</sup> 111 *Congressional Record* 137, January 6, 1965.

<sup>180</sup> 115 *Congressional Record* 171 - 172, 246 - 247, January 6, 1969.

An objection was made in proper form to the votes cast from the State of North Carolina concerning the vote of one elector who voted for George C. Wallace for President and 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 Spiro T. Agnew for Vice President and the State thereby appointed thirteen electors to vote for ... [Nixon and Agnew] and appointed no electors to vote for any other persons.”<sup>181</sup> The joint session then dissolved and the matter was taken up separately in the House and in the Senate. The House disagreed to the objection,<sup>182</sup> as did the Senate,<sup>183</sup> and the electoral vote of the so-called “faithless elector” was counted as cast.

- 1973** It was announced for the 1972 election that the “whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270.”<sup>184</sup> There were no objections, and there were no electoral votes not given or not counted.

One elector from the State of Virginia did not vote for the presidential candidate for whom the elector was listed and who had won a plurality of votes in that state (Richard Nixon), but rather cast his vote for a different individual. No objection was made to that vote.<sup>185</sup>

- 1977** It was announced for the 1976 election that the “whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270.”<sup>186</sup> There were no objections, and there were no electoral votes not given or not counted.

One elector from the State of Washington did not vote for the presidential candidate for whom the elector was listed and who had won a plurality of votes

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<sup>181</sup> *Id.* at 146.

<sup>182</sup> *Id.* at 170 - 171.

<sup>183</sup> *Id.* at 246. One Senator, Senator Brooke of Massachusetts, noted that since the elector came from a state (North Carolina) that did not by statute “bind” the elector to vote for whom pledged or listed, that the Senator would vote against the objection; but had the elector come from such a state, then, the Senator believed, “Congress can properly act to see that the State’s legal requirements are fulfilled.” *Id.* at 213. The instance of an elector voting for a different candidate (the so-called “faithless elector”), from a state which does, in fact, bind by law the elector to vote for the candidate to whom listed or pledged (see *Ray v. Blair*, 343 U.S. 214 (1952) in which the Court upheld the permissibility of such state limitations but did not address their enforceability), has not as yet been expressly addressed by the Congress or the courts.

<sup>184</sup> 119 *Congressional Record* 379, January 6, 1973.

<sup>185</sup> *Id.* at 378-379.

<sup>186</sup> 123 *Congressional Record* 320, January 6, 1977.

in that state (Gerald R. Ford), but rather cast his vote for a different individual.<sup>187</sup> No objection was made to that vote.

**1981** It was announced for the 1980 election that the “whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270.”<sup>188</sup> There were no objections, and there were no electoral votes not given or not counted.

**1985** It was announced for the 1984 election that the “whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270.”<sup>189</sup> There were no objections, and there were no electoral votes not given or not counted.

**1989** It was announced for the 1988 election that the “whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270.”<sup>190</sup> There were no objections, and there were no electoral votes not given or not counted.

One elector from the State of West Virginia did not vote for the presidential candidate for whom the elector was listed and who had won a plurality of votes in that state (Michael S. Dukakis), but rather cast his vote for a different individual.<sup>191</sup> No objection was made to that vote.

**1993** It was announced for the 1992 election that the “whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270.”<sup>192</sup> There were no objections, and there were no electoral votes not given or not counted.

**1997** It was announced for the 1996 election that the “whole number of electors appointed to vote for President of the United States is 538, of which a majority is 270.”<sup>193</sup> There were no objections, and there were no electoral votes not given or not counted.

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<sup>187</sup> *Id.* at 319.

<sup>188</sup> 127 *Congressional Record* 193, January 6, 1981.

<sup>189</sup> 131 *Congressional Record* 588, January 7, 1985.

<sup>190</sup> 135 *Congressional Record* 195, January 4, 1989.

<sup>191</sup> *Id.* at 195.

<sup>192</sup> 139 *Congressional Record* 313, January 6, 1993.

<sup>193</sup> 145 *Congressional Record* H77 (daily ed., January 9, 1997)