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ELECTION CONTESTS AND THE ELECTORAL VOTE

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The extremely close presidential election of 1960 stirred a problem that has long lain dormant. As the result of a recount of the popular vote in Hawaii, Congress, in its joint meeting to count the electoral vote, was presented with conflicting returns from a state for the first time since the Hayes-Tilden controversy of 1877. Since the outcome of the election was not affected, the joint meeting accepted the result of the recount proceeding, and the votes given by Hawaii's Democratic electors were counted.[1] The once fiercely agitated question of the location and nature of the power to decide controversies concerning the electoral vote was thus avoided.

This question, arising from an ambiguity in the Constitution, has long been deemed settled by the statutory provisions for the count of the electoral vote made in the aftermath of the Hayes-Tilden controversy.[2] The system for resolving electoral disputes which this legislation embodies has never been tested, however. The events of 1960 raise serious doubts as to whether the present provisions would be effective either in resolving election contests on their merits or in producing a smooth solution to a political crisis on the order of 1877. Moreover, Mr. Kennedy's narrow margin is a reminder that the possibility of controversy is always present. With broad electoral reforms once again under consideration in Congress,[3] it seems appropriate to take a fresh look at the present constitutional and statutory scheme for dealing with disputed electoral votes.

The basis of our system of electing a President is laid down in the Constitution, which provides that

> Each State shall appoint in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in Congress; but no Senator or Representative, or person

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1. 107 CONG. REC. 281-284 (daily ed., Jan. 6, 1961). For an account of the proceedings in Hawaii, see *infra*, notes 78-81.

2. Act of Feb. 3, 1887, ch. 90, 24 Stat. 373, [hereinafter referred to as the Electoral Count Act]. For subsequent legislative history, see *infra*, notes 61, 63, and 76. The Act provoked considerable debate following its passage, but recent commentators have treated it only in passing, or have viewed it as solving all problems. See Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633 (1888); Carlisle, *Dangerous Defects in Our Electoral System*, 24 FORUM 257, 264 (1897); DOUGHERTY, THE ELECTORAL SYSTEM OF THE UNITED STATES 214-249 (1906); Tansill, *Congressional Control of the Electoral System*, 34 YALE L.J. 511, 524 (1925); Mullen, *The Electoral College and Presidential Vacancies*, 9 MD. L. REV. 28, 41-42 (1948); Dixon, *Electoral College Procedure*, 3 WEST. POL. SCI. Q. 214, 222-223 (1950); WILMERDING, THE ELECTORAL COLLEGE XI (1958).

3. *Infra*, note 117.

> holding an office of trust or profit under the United States shall be appointed an elector.
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> The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.[4]

The actions of the electors are regulated by the Twelfth Amendment:[5]

> The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least shall not be an inhabitant of the same state with themselves; . . . they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be President, if such number be a majority of the whole number of Electors appointed.

The only other constitutional limitations on the election of a President are those which establish the age and citizenship requirements for eligibility to the office.[6]

Pursuant to the constitutional plan the electors are "appointed"—now uniformly by popular vote—on the Tuesday after the first Monday in November.[7] The procedure for counting the vote and ascertaining the result varies from state to state,[8] but in general it is something like this: The ballots, or the contents of the voting machines, are tabulated at the polls by precinct election judges, who send their tally sheets forward to a county canvassing board. This board makes an abstract of the votes shown for each candidate in the precinct returns, which it sends to a state canvassing or returning board. The state board tallies all the county returns and determines who have been appointed electors. This result is then relayed to the governor of the state, who under federal law is required to make a certificate of the result based on this ascertainment and forward it to Washington.[9] The electors, who have also received the governor's certificate, meet on the Monday after the second Wednesday in December to cast their votes, which

4. U.S. CONST. art. II, § 1.
5. See *infra*, notes 18 and 28.
6. U.S. CONST. art II, § 1.
7. 3 U.S.C. § 1 (1958). As to state methods of appointment, see Wilkinson, *The Electoral Process and the Power of the States*, 47 A.B.A.J. 251, 253-4 (1961).
8. See HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES, 236-307 (1934).
9. 3 U.S.C. § 6 (1958). See *infra*, note 63.

they certify and send to the President of the Senate.[10] On January 6th, at a joint meeting of Congress, these votes are opened and tabulated and the result declared.[11]

At a number of points in this process, controversies may arise which could affect the validity of a state's electoral vote. (1) There may be fraud or error at the polls on the part of voters or election officials. (2) There may be fraud or error in the initial count of the ballots at the precinct level. (3) There may be fraud or error on the part of the county or state canvassing board, or one of these agencies may abuse whatever powers are given to it by state law. (4) The governor may act fraudulently or erroneously in certifying the electors. (5) An elector may be appointed who is constitutionally ineligible for the office. (6) The electors may act erroneously in the signing and sealing of their certificates of the vote. (7) The electors may cast their votes for an ineligible person. (8) The electors may vote on a day other than that ordained by Congress. (9) The electors may be influenced by fraud or a third party may somehow tamper with their deliberations. (10) The right of a state to participate in an election, or of a particular government to attest to the acts of a state may be called in question.

This group of controversies may be divided into those concerning the recognition of state governments and the status of states; those concerning the qualifications and acts of the electors in giving their votes; and those concerning the manner in which the popular vote is given, counted, canvassed and communicated to Congress. The problems of greatest importance are those of the last class. Questions of statehood and the recognition of state governments are unlikely to arise short of another Civil War. When they do come up, Congress has sole jurisdiction.[12] Questions concerning the electors would be important in a great crisis such as that of 1877,[13] but they involve technicalities which are no longer of the essence of our electoral system. We view our presidential elections as popular elections. If the President is to take office free of uncertainty or scandal that might weaken his authority, controversies concerning the popular vote in a close election must be promptly resolved by a method that leaves no doubt of its fairness on the merits.

Problems of all three classes arose during the stormy century of legislative history which culminated in the Electoral Count Act of 1887.[14] Con-

10. 3 U.S.C. §§ 7-11. To insure safe arrival of the electors' certificates, five duplicates are deposited with various other officers. *Id.*, § 11. Provision is made for the President of the Senate to send for these duplicates if necessary. *Id.*, §§ 12-14. See 20 OPS. ATT'Y GEN. 522 (1893).

11. *Id.*, §§ 15-18.

12. See *infra*, note 30.

13. See *infra*, note 53.

14. *Supra*, note 2. The history of the electoral system can be only sketched here. For fuller treatment, see MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES

troversy focused on the congressional counting sessions, where three great questions were continually agitated. First, does the Constitution give the President of the Senate sole power to exercise whatever discretion the count involves, or are the two Houses of Congress the final judge of the validity of votes? Secondly, is the power to count merely the power to enumerate votes given by electors declared by state authority to have been appointed, or is there power to determine the correctness of the state authority's declaration and to examine the validity of the acts of the electors? Thirdly, whatever the scope of the power, how is the evidence necessary to a decision to be presented, and by what means is the decision to be made?

Close scrutiny of the debates of the Constitutional Convention reveals no direct discussion of these problems. The possibility that a dispute might arise with which Congress would have to deal does not seem to have been considered. In fact, the machinery of the Electoral College, a compromise between popular election and election by Congress, was designed to provide a means for the election of a President free from any hint of the evils of Congressional influence.[15] The plain implication of the original scheme is that the states in their control of the manner of appointment were to provide for the settlement of whatever controversies might arise. Only local interests would be at stake in the appointment process, because the electors were to be independent of any presidential candidate[16] and would thus be chosen solely on their own merits. Local authorities would naturally resolve any contest.

While state control guarded state interests, other features of the plan protected the national interest. If certain states failed to appoint electors, the President was still elected by a majority of those who were appointed.[17] If no state had appointed electors, the provisions for failure of a majority would come into play, and the election would devolve upon the House.[18]

(1878); DOUGHERTY, *op. cit. supra*, note 2; STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897 (Bolton ed. 1926); Tansill, *supra*, note 2. A complete compilation of all congressional proceedings on the subject from 1789 until 1876 may be found in *House Special Committee on Counting Electoral Votes*, H.R. MISC. DOC. No. 13, 44th Cong., 2d Sess. (1877) [Hereinafter cited as *Counting Electoral Votes*]. When appropriate, reference will be made to this work, rather than to the original sources in the congressional debates. Dates will be given, however, so that the referenced matter may be found in the original.

15. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 109, 501 (Farrand ed., 1911). The Convention wavered between election by Congress and a number of other methods. The Congressional plan was actually approved and then reconsidered. *Id.* 101, 171.

16. U.S. CONST., art. II, § 1; 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, note 15, at 500-501. THE FEDERALIST No. 68, at 452 (Ford ed. 1898) (Hamilton).

17. Before the present language was adopted in the Convention, a motion that the provision read "who shall have balloted," intended to prevent the number needed for a majority from being increased by non-voting electors, was lost. 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, note 15 at 515.

18. U.S. CONST., art. II, § 1; *cf. id.*, amend. XII. In the original provision, if the

The method for electing a President may be contrasted with the provisions for congressional elections. In the latter instance, as Hamilton pointed out in the *Federalist*,[19] Congress must have ultimate control over the manner of election of its own members, lest the states, by refusing to elect Congressmen, cause the whole structure to fall. In the case of the presidency, since the House was ready to carry out the election if the states failed, congressional control was not only undesirable but unnecessary.

The absence of two elements in the original plan made it impossible to determine when a state had failed in its obligations. No provision was made for the states to validate their choice of electors to Congress, and the power to determine what were valid votes was neither defined nor expressly granted. The former gap was filled in 1792 by a statute providing that the "executive authority" of each state was to give to the electors a certificate of their appointment which they were to forward to the President of the Senate with their votes.[20] That this provision did not solve the problem, however, became apparent as the result of a development unforeseen in the Convention. After a very few elections the electors virtually lost their independence.[21] Their election thus took on a national interest, requiring that the electoral votes counted be those given by electors who were actually chosen, whatever the executive certificate might say. In the absence of provision as to the second missing element, it was considered that the President of the Senate had the power to "count," and thus to determine what

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electoral vote ended in a tie, or if no candidate had a majority, the House, balloting by states, was to choose the President from the tied pair. If there were no majority, the choice was to be from among the five highest candidates. In any case the Vice President was to be the man who placed second. The Twelfth Amendment, in providing for the separate election of the Vice President, preserved the power of the House over the Presidential election and gave the Senate similar powers in the case of the Vice President. See *infra*, note 28.

19. THE FEDERALIST, *supra*, note 16, No. 59, at 392-393. Hamilton did not discuss the electoral count or contests over the electoral vote. *Id.*, No. 68.

20. The Act of March 1, 1792, ch. 8, 1 Stat. 239, also established the times at which the electors were to be appointed and were to vote, as well as the date on which Congress was to meet for the count of the vote.

21. The rise of party feeling was apparent enough by 1796 to cause outspoken comment when a Federalist elector voted for Jefferson. STANWOOD, *op. cit. supra*, note 14, at 51. While the electors retain their independence as a theoretical matter, in practice virtually every elector ever appointed has voted at his party's call. DAVID, GOLDMAN & BAIN, THE POLITICS OF NATIONAL PARTY CONVENTIONS 222n (1960); *cf.* CORWIN, THE PRESIDENT—OFFICE AND POWERS, 1787-1957 40-41 (4th rev. ed. 1957). One court has gone so far as to suggest that mandamus would lie to compel an elector to vote as the party directed. Thomas v. Cohen, 146 Misc. 836, 262 N.Y. Supp. 320, 326 (Sup. Ct. 1933) (dictum), and the statutes of at least five states require a pledge. Wilkinson, *supra*, note 7 at 254. The Supreme Court has indicated, however, that while a political party may exact a pledge from a primary candidate, its enforceability is constitutionally dubious. Ray v. Blair, 343 U.S. 214, 230 (1952) (dictum). Recent legislation in the southern states seems to embody express recognition of the principal of independence. CORWIN, *supra*, at 41; Wilkinson, *supra*.

votes were to be counted.[22] The dangers in such a system, especially when that officer was a presidential candidate soon appeared, however, and it was urged that Congress could by legislation provide a more satisfactory procedure.[23]

These problems were first faced after the good will surrounding Washington's administrations had been dissipated by strife over John Adam's efforts to deal with the foreign and domestic consequences of the French Revolution. In the spring of 1800 both Houses of the Federalist Congress, in a last ditch effort to stem the tide of Jeffersonian Republicanism,[24] passed different versions of a measure under which a joint committee was to meet prior to the count of the vote, with "power to examine into all disputes relative to the election of President and Vice President of the United States, other than such as might relate to the number of votes by which the electors may have been appointed." All petitions for the contest of electoral votes were to be referred to the Committee, which was to take any necessary additional evidence, and make a report of its entire proceedings, without opinion, to both Houses. Congress was then to meet in joint session, for the count of the vote. If objection was made to the vote of any state, the Houses were to decide it without debate in separate session. As passed by the House the bill provided that a disputed vote was to be counted unless the Houses concurred in rejecting it.[25] The Senate, agreeing in every provision of the bill but this one, passed an amendment

22. Resolution of September 17, 1787, 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, note 15, at 665-666; *Counting Electoral Votes* 7-8 (April 6, 1789); 1 KENT, COMMENTARIES ON AMERICAN LAW 258-259 (1826); MCKNIGHT, *op. cit. supra*, note 14, at 140-147, 157-167, 179-181.

23. In 1797 John Adams did not hesitate to count for himself the four votes of Vermont, which apparently had been improperly cast by the state legislature. STANWOOD, *op. cit. supra*, note 14, at 52. Although this act gave Adams the presidency, no objection was raised in the counting session. *Counting Electoral Votes* 13, 15 (Feb. 8, 1797). In the tied election of 1800, Jefferson, also without opposition, counted dubious votes that gave a majority to himself and Burr. 2 DAVIS, MEMOIRS OF AARON BURR 71-73 (1837); STANWOOD, *op. cit. supra*, at 69-73; *Counting Electoral Votes* 30 (Feb. 12, 1801). As to the idea that Congress could by legislation provide another agent for the count, see *Counting Electoral Votes* 16 (Senate, Jan. 23, 1800); KENT, *op. cit. supra*, note 22; H.R. REP. No. 31, 40th Cong., 3d Sess. 84-88 (1869). *Cf.* 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1470 (3d ed. 1858).

24. Their purpose was to prevent the appointment of Republican electors by the Pennsylvania legislature. BEVERIDGE, THE LIFE OF JOHN MARSHALL 452-458 (1916); MCKNIGHT, *op. cit. supra*, note 14, at 262-269; DOUGHERTY, *op. cit. supra*, note 2, at 62-63.

25. *Counting Electoral Votes* 23, 27 (April 25, May 2, 1800). The original version of the bill in the Senate had provided for a "Grand Committee" with a majority of its members drawn from the Senate, having power to arrive at a binding final determination of all disputes except those over the popular vote. *Id.*, 21 (March 27, 1800). The milder House version reflected the efforts of John Marshall, a somewhat more moderate Federalist than his New England colleagues, to prevent the passage of a measure that would have excited even greater popular ill will against his party. BEVERIDGE, *op. cit. supra*, note 24.

providing that a disputed vote was to be *rejected* unless the Houses concurred in counting it. The House, less aggressively partisan than the Senate, refused to accept a measure which would permit rejection by vote of the Senate alone. The bill failed when neither House would yield.[26]

The bill of 1800 was a measure designed to achieve partisan ends. While it prohibited Congress from questioning a state's popular vote, it did not bind Congress to accept a particular determination of the popular result. Since the facts reported by the Committee were in no way made the basis of the ultimate decision, there was not even a procedural guarantee that the result reached by the two Houses would be based on a fair assessment of the facts. If the bill did not provide a satisfactory means of validating a state's votes, however, it left no doubt as to where the power to validate lay. Even the Republican members of both Houses seemed to concede that Congress had full power to deal with the matters over which the bill gave it jurisdiction.[27] In light of this understanding it can be argued that the Twelfth Amendment, the remedy for other defects appearing in the election of 1800, embodied the view that the power to count the vote lay in Congress, rather than in the President of the Senate.[28]

No measure materially affecting the electoral count was passed in the years prior to the Civil War,[29] but on three occasions, Congress assumed the power to reject the votes of a state which had not completed the formalities necessary for admission to the Union.[30] The only other question concerning

26. *Counting Electoral Votes* 28, 29 (May 8, 9, 1800).

27. In both Houses they had urged substitute measures that gave the power to decide disputes to a majority of the joint convention. *Id.* 19 (Senate, March 25, 1800); *id.* 26 (House, April 30, 1800).

28. The amendment did not alter the language of the original instrument regarding the count of the vote. *Cf.* U.S. CONST. art. II, § 1. As to the changes actually made, see *supra*, note 18. The amendment was passed by the Republican 8th Congress on December 8, 1803, in a strict party line vote. 2 Stat. 306; STANWOOD, *op. cit. supra*, note 14, at 77-82. The language of the act which implemented it suggests that someone other than the President of the Senate was to count the vote. Act of March 26, 1804, ch. 50, 2 Stat. 295. The language used in the count of 1805 indicates an understanding that Congress was the counting authority. *Counting Electoral Votes* 36, 37 (Feb. 13, 1805).

29. In 1824, another year of impending crisis, the Senate passed a bill providing that the Houses should separate to decide disputed votes, with votes to be rejected only if the Houses concurred. The bill died in the House without being considered. *Id.* 57-60 (March 4-April 21, 1824). The Act of January 23, 1845, ch. 1, 5 Stat. 721, established the present election day and permitted the states to remedy minor defects in the electoral process. See 3 U.S.C. §§ 1, 2, 4 (1958).

30. In 1817 the votes of Indiana were counted after a debate in which it was assumed that if Indiana were not a state her vote would not be counted. *Counting Electoral Votes* 44-47 (Feb. 10-11, 1817). In 1821, Missouri not having complied with the anti-slave conditions to its admission, Henry Clay put through a compromise resolution which provided that the result should be announced in alternative form, both as though the vote of Missouri had been counted and as though it had not. *Id.* 48-56 (Feb. 6-14, 1821). Michigan's vote was counted in similar fashion in 1837, and the ineligibility of certain electors was pointed out. *Id.* 70-76 (Jan. 26-Feb. 8, 1837). The

the electoral vote during this period arose in 1857, when the votes of Wisconsin, unavoidably given on the wrong day, were counted after an inconclusive debate.[31] In all four of these cases, the disputed votes had no effect on the outcome of the election. The only consistent pattern in the debates is the call for legislation to deal with the problem of the count.[32]

Congress asserted total power over the electoral vote with the adoption of the Twenty-second Joint Rule in 1865. Even more than the bill of 1800, the Rule was a political measure, passed and used by Republican majorities of both Houses to assure control over the votes of the recently rebellious southern states. It thus contained no machinery at all for solution of disputes on the facts. The Rule first provided for the joint meeting of the two Houses, at which the certificates were to be opened by the President of the Senate and read out by tellers. The critical portion was as follows:

> If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and the question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall in like manner state the question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurring vote of the two Houses, which being obtained, the Houses shall immediately reassemble, and the Presiding Officer shall then announce the decision of the question submitted; and upon any such question there shall be no debate in either House. And any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner.[33]

Since concurrence was required to count a disputed vote, either House, by its negative, could cause rejection. This procedure created no problem, because in the post Civil War political climate there was little prospect of disagreement over which votes to reject.

The Twenty-second Joint Rule was not applied in the count of 1865.[34]

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power of Congress to make such decisions is derived directly from its power to provide for the admission of new states. U.S. CONST., art. IV, § 3. If the two Houses cannot agree as to whether a certain entity is a state, or whether certain acts are the acts of the lawful government of a state, no other authority can resolve the question. See Luther v. Borden, 48 U.S. (7 How.) 1 (1849). For the treatment of similar problems in 1865 and 1869, see *infra*, notes 34, 35.

31. *Counting Electoral Votes* 87-144 (Feb. 11-12, 1857).

32. *Id.* 47 (House, Feb. 11, 1817), 52 (House, Feb. 14, 1821), 71 (Senate, Feb. 4, 1837), 129-132 (Senate, Feb. 12, 1857).

33. *Id.* 224 (Senate, Feb. 6, 1865). The rule was hastily passed in sparsely attended sessions of both houses. *Id.* 223-226. *Cf. id.* 536 (March 13, 1876) (Remarks of Senator Whyte).

34. The Twenty-second Joint Rule was only an alternative to the chief measure upon which the Radical Republicans relied to block the votes of lately reconstructed

In 1869, although serious questions arose, no votes were rejected under the Rule.[35] The count of 1873, in which the Rule was applied to the votes of five states, is the first case in which a dispute over the popular vote was presented to Congress.[36] In four cases objection was made to the acts of the electors and to alleged technical faults in the certification.[37] When the votes of Louisiana came up, Congress for the first time dealt with a "double return," the device with which all subsequent legislation has been designed to deal. Two bodies in the state claimed to be the final canvassing authority. One had certified the state's Grant electors, while the other had validated a slate of Democrats, who also had the certificate of the governor. After a debate in which members of both parties said that Congress could look to the facts of a disputed election, in order to prevent the acceptance of a corrupt return, the Senate Committee on Privileges and Elections was empowered to investigate the situation.[38] The Committee found that neither canvass was valid, and held that Congress itself could not canvass the votes without usurping the state's constitutional powers. The Committee's report suggested, however, that it would be proper for Congress to go behind the governor's certificate to

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Louisiana and Tennessee. The Houses had previously resolved that no votes from those two states should be counted. *Id.* 147-149 (House, Jan. 30, 1865); *id.* 149-223 (Senate, Feb. 1-4, 1865; House, Feb. 4, 1865). In the count of the vote this resolution, reluctantly approved by Lincoln at the last minute, was relied on by the President of the Senate to keep the votes of Louisiana and Tennessee from the floor. *Id.* 227-228 (Feb. 8, 1865). In a message received two days after the count Lincoln made it clear that he deemed his approval of the measure unnecessary, if not improper, since Congress had "complete power to exclude from counting all electoral votes deemed by them to be illegal." *Id.* 229-230 (Senate, Feb. 10, 1865).

35. The vote of Louisiana was objected to under the Twenty-second Joint Rule on the ground that no valid election had been held there. During the debate it appeared that there was no evidence of any misconduct, and the Houses concurred in accepting the questioned votes. *Id.* 237-244 (Feb. 10, 1869). The votes of Georgia, whose statehood was then pending before Congress, were counted under an alternative measure similar to those used in the pre-war crises, *supra*, note 30. The radicals of the House had sought to have Georgia's vote rejected altogether under the Twenty-second Joint Rule. Outraged, they debated a censure proposal for two days after the count. *Id.* 231-236 (Senate, Feb. 8, 1869; House, Feb. 8, 1869); *id.* 246-266; 267-320 (House, Feb. 11, 12, 1869). After the election an intensive and enthusiastically partisan investigation in New York City by a House Committee produced evidence of fraud which Republican members claimed would have given the state's electoral votes to Grant. H.R. REP. No. 31, *supra*, note 23.

36. In several instances between 1836 and 1872, the returns of isolated counties had been thrown out in the state canvass for various irregularities, but no protest was made in the count. BURNHAM, PRESIDENTIAL BALLOTS, 1836-1892 895-949 (1955).

37. Three votes from Georgia cast for Greeley, the Democratic candidate who had died after the election, were rejected on the vote of the House, the Senate voting to accept them. *Id.* 368, 377 (Feb. 12, 1873). Objections on various technical grounds to the votes of Texas and Mississippi were denied by both Houses. *Id.* 369-371, 380, 383, 386-389. Arkansas's votes for Grant were rejected by the Senate for lack of a seal, suggesting that the Republicans were seeking to create an impression of fairness. *Id.* 402. It later appeared that Arkansas had no seal at the time of the election. *Cf. id.* 510 (Feb. 25, 1875) (Remarks of Senator Logan).

38. *Counting Electoral Votes* 336-345 (Senate, Jan. 7, 1873).

determine whether a legal canvass had been made.[39] In the count proceedings this report was not mentioned, but objections based on its facts were made and both sets of votes were rejected by concurrent vote.[40]

Under the Twenty-second Joint Rule Congress not only claimed the power to count, but defined that power as permitting it to reject an invalid state canvass. As in 1800, however, Congress would not undertake to decide for itself which electors had actually been appointed. Moreover, the makeshift fact-finding provisions relied upon were effective only because the state contest was not material to the outcome of the national election. The solution that was reached may have been just, as far as it went, but it left unresolved the question of who actually carried Louisiana.

Between 1873 and 1876 Congress tried vainly to pass permanent legislation to regulate the electoral count. A bill drafted by Senator Oliver P. Morton of Indiana passed the Senate in February 1875,[41] but the House failed to act upon it. The bill was in essence the Twenty-second Joint Rule, with a provision that a single return from a state could not be rejected unless both Houses concurred in the action, but that in case of a double return, no vote could be counted unless both Houses concurred. Brief debate was permitted in the separate sessions of the Houses, but an amendment creating a committee to find the facts was rejected.[42] Since any serious contest would present a double return the bill gave no greater guarantee of a non-political decision than did the Rule. When the 44th Congress convened in December 1875, the House was Democratic for the first time since before the Civil War.[43] In this situation the Senate did not re-adopt the Twenty-second Joint Rule, in effect repealing it.[44] The Morton bill was brought up again in an effort to fill the gap, but members of both parties apparently felt

39. *Id.* 358-363 (Senate, Feb. 10, 1873). The Republican returning board had been upheld by the state supreme court, but the majority voted to ignore this fact, since the decision came after the meeting of the electors. *Id.* 362. See State *ex rel.* Attorney General v. Wharton, 25 La. Ann. 2 (1873).

40. *Counting Electoral Votes* 399, 406 (Feb. 10, 1873).

41. *Id.* 519 (Feb. 25, 1875). Prior efforts to pass a Constitutional Amendment giving Congress "power to provide for holding and conducting the elections of President and Vice President and to establish tribunals for the decision of such elections as may be contested," had been unsuccessful. *Id.* 345-357 (Senate, Jan. 17, 1873), 408-444 (May 28, 1874, Jan. 21-27, 1875). A proposal to change the Twenty-second Joint Rule to provide that concurrence was necessary for rejection also failed. *Id.* 444-458 (Feb. 4, 1875).

42. S. 1251, 43 Cong., 2d Sess., *id.* 459 (Feb. 25, 1875). The amendment was thought too great a delegation of the congressional power over the count. *Id.* 480-487, 498-499. An amendment to eliminate the broad language of the Twenty-second Joint Rule, *supra,* note 33, permitting decision of "any other question," was passed, in order that the bill would not be construed as covering questions over which Congress had no jurisdiction, such as the determination of state contests. *Id.* 463.

43. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 692 (1960) [Hereinafter cited HISTORICAL STATISTICS].

44. *Counting Electoral Votes* 786-787 (Jan. 20, 1876).

that the time was not ripe for a measure which would permit the action of one House to control the other. The bill was laid aside for good in August 1876.[45] The nation thus faced the election of 1876 with no machinery for resolving disputes over the electoral vote. Perhaps both sides expected a close fight and neither wished to put into effect a plan which might work to its disadvantage.

All such expectations were more than justified in the election of 1876, which resulted in the Hayes-Tilden controversy, the one great test of our electoral system.[46] In no other election have disputed electoral votes been sufficient to affect the outcome. On this occasion Tilden, the Democratic candidate, could win either by picking up one of twenty contested votes or by prevailing in an election in the Democratic House. Unless Hayes won all of the contested votes, he would lose the presidency. In the count the chief problem was presented by double returns from Florida, Louisiana, and South Carolina, where Republican returning boards, claiming that the Democrats had used force and fraud among the Negro voters, had thrown out sufficient Tilden votes to carry the states for Hayes. Questions were also raised as to the eligibility of certain Hayes electors in Florida and Louisiana, and in Oregon, where the Democratic governor had certified a Tilden elector in place of the ineligible Republican. To resolve the controversy, a bi-partisan majority of both Houses passed an act[47] creating the Electoral Commission, a body with "the same powers, if any, now . . . possessed by the two Houses," to take evidence upon and arrive at a decision of the disputes. In the joint session for the count, single returns were to be dealt with as in the Morton Bill.[48] Questions involving double returns were to be sent to the Commission. Its decision was to be binding upon Congress in the count, unless rejected by the vote of both Houses.

The composition of the Commission reflected a game but unsuccessful attempt to attain impartiality. It consisted of five Senators, five Representatives, and five Justices of the Supreme Court. In this group there were seven

45. *Id.* 519-520, 676-687 (Senate, March 13, April 19, Aug. 5, 1876).

46. For fuller treatment of the controversy, see HAWORTH, THE HAYES-TILDEN ELECTION (2d ed. 1927); DOUGHERTY, *op. cit. supra*, note 2, at 105-213; NEVINS, ABRAM S. HEWITT 305-399 (1935); WOODWARD, REUNION AND REACTION (1951); Lewis, *The Hayes-Tilden Election Contest*, 47 A.B.A.J. 36, 163 (1961). The proceedings of the Electoral Commission are found in 5 CONG. REC., part 4 (1877), a separately paged supplement to the CONGRESSIONAL RECORD [Hereinafter cited as 5(4) CONG. REC.]. See also U.S. CONGRESS, ELECTORAL COMMISSION, ELECTORAL COUNT OF 1877 (1877).

47. Act of Jan. 29, 1877, ch. 37, 19 Stat. 227. For a summary of the debates on the Act, see DOUGHERTY, *op. cit. supra*, note 2, at 110-135. The committee deliberations that led to the acceptance of the measure are documented in NEVINS, *op. cit. supra*, note 46, at 342-364.

48. During the count single returns from Michigan, Nevada, Pennsylvania, Rhode Island, Vermont, and Wisconsin were objected to on eligibility grounds. All were accepted, either by concurrent vote or by the vote of the Senate. 5 CONG. REC. 1720, 1728, 1938, 1945, 2054, 2068 (1877).

Democrats and an equal number of avowed Republicans. The fifteenth man, a Justice to be chosen by the other four Justices, was to be the neutral balance. After Mr. Justice Davis, an independent, thankfully declined the honor in somewhat dubious circumstances,[49] it fell upon Mr. Justice Bradley, a Republican, who seemed to the Democrats the next most likely to decide impartially. Whether for partisan reasons, or because he saw the issues that way, Bradley consistently voted with the Republicans, giving Hayes an eight-man majority on every important question before the Commission. As a result, the view that the decision was at least influenced, if not corrupted, by political considerations was widely held at the time and seems difficult to avoid today.[50]

The main issue before the Commission was its power (and thus the power of Congress) to go behind a state's own determination of the results of the popular election, as reflected in the findings of the returning board, duly certified by the governor. It seems clear, that whatever acts of violence the Democrats may have committed, in the three southern states, the Republican boards, in throwing out votes wholesale, had exceeded even the broad powers which reconstruction statutes had given them.[51] The Democrats argued that

49. Davis was unexpectedly chosen by the Illinois legislature to fill a vacancy in the United States Senate. It is unclear whether this transpired through Democratic stupidity or Republican cleverness. See NEVINS, *op. cit. supra*, note 46, at 361-367.

50. The letters of Mr. Justice Miller, avowedly a Republican, leave little doubt that he was heavily in favor of Hayes and greatly relieved by the outcome. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 280-291 (1939). For the torrent of abuse to which Mr. Justice Bradley was subjected both before and after the proceedings, see Klinkhamer, *Joseph P. Bradley: Private and Public Opinion of a "Political" Justice*, 38 U. OF DET. L.J. 150 (1960). The role of the five justices in the controversy increased public criticism of the opinion of the Court in the Granger Cases (Munn v. Illinois), 94 U.S. 113, handed down on March 1, 1877. 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 583 (Rev. ed. 1926). For more recent views, see NEVINS, *op. cit. supra*, note 46, at 370-373, 378n; FAIRMAN, *op. cit. supra*, at 292; WOODWARD, *op. cit. supra*, note 46, at 155-163.

51. The applicable Florida statute provided that the Board of State Canvassers might throw out any returns which appeared so false and fraudulent that the Board could not determine the true vote. Acts and Resolutions of Fla. 1872, ch. 1868, § 4. See FLA. STAT. ANN. § 102.131 (1960). The Board had taken testimony regarding alleged offenses and had thrown out numerous individual votes. In the gubernatorial contest the state supreme court ruled this action illegal, holding that the statute gave the Board discretion to look only to the *bona fides* of the returns, not to the votes themselves. State *ex rel.* Drew v. Board of State Canvassers, 16 Fla. 17 (1877). In Louisiana the statute set up an elective returning board. If sworn complaints regarding fraud or violence at the polls were made to it, the board could investigate the charges and exclude from the count any return which it found materially affected by these influences. Acts of La. 1872, No. 98. § 3. Without complying with these formalities, the board had thrown out some 13,000 Democratic votes. 5(4) CONG. REC. 60-61. The South Carolina statute gave the State Canvassing Board power to decide "cases under protest or contest." S.C. REV. STAT. tit. 2, § 26 (1873). See S.C. CODE § 23-476 (1952). The Board had refused to entertain Democratic allegations of fraud in certain of the county canvasses. 5(4) CONG. REC. 180. For the unsuccessful efforts of the South Carolina Democrats in the state courts, see State ex rel. Barker v. Bowen, 8 S.C. 382 (1876); *Id.* 400 (1877).

pursuant to the national interest in a true result, the Commission should look to the facts of the election and find that the Tilden electors had been appointed. In the alternative they urged that, as in the case of Louisiana in 1873, there were no valid returns from the states in question. These arguments failed to persuade the Republican majority of the Commission, which held by an eight to seven vote in each case that it was bound by the certificates based on results reached by the validly constituted state returning boards and would look to no evidence of the facts of the election.[52] The Commission also held that it had power to look into eligibility only if ineligibility at the time of voting were alleged. In the case of Oregon it made clear that the unchallenged result reached by the returning board could not be overruled by the governor's certificate.[53] In denying that it had power to go behind the returns, the majority was careful to leave open the possibility that Congress might provide by law some proper means for determining such questions.[54]

The decision of the Commission was accepted by the Senate in each case and so was binding in the count in spite of rejection by the House. The more eager Democratic partisans threatened to prolong the proceedings past the end of Grant's term on March 4, but other forces were working for compromise. Those who honestly feared civil tumult worked with those who saw the chance for personal advantage in a series of desparate negotiations that finally persuaded a majority of the House to desist, in time for Hayes to be declared elected on March 2.[55]

Congress had again taken control of the power to validate electoral votes, but Democratic hopes that the validation would be based on the merits of the individual controversies were illusory. The Commission not only refused to make impartial findings of fact, but allowed itself to be bound by the findings of partisan state agencies that were the source of the dispute. In spite of its judicial trappings, the Commission was a political body, an arm of Congress, and so it reached a partisan result. This result did not itself resolve the great controversy. It rather provided a medium for political compromise. The legal arguments involved had merit on both sides and

52. 5(4) CONG. REC. 56, 119, 192. In the case of Florida the Commission further held invalid the certificate of the newly elected Democratic governor based on a state quo warranto proceeding completed subsequent to the date of meeting of the electors. In Louisiana it decided that a group of Democrats claiming to be the returning board was not authorized to act as such. In South Carolina it rejected Democratic arguments based on the failure of the state to enact a registration statute required by its constitution and on alleged federal interference in the election. *Ibid.* See generally, DOUGHERTY, *op. cit. supra*, note 2, at 136-183, 202-207.

53. 5(4) CONG. REC. 38, 57, 117, 119, 179. DOUGHERTY, *op. cit. supra*, note 2, at 153, 160, 180, 184-202.

54. 5(4) CONG. REC. 56, 192; *cf. Id.* 263-264 (Opinion of Mr. Justice Bradley).

55. 5 CONG. REC. 2068 (1877). The story of the negotiations is told in full detail in WOODWARD, *op. cit. supra*, note 46. See also, NEVINS, *op. cit. supra*, note 46, at 379-399.

would have divided Congress unalterably on political lines. The Commission prevented such a split by reaching a result which one House was bound to accept. A House compromise could then be reached without loss of face on either side. Considering the potential for civil disturbance which underlay the Hayes-Tilden controversy, an acceptable political solution was of great importance. Crisis might have been avoided altogether, however, if there had already been in effect a provision for fair determination of state controversies on the merits.

The Hayes-Tilden decision marked the end of a fifteen-year period of national crisis, but it did not halt congressional efforts to pass legislation that would solve the problems made manifest in 1877. The bill which finally became the Electoral Count Act was introduced by Senator Edmunds of Vermont in May 1878.[56] Spurred by two close presidential elections,[57] the Senate passed the bill three times in the next decade, but each time could not win the agreement of the House.[58] Finally, in 1887, when the passions of Reconstruction had cooled, the Republican Senate and Democratic House of the 49th Congress were able to pass a compromise measure in an atmosphere relatively free of partisan pressures.[59]

The Electoral Count Act as introduced in 1878 and passed in 1887

56. S. 1308, 45th Cong., 2d Sess., 7 CONG. REC. 3739. *Cf.* Edmunds, *Presidential Elections*, 12 AM. L. REV. 1, 15-19 (1877).

57. Garfield defeated Hancock in 1880 by only 7,368 votes out of some 9,000,000 cast, and won in the Electoral College by 214 votes to 155. In 1884 Cleveland's popular vote lead was some 68,000 out of 9,500,000, but his electoral vote lead was a mere 37. He carried New York with its 36 electoral votes by a plurality of only 1167 out of nearly, 1,200,000 votes. HISTORICAL STATISTICS 682-683, 689. *Cf.* BURNHAM, *op. cit. supra*, note 36, at 130, 137. As to the counts in 1880 and 1884, see *infra*, note 58.

58. S. 1308, *supra*, note 56, passed the Republican Senate in December 1878, but was allowed to die in the still Democratic House. 8 CONG. REC. 51-54, 68-74, 157-170, 197 (1878). In the 46th Congress, with both Houses Democratic, efforts to pass legislation to control the count of 1881 failed, and a compromise was adopted, providing for the alternative count of the votes of Georgia, which had been cast on the wrong day. STANWOOD, *op. cit. supra*, note 14, at 399; 11 CONG. REC. 19-32, 39-48, 61-73, 132-134 (1880). The count proceeded peacefully under this device. *Id.* 1386-1387 (1881). The bill reappeared in the Republican 47th Congress as S. 613. 13 CONG. REC. 859, 2651-2652 (1882). It died in the House, after an unsuccessful effort to amend it to provide that the losing candidate might contest the election in federal court after the President of the Senate had declared the result. *Id.* 5142-5150. On its next appearance the bill passed a Republican Senate for the third time. S. 25, 48th Cong., 1st Sess., 15 CONG. REC. 430, (1883). The House, again Democratic, passed a substitute giving decision of all questions to a per capita vote of the joint session, which was unacceptable to the Senate. *Id.* 5460-5468, 5547-5551 (1884); 16 *Id.* 1618 (1885). As in 1876, neither party would give ground in an election year, but the count of the vote in 1885 passed without incident. *Id.* 1532. As to the composition of Congress, see HISTORICAL STATISTICS 692.

59. S. 9, 49th Cong., 1st Sess. It was introduced in the form in which it had last passed the Senate. 17 CONG. REC. 122, 242 (1885). After a brief debate, a substitute was reported back. *Id.* 1021, 1057-1064, 2387 (1886). This version passed the Senate without amendment. *Id.* 2427-2430. Numerous amendments were added in the House, and the final form of the bill was the result of a conference. 18 CONG. REC. 29-31, 45-52, 77 (1886); 668 (1887).

involved one significant change from the plan of the Morton Bills of 1875-76. If a state provided for the determination of contests over the electoral vote, the result of any proceeding under such a provision was to be binding on Congress in the count. Only in the failure of such a determination was Congress to have the power to reject votes. In its report in December 1886, the House Select Committee on the Election of President and Vice President described the effect of the proposed legislation:

> The bill provides the means of determining what is the vote, how it shall be counted, its count, and the authoritative declaration of the result.
>
> The two Houses are by the Constitution authorized to make the count of the electoral votes. They can only count legal votes, and in doing so must determine from the best evidence to be had, what are legal votes; and if they cannot agree upon which are legal votes, then the state which has failed to bring itself under the plain provisions of the bill and failed to provide for the determination of all questions by her own authorities will lose her vote.
>
> Congress having provided by this bill that the State tribunals may determine what votes are legal coming from that State, and that the two Houses shall be bound by this determination, it will be the State's own fault if the matter is left in doubt.[60]

The great problems of the first century of our electoral system seemed solved. A measure had finally been passed providing for a fair determination of the facts of individual contests that would be binding upon Congress in the count. The national interest in a true result was thus vindicated without offense to state control of the process of appointment. While Congress claimed full power to validate votes, its role was limited to cases in which a state had failed to settle its own disputes and to questions beyond state competence. If the Act worked in practice, no dispute could again disrupt the orderly process of a presidential election.

The pertinent provisions of the Electoral Count Act as presently found in the United States Code[61] are as follows:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such

60. H.R. REP. No. 1638, 49th Cong., 2d Sess., 18 CONG. REC. 30 (1886).

61. Act of February 3, 1887, ch. 90, 24 Stat. 373, 3 U.S.C. §§ 5-7, 15-18 (1958). Technical changes were made by the Act of October 19, 1888, ch. 1216, 25 Stat. 613, and by the Act of May 29, 1928, ch. 859, 45 Stat. 945. For later changes, see *infra*, notes 63, 76. The Act, prior provisions still in effect, *supra*, notes 20 and 29, and subsequent changes were codified as 3 U.S.C. §§ 1-20 (1958), by Act of June 25, 1948, ch. 644, § 1, 62 Stat. 672.

> determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.[62]

Congress is to meet in joint session in the House at one P.M. on January 6th for the count of the vote, with the President of the Senate in the chair. The latter is to open "all the certificates and papers purporting to be certificates of the electoral votes," in alphabetical order by states and hand them to tellers who are to read them out.

> Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one member of the House of Representatives before the same shall be received. When all objections made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to Section 6 of this title[63] from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in Section 5 of this title[64] to have been appointed, if the determination in said section provided for shall have been made . . . but in case there shall arise the question which of two or more of such State authorities determining what

62. 3 U.S.C. § 5 (1958).

63. *Id.* § 6 provides that the executive of each state, "as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment," is to mail a certificate of the electors appointed and the number of votes to the Administrator of General Services. Copies of this certificate are also given to the electors, who forward them with the certificates of their votes. *Supra*, note 10. If there is a subsequent determination of a controversy under 3 U.S.C. § 5, *supra*, note 62, evidence of it is to be forwarded in similar fashion. As to the role of the Administrator of General Services, see 107 CONG. REC. 265 (daily ed. Jan. 6, 1961) (Remarks of Senator Russell). This function was transferred from the Secretary of State as part of the reorganization of 1950. Act of Oct. 31, 1951, ch. 655, §§ 4-9, 65 Stat. 711.

64. *Supra*, note 62.

> electors have been appointed, as mentioned in Section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State under the seal thereof, shall be counted.[65]

A survey of the sessions of Congress called to count the vote under the Electoral Count Act shows that prior to 1961 no question was presented at any count that might have called any of these provisions into play.[66] It is thus necessary to look closely at the language of the Act and its legislative history in order to understand its operation and effect in dealing with the problems of single and double returns so familiar to its drafters.

(1) *Single Returns.* If those who wish to contest the vote of a state have not sent forward a paper purporting to be a certificate of the electoral votes which they urge to be the correct ones, then the return which Congress has received is given virtually binding effect. The intention here was to insure that the election result reached by proper state authority would not be questioned in Congress if it were unchallenged in the State. Even in such a case, however, Congress must have power to see that the state governor has certified the results actually reached in the state canvass, and to deal with any irregularity in the acts of the electors.[67] By concurrent action the Houses may thus reject even votes in a single return that they find not

65. 3 U.S.C. § 15 (1958). The Act also provides for brief recesses during the count, *id.* § 16; for a maximum of two hours of debate in separate session, with each speaker limited to five minutes, *id.* § 17; and in joint session for no debate and consideration of no other question except a motion to withdraw, *id.* § 18.

66. In the count of 1889 there was some confusion, but no actual problems were present. 20 CONG. REC. 1859-1860. For the subsequent counts, see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §§ 1960-1963 (1907); 6 *Cannon's Precedents of the House of Representatives*, §§ 442-446 (1935); 81 CONG. REC. 83 (1937); 87 *id.* 43 (1941); 91 *id.* 90 (1945); 95 *id.* 89 (1949); 99 *id.* 130 (1953); 103 *id.* 294 (1957). The procedure presently followed has been purely a formal ritual for many years. See *Cannon's Procedure in the House of Representatives*, H.R. Doc. No. 122, 86th Cong., 1st Sess., 193-196 (1959).

67. See 8 CONG. REC. 54 (1878) (Remarks of Senator Edmunds); 18 CONG. REC. 30-31 (1887) (Remarks of Mr. Caldwell); *id.* 49 (Remarks of Mr. Eden); *id.* 668 (1887) (Report of Conference Committee).

"regularly given by electors whose appointment has been lawfully certified to" by the executive authority of the state under the terms of the Act.

The power of Congress over a single return is carefully limited to these two areas, but even in carrying out this mandate, difficult problems of interpretation could arise. Presumably votes "regularly given" are given in accordance with the requirements of the Constitution as to time and form. The language undoubtedly also means that the electors have acted without mistake or fraud. Does it have the further meaning that they have voted for an eligible candidate? Likewise, votes "lawfully certified to" would seem to be votes certified to in accordance with the terms of the Act. Presumably the phrase also extends to a case in which the governor has certified electors other than those shown to have been elected by the state canvass, as in the case of Oregon in 1877. Could Congress look further under this provision and refuse to accept a governor's certificate based on a canvass illegally made? Does a vote cast by an ineligible elector otherwise properly certified to, who is ineligible to the office of elector fall within either of these categories upon which Congress may act? These unanswered questions could lead to the arbitrary congressional action which the Act sought to avoid.

(2) *Double Returns.* Since a return need only "purport" to be a certificate of the vote to merit consideration under the Act, in any serious contest, double returns will be presented. There are four situations which may arise.

(a) *Final Determination by Appropriate State Authorities.* The state contest provision was considered the central provision of the Act. Since the result of a contest was to be absolutely binding upon Congress as to the identity of the electors,[68] a return so validated would be counted if otherwise proper. The Act requires that only votes "regularly given" must be counted. The implication seems clear that votes not meeting this standard could be rejected as in the case of a single return,[69] and the problems of interpretation in that case would again be present.

Unfortunately the contest provisions present such difficulties, both of interpretation and application, that in the great majority of cases they will not apply. In the first place there is another problem of definition. Although the language of the Act was intended to give the states the broadest latitude to provide for the final determination of contests by any means—judicial or otherwise—only 19 states have passed contest legislation expressly dealing

68. 8 CONG. REC. 52 (1878) (Remarks of Senator Edmunds). In the course of the debates in 1882, the Senate rejected an amendment that would have given the two Houses power to overturn the state determination by concurrent vote. The proponents of the bill made it clear that they deemed the state's determination to be absolutely binding. 13 CONG. REC. 2651-2652. *Cf.* H.R. REP. No. 1638, *supra*, note 60.

69. 8 CONG. REC. 54 (1878) (Remarks of Senator Edmunds); 18 CONG. REC. 31 (1886) (Remarks of Mr. Caldwell).

with presidential electors in any way.[70] In the remaining states a variety of provisions exist which deal generally with election contests.[71] In these states

70. As to the legislative intent, see 17 CONG. REC. 2387, 2427 (1886). In five states the legislature has provided a special contest proceeding in an existing court. COLO. REV. STAT. ANN. §§ 49-14-1, 49-14-2 (1953); CONN. GEN. STAT. ANN. §§ 9-315, 9-323 (1958); DEL. CODE ANN. tit. 15, §§ 5921-5928 (1953); MASS. ANN. LAWS, ch. 54, §§ 119-120 (1953); S.D. CODE, §§ 16.1902-1914 (1939). In two states a special court has been established. IOWA CODE ANN. §§ 60.1-60.6 (1949); N.D. CENT. CODE §§ 16-06—16-15 (1960). In two states express provision is made for trial in the manner decreed for contests for other offices. OKLA. STAT. ANN. tit. 26, §§ 518, 392 (1955), 391 (Supp. 1960); PA. STAT. ANN. tit. 25, §§ 3291, 3351-3352, 3456-3475 (1938). The legislature of one state has provided that it shall determine all contests for the office of elector. VERNONS ANN. MO. STAT. § 128.100 (1952). Three states have provided for final determination of contests by the canvassing authority. KANS. GEN. STAT. ANN. § 25-1433 (1949); R.I. GEN. LAWS ANN. § 17-22-4 (1956); VERNON'S ANN. TEX. STAT. ELECTION CODE, § 9.29 (1952). In two other states there are similar provisions, but court decisions cast doubt on their finality. ME. REV. STAT. ANN. ch. 5 § 50 (1954) (See Rounds v. Smart, 71 Me. 380 (1880)); *cf. infra*, note 71; S.C. CODE §§ 23-475, 23-476 (1952) (See Redfearn v. Board of State Canvassers, 234 S.C. 113, 107 S.E.2d 10 (1959)). In two states the provisions specifically applicable to electors are not the exclusive form of contest. FLA. STAT. ANN. tit. 9, §§ 102-121, 131; 99.192-221 (1960) (See *infra*, note 71); N.H. REV. STAT. ANN. §§ 59:94-98, 68:1-11 (1955) (See *infra*, note 71). Two southern states have passed identical legislation giving to a special board broad powers over the electoral vote which might be construed to include final power to determine contests. ARK. STAT. ANN. § 3-327 (Supp. 1959); GA. CODE ANN. § 34-2515 (Supp. 1960). If the Arkansas provision does not apply, then contests would be tried as for supreme court judge. ARK. STAT. ANN. § 3-313 (1947). In Georgia the contest provisions for members of the General Assembly would govern. GA. CODE ANN. §§ 34-2101, 2901, 2801-2803 (1936). One proposal for legislation to implement the Twenty-third Amendment, giving the District of Columbia the presidential vote, would provide both a recount and a special contest proceeding in the United States District Court for the District of Columbia. Washington Star, April 2, 1961, § 1, p. 7; cf. S. 1883, 87 Cong., 1st Sess., 107 CONG. REC. 7478-9 (daily ed. May 16, 1961).

71. In 17 states provision has been made for the contest in the state courts of election to "any office," "any public office," "any state office," or a similar variation. ALASKA Sess. Laws 1960, ch. 83, §§ 4.71-4.93; ARIZ. REV. STAT. ANN. §§ 16-1201-1207 (1956); CAL. ELECTIONS CODE §§ 8510-8575; FLA. STAT. ANN. tit. 9, §§ 99.192-99.221 (1960) (See *supra*, note 70); HAWAII REV. LAWS §§ 11-85.1-.5 (Supp. 1960); ILL. ANN. STAT. ch. 46, §§ 23.19-.30 (1944; Supp. 1960); KY. REV. STAT. §§ 122.070-.090 (1955); MD. ANN. CODE art. 33, §§ 145-146 (1957; Supp. 1960); MINN. STAT. ANN. §§ 209.02-209.10 (Pamphlet Supp. 1959); MONT. REV. CODES ANN. §§ 23-1459-1467 (1955); NEV. REV. STAT. §§ 296.505-.515 (1959); N.J. STAT. ANN. §§ 19:29-1-29-11 (1940); N.M. STAT. ANN. §§ 3-9-1—3-9-10 (1953); N.Y. ELECTION LAW §§ 330-333, *cf.* N.Y. CIVIL PRACT. ACT §§ 1208-1221; OHIO REV. CODE §§ 3515.08-.15 (Baldwin, 1960); ORE. REV. STAT. §§ 251.025-.090 (1957); UTAH CODE ANN. §§ 20-15-1—15-12 (1953). Two states provide for such contests in the legislature. IND. STAT. ANN. tit. 29, §§ 5601-5617 (1949); N.C. GEN. STAT. §§ 163-99 (1952). The general contest provisions of the remaining states do not extend to presidential electors, but all of these states provide an action in quo warranto against one who "usurps, intrudes into or unlawfully holds or exercises any public office." In 11 of the states there is little doubt that a lack in the general contest provisions is to be supplied by a quo warranto proceeding. ALA. CODE tit. 17, §§ 231, 254 (1959), *id.* tit. 7, §§ 1136-1155 (1960) (Provision that no election triable under the Code may be tried by quo warranto is to be strictly construed. Walker v. Junior, 247 Ala. 342, 24 So. 2d 431 (1946)); IDAHO CODE ANN. §§ 34-2001-2011, 6-602-609 (1948) (See Tiegs v. Patterson, 79 Idaho 365 318 P.2d 588 (1957)); ME. REV. STAT. ANN. ch. 129, §§ 21, 22 (1954) (Common law right of action preserved) (See *supra*, note 70); MICH. STAT. ANN. §§ 27.2315-2326 (1938), 6.1861-1892 (1956) (Statutory recount proceeding does

the courts would first have to decide whether they had jurisdiction in a contest involving electors.[72] If a state court took jurisdiction, Congress would then face two questions: (1) Does the language of the Electoral Count Act include contest provisions which do not specifically deal with electors? (2) If the state result is otherwise binding, is it the "final determination" envisioned by the Act? The Act does not provide for the decision of such questions. There seem to be grounds for argument that concurrence would be required to reject a state determination on these grounds, as in the case of a single return, but the question is open.

Problems of definition aside, there is a further difficulty in the time provisions of the Act. In Edmund's original bill a state determination made at any time prior to the date of the meeting of the electors would bind Congress. To insure that contests would be completed, the electors were to be appointed on the first Tuesday in October and were not to meet until the first Monday in January.[73] In the Act as passed, although a November election day was retained and the requirement that a state determination be made at least six days prior to the meeting of the electors was added,[74]

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not abridge common law right); MISS. CODE ANN. §§ 1120-1145, 3287-3290 (1956) (Quo warranto lies in cases not covered by election contest provisions. Kelly v. State *ex rel.* Kiersky, 79 Miss. 168, 30 So. 49 (1901); Warren v. State *ex rel.* Barnes, 163 Miss. 187, 141 So. 901 (1932)); N.H. REV. STAT. ANN. § 491.7 (Supp. 1960) (Common law right of action preserved. Stickney v. Salem, 96 N.H. 500, 78 A.2d 921 (1951) (See *supra*, note 70); TENN. CODE ANN. §§ 2-1901-2017, 23-2801-2821 (1955) (Provision that no election triable under the Code may be tried by quo warranto is designed to insure that there be only one contest proceeding. State *ex rel.* Anderson v. Gossett, 77 Tenn. 644 (1882)); VT. STAT. ANN. tit. 12, §§ 4041-4045 (1958), tit. 17, §§ 1361-1365 (1959) (See State *ex rel.* Ballard v. Greene, 87 Vt. 515, 89 Atl. 743 (1914)); WASH. REV. CODE §§ 29.65.010-.130 (1951), WASH. REV CODE ANN. §§ 7.56.010-.100 (1961) (See State *ex rel.* Holt v. Hamilton, 118 Wash. 91, 202 Pac. 971 (1921)); WIS. STAT. ANN. §§ 6.66 (1957), 294.01-.13 (1958) (See State *ex rel.* Dithmar v. Bunnell, 131 Wis. 198, 110 N.W. 177 (1907)); WYO. STAT. ANN. §§ 22-296, 22-306-324 (1957), 1-896-929 (1959) (See State *ex rel.* Walton v. Christmas, 48 Wyo. 239, 44 P.2d 905 (1935)). In the remaining four states serious doubts exist as to whether the writ would lie in an election contest. LA. STAT. ANN. §§ 18:1251, 42:76-85 (1951); NEBR. REV. STAT. §§ 25-21,121-21,134 (1956), 32-1001-1034 (960); VA. CODE ANN. §§ 24-419-434 (1950), 8-857-865 (1957); W. VA. CODE ANN. §§ 193-207, 5310-5316 (1955). As to quo warranto generally, see MCCRARY, AMERICAN LAW OF ELECTIONS §§ 393-395, 425 (4th ed. 1897).

72. This question in most cases would turn on the definition of the term "public" or "state" office in the applicable statute. The United States Supreme Court has held that electors are "state officers" in denying habeas corpus in a conviction under state law for vote fraud in a presidential election. In re Green, 134 U.S. 377 (1890). Interpretation in state courts has varied from case to case, however, according to the intention of the legislature. *Compare* State v. Mountjoy, 83 Mont. 162, 271 Pac. 446 (1928), *with* Spreckels v. Graham, 194 Cal. 516, 228 Pac. 1040 (1924); Harless v. Lockwood, 85 Ariz. 97, 332 P.2d 887 (1958), *with* Lane v. Melamore, 169 S.W. 1073 (Tex. Civ. App. 1914); *cf.* Annot., 68 A.L.R.2d 1320 (1959). See also Smith v. Ruth, 308 Ky. 60, 212 S.W.2d 532 (1948); Lillard v. Cordell, 200 Okla. 577, 198 P.2d 417 (1948).

73. 8 CONG. REC. 51 (1878).

74. In the third version of the bill, S. 25, *supra*, note 58, Senator Hoar, floor manager, insisted that it was unchanged from its previous passage in the Senate, but the six-day requirement was in the version taken up by the House. 15 CONG. REC. 430,

contests were still practicable, because the electoral meeting was to be on the second Monday in January.[75] When the Twentieth Amendment changed Inauguration Day from March 4 to January 20, the legislation enacted to implement it made a corresponding change in these provisions.[76] The electors now are to meet on the Monday after the second Wednesday in December, only 40 days after they are appointed. In order to be of binding effect, a contest must be completed six days prior to that date, a mere 34 days after the election.

In only two states are the election contest provisions certain to produce a final result within this short period.[77] In the rest, finality would depend on a number of factors, such as the diligence of the contestant, the success of his opponent with delaying tactics, the number of votes questioned, and the time limitations of the contest procedure.

The aftermath of the 1960 election highlights the time problem. In Hawaii the official count of the popular vote showed that Mr. Nixon had carried the state by a mere 141 votes out of some 184,000 cast.[78] In the latter part of November the Democratic electors petitioned in the circuit court for a recount, which was allowed on December 13th, over the protest of the State Attorney General that federal law required a decision six days prior to the meeting of the electors.[79] Both sets of electors met on the appointed day, December 19, 1960, and cast their votes. The governor of Hawaii gave his certificate to the Republican electors. On December 30, 1960, the court handed down its decree, finding that the Kennedy electors had prevailed by 115 votes. On January 4, 1961, the governor forwarded to the Administrator of General Services a copy of the court decree and his revised certificate, validating the Democrats.[80] In the counting session the certificate of the Republican electors with its validation by the governor, the certificate of the Democratic electors, and the governor's revised certificate were all presented. After ascertaining that there was no objection, Mr.

5076 (1884). Amendments to eliminate the provision from the final version of the bill, S. 9, *supra*, note 59, were rejected in the House. 18 CONG. REC. 77 (1886).

75. 24 Stat. 373.

76. Act of June 5, 1934, ch. 390, §§ 6-7, 48 Stat. 879. The Twentieth Amendment altered Inauguration Day to January 20th, and the first meeting of the new Congress to January 3d. The Act, in providing that the counting session should be on January 6th, insured that the count would not be made by a lame-duck Congress.

77. The statutes of Connecticut and Iowa, *supra*, note 70, expressly provide that a result is to be reached prior to the deadline in the federal statute.

78. N.Y. Times, Dec. 16, 1960, p. 28, col. 2 (city ed.).

79. Lum v. Bush, Civil No. 7029, Circuit Court of the First Judicial Circuit. See N.Y. Times, Nov. 30, 1960, p. 29, col. 7 (city ed.); *id.* Dec. 2, 1960, p. 17, col. 6; *id.* Dec. 15, 1960, p. 39, col. 1; 107 CONG. REC. 282-3 (daily ed. Jan. 6, 1961). See Hawaii's contest statute, *supra*, note 71.

80. For the various certificates, the court decree, and the governor's letter of explanation, see *ibid.* The governor noted that the time for appeal would not expire until January 9th, but that no appeal was planned. *Id.* 282.

Nixon, presiding as Vice President, accepted the revised determination, with a careful statement that he was not to be considered as setting a precedent.[81] With the best will in the world the contestants in Hawaii were not able to reach a result until seventeen days after the deadline set in the Act. If Hawaii's three votes could have affected Mr. Kennedy's lead, Republican objections to the acceptance of the decree as binding would have been sound, whatever their fate in a Democratic Congress.

In Illinois, where Mr. Kennedy had prevailed by 8900 votes out of 4½ million cast, Republicans launched a vigorous campaign to uncover vote frauds in heavily Democratic Cook County and carry the state's 27 electoral votes for Mr. Nixon.[82] Amidst charges and counter-charges, they soon discovered that even without hindrance from Democratic election officials, it would be impossible to achieve a result in time.[83] They then urged that there was sufficient evidence of fraud that the State Election Board could refuse to certify the Democratic electors.[84] After maximum delay the Board, which was four-to-one Republican, certified the Kennedy electors, in the absence of "an overwhelming showing of fraud."[85] While the Republican tactics had an obvious political motivation, the episode illustrates that in a state the size of Illinois,[86] any kind of final state determination would be

81. *Id.* 283. *Cf.* N.Y. Times, Jan. 7, 1961, p. 1, col. 4; p. 8, col. 2 (city ed.).

82. N.Y. Times, Nov. 29, 1960, p. 17, col. 1 (city ed.); *id.* Nov. 30, 1960, p. 29, col. 1; *id.* Dec. 2, 1960, p. 17, col. 2; *id.* Dec. 3, 1960, p. 23, col. 3. *Cf.* 107 CONG. REC. A-1402 (1961).

83. Under Illinois law a "discovery" recount, which is of no effect on the official count or in a subsequent contest, may be undertaken by a defeated candidate in order to determine whether or not he has grounds for contest. ILL. ANN. STAT., ch. 46, § 22-6 (Supp. 1960). This proceeding bogged down due to a difference of opinion between the parties as to the scope of the recount. N.Y. Times, Dec. 1, 1960, p. 22, col. 3; *id.* Dec. 3, 1960, p. 23, col. 3; *id.* Dec. 6, 1960, p. 30, col. 1. An attempt to get mandamus requiring the Cook County Canvassing Board to change its result in accordance with the discovery proceeding failed. *Id.* Dec. 13, 1960, p. 23, col. 1.

84. The Board, composed of the governor and four other executive officers, is required to meet within twenty days after the election and "proceed to open and canvass" the returns from the counties in order to ascertain which presidential electors are the winners. ILL. ANN. STAT. ch. 46, §§ 1-3, 7-14, 21-2, 21-3 (1944; Supp. 1960). The Republican claim was based on a "1912" decision which would permit the Board to reject county returns. The Democrats consistently argued that the Board had ministerial powers only and could do no more than tabulate the county canvasses. N.Y. Times, Dec. 1, 1960, p. 22, col. 4 (city ed.); *id.* Dec. 7, 1960, p. 24, col. 3. The Republicans' case was apparently People *ex rel.* Hill v. Deneen, 256 Ill. 536, 100 N.E. 180 (1912), in which the state board was permitted to refuse a revised proclamation by a county board based on a court proceeding in which there was no jurisdiction. The board was directed to accept the original county canvass. This case is far from giving the state board power to hear facts and decide a contest for itself. If anything, it stands for the proposition that the county canvass is conclusive upon the board unless attacked in a proper proceeding, which under Illinois law is a statutory election contest. *Supra*, note 71. See People *ex rel.* Wilson v. Mattinger, 212 Ill. 530, 72 N.E. 996 (1904); People *ex rel.* Ganschinietz v. Renner, 334 Ill. App. 302, 79 N.E.2d 298 (4th Dist. 1948).

85. N.Y. Times, Dec. 15, 1960, p. 39, col. 1 (city ed.).

86. Illinois ranked fourth in the 1960 census, with 10,081,158 inhabitants. Chicago,

impossible within the time allowed by the Electoral Count Act. The combination of inappropriate procedures, large numbers of votes to be recounted, and delaying tactics would undoubtedly mean that in any serious contest no state result could be reached six days prior to the meeting of the electors.

(b) *Conflicting Determinations by Different State Authorities.* The question of which state tribunal has been empowered by the legislature to determine contests could arise either in a dispute between two groups of men, each claiming to be the same final authority, or between two different tribunals, each claiming the power to act under a different provision of state law. The drafters of the Act left the decision of this problem to Congress. The concurrence of the two Houses was necessary for an affirmative result, as in any question of the recognition of a state government.[87] If the Houses cannot agree on the authoritative determination, or, if, as in the case of Louisiana in 1873, they agree that no determination was authoritative, the principle of the Twenty-second Joint Rule is applied and no vote from the state in question is counted. This result follows regardless of the governor's action. Congress in this case looks to the executive certificate only as evidence of the decision reached by a tribunal authorized by the state legislature. If the decision of the authorized tribunal cannot be made out, then there is no valid return for the governor to certify.[88] Congress must here decide a difficult factual and legal question, in addition to the problems already noted in the cases of single returns and single state determinations.

(c) *No Determination by State Authorities.* As the previous discussion of state contest provisions indicates, this situation is the one most likely to arise. If the Houses are in agreement, they can decide to count any set of votes that they find to have been "cast by lawful electors appointed in accordance with the laws of the State." This language presents difficulties. If double returns are presented they must be based on conflicting versions of the true state canvass. The decision of the governor should not be permitted to bind Congress if the state has not made him its final canvassing authority, but how far may Congress go? Is it limited to determining which of two contesting bodies is the lawfully appointed canvassing board of the state, or can it find that the lawfully appointed board has itself violated state law in the manner of its canvass?[89] If the Act really does embody a

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with a population of 3,550,404 is the nation's second largest city. *World Almanac 1961* 81-82.

87. 8 CONG. REC. 52-54 (1878). See *supra*, note 30.

88. In the debates and in the final report of the Conference Committee, it is clear that the provision for the governor's certificate to control in the disagreement of the Houses was to apply only in the case of double returns without a state determination. See 17 CONG. REC. 1020, 1022 (Remarks of Senator Hoar); 18 *id.* 49-50 (Remarks of Mr. Eden); *id.* 668 (1887) (Conference Committee Report).

89. This situation might have arisen if the Illinois Election Board had failed to certify the Kennedy electors. See *supra*, note 84. In 1877 the Electoral Commission

policy that Congress may act in the national interest to find the true result when the states have failed to do so,[90] then the latter course should be permissible. There might be practical limitations on reaching a fair result in this case, however. If the question were merely one of the legal effect of the board's action, the decision would be easy to make, but if the board had taken no action, and there were unresolved contests in the state, Congress would be ill-equipped to solve the problem on its merits.

If the Houses disagree, then the votes certified by the state executive are counted. Presumably the Houses could then agree that some or all of the votes so certified were not "lawful," that is, not "regularly given,"[91] and so reject them. This turnabout, however, is politically unlikely. The provision reflects a long-standing concern that no votes should fail merely through disagreement of the Houses, but it seems more dangerous than the ill that it is meant to cure. In an election where contested votes in one or two states are decisive, the actual choice of a President will devolve upon the governors, who may act to serve a personal interest in the outcome.

(d) *No Executive Certification; Conflicting Certifications.* None of the returns presented may have a valid certificate because the governor has refused to certify any electors, or because one who has certified votes may have done so without authority under state law. There may be two claimants to the office of governor, or to the right to exercise executive authority under state law, each of whom has certified a different return. In these cases if the two Houses concur, either return may be counted, subject to the problems noted in the case where there is a governor's certificate. If the Houses disagree, the clear implication of the Act is that the vote of the state fails altogether, merely through lack of concurrence.[92]

The contest provisions of the Electoral Count Act were intended to provide a balance of the state interest in the process of appointment and the federal interest in reaching a result free of fraud or unfairness in time to inaugurate the winning candidate. If these provisions work as planned contests over the popular vote will be resolved in a fair manner, and few matters will be left to the decision of Congress. State contests are not likely to be effective, however. All disputes—even those involving the facts of the popular election—will thus be presented to Congress in the first instance.

The questions of fact or law which Congress must resolve in these disputes are problems of the sort which courts are accustomed to decide, but Congress is not a court. The facts upon which a court bases its decision

would not extend Congressional power beyond an inquiry into the credentials of the state board. *Supra*, note 52.

90. This was the view of Mr. Caldwell of Tennessee, House floor manager of the bill. 18 CONG. REC. 30-31 (1886).

91. *Id.* 31.

92. 17 *id.* 2427-2428 (Remarks of Senator Hoar).

are adduced according to stringent rules of evidence, and the legal questions before it are decided under long-established canons of construction and interpretation. At best Congress can get its facts at second hand through the medium of an investigating committee,[93] with only a little further light to be shed during the brief debate which the Act permits. Moreover, even if the facts are carefully and completely put before it, Congress is under no obligation to justify its decision by reference to the evidence or to rules of law. Courts may not be free from bias and prejudice in their treatment of the issues before them, but the paraphernalia with which their decisions are surrounded at least forces them to carry the burden of self-justification. Moreover, courts decide single cases, whereas Congress would unavoidably be dealing with the entire range of political questions involved in the election. There is no way of demonstrating whether each Congressman who votes on a question such as an electoral contest would pose is deciding it on the merits, but it is a fair inference that he is not.[94] Perhaps he should not even be expected to so decide, since he was elected to serve the political interests of those whom he represents. Congress is thus not only ill-equipped to solve the kind of problems which it will face, but is more than likely to decide these problems according to political needs. It is difficult to imagine public confidence of a high order in an election result arrived at in this manner.

If the Houses of Congress are of differing parties, partisanship may reach such heights that no decision under the Act is possible. While there is some question as to the effect of the rejection of votes on the number needed for a majority,[95] the situation could arise in which enough votes were

93. In the Senate the Committee on Privileges and Elections, now a standing sub-committee of the Committee on Rules and Administration, has jurisdiction over "matters relating to the election of the President, Vice President, or Members of Congress; corrupt practices; contested elections; credentials and qualifications; Federal elections generally." Senate Standing Rule XXV 1(o)(1)(D), *Senate Manual*, S. Doc. No. 2, 87 Cong., 1st Sess. (1961). Similar jurisdiction is vested in the appropriate sub-committee of the Committee on House Administration. House Rule XI.9. (K), *House Manual*, H.R. Doc. No. 458, 85 Cong., 2d Sess. (1959). See GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS 358 (1953). *Cf.* the activities of Senate investigators in 1873, *supra*, notes 38-40, and committees of both Houses in 1877. DOUGHERTY, *op. cit. supra*, note 2, at 141, 164.

94. Congress has long had a reputation for the partisan decision of contests over its own membership. Out of 382 cases decided in the House between 1789 and 1907 only three members not of the majority party were seated. ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 313-324 (1916). Decisions in the years since 1907 seem to have been somewhat less partisan. 1 HAYNES, THE SENATE OF THE UNITED STATES 126n (1938); *cf.* GALLOWAY, *op. cit. supra* note 93. In the most recent contest in the House, minority members of the Sub-Committee which had conducted a partial recount agreed in seating the Democratic candidate, but accused the majority of partisanship in certain decisions regarding the application of Indiana law. Roush v. Chambers, H.R. REP. No. 513, 87 Cong., 1st Sess. 65-70 (1961). On the floor Republican members raised the same objection, urging that the state determination should have been binding, but conceded that to object was "an exercise in futility" in view of the Democratic majority in the House. 107 CONG. REC. 9647-9661 (daily ed. June 14, 1961).

95. In 1877, because no votes were rejected, the problem never arose. Since the

rejected to throw the election into the House.[96] If in spite of the provisions of the Act designed to guard against dilatory tactics, the count is prolonged past January 20th, the Speaker of the House would assume the presidency until one of the candidates should have qualified, or until the next election, if the deadlock is impenetrable.[97] In either case, while the country is not left without a leader, the public is unlikely to feel that its interests have been served in the choice.

Congressional control of any phase of the appointment of electors can be justified only if it serves the interest of all the states in finality and accuracy of result. The Electoral Count Act gives to Congress a substantial measure of control, but it fails to serve the requisite national interest. If a dispute arose the mechanism of the Act would undoubtedly lead Congress to a final result, but a President chosen in this way could never completely refute the charge that his title depended on mistake or illegality in the election process.

The Electoral Count Act must be revised to provide for the impartial and conclusive settlement of all contests arising out of the popular vote. It is possible that the number of such contests could be reduced by state election law reform[98] and their effect minimized by change in or abolition of the Electoral College,[99] but prospects for these developments are unclear. The dangers in an unresolved electoral dispute are clear, however, and provision must be made to meet them, whatever other reforms are enacted.

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constitutional language, *supra*, note 5, calls for election by a majority of the electors appointed, the answer would seem to depend on whether the votes in question were rejected because of a failure in the appointment process, or because of a subsequent failure on the part of the elector. Precedents drawn from other electoral counts are inconclusive. In 1873 the total announced by the President of the Senate as necessary for a majority included the votes of Louisiana, even though both sets of electors had been rejected because neither was found to be supported by a valid canvass. *Counting Electoral Votes* 408 (Feb. 12, 1873). In the years in which the vote was counted in the alternative, the number needed for a majority was reduced by the amount of the questioned votes. In these cases, however, it is clear that a state which cannot vote at all has not appointed electors. *Id.* 266 (Feb. 10, 1869); see *supra*, note 30; *cf.* 11 CONG. REC. 1387 (1881) (electors voted on wrong day; majority not reduced). On several occasions the majority figure was reduced to account for electors who had been appointed, but had not voted through death or disability, *Counting Electoral Votes* 40 (Feb. 8, 1809); *id.* 50 (Feb. 14, 1821); *id.* 226, 229 (Feb. 8, 1865); see STANWOOD, *op. cit. supra*, note 14, at 63, 113. This practice is in direct contravention of the express intention of the Constitutional Convention, *supra*, note 17. Whatever the precedents, the sponsors of the Electoral Count Act clearly intended that votes rejected under it would reduce the number needed for a majority accordingly. 17 CONG. REC. 821 (1886) (Remarks of Senator Hoar).

96. U.S. Const. amend. XII.

97. For the succession, see U.S. CONST. amend. XX; 3 U.S.C. § 20 (1958).

98. See HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES (1934); *cf.* Note, 106 U. PA. L. REV. 279 (1957).

99. See WILMERDING, THE ELECTORAL COLLEGE 85-86, 115-116 (1958); *cf.* Margolin, *Proposals to Reform Our Electoral System* 30, 46, 66 (Library of Cong. Legisl. Ref. Serv. 1960).

There are at least four possible methods by which the present system might be improved. The basic pattern of the existing legislation could be retained, with revisions that would make effective its original provisions for the final determination of state contests by state authority. The existing legislation could be strengthened by making a state determination within certain time limits mandatory, with an alternative action in federal court if the state failed to provide an appropriate procedure. Exclusive jurisdiction of contests could be lodged in the federal courts. Finally, federal control might be established over all phases of the presidential election. Federal contest jurisdiction is the most satisfactory of these alternatives. Technical changes in the present plan would not insure a state finding in every case, because the requirement of a timely proceeding is not binding. If the state proceeding was made mandatory, this objection would be met, but the removal proceedings would be cumbersome and subject to abuse by a dilatory defendant. A provision for total federal control, which would have to be made by constitutional amendment, would totally defeat the wisdom of the original plan by making the executive at least indirectly subject to control by Congress.

Exclusive federal jurisdiction of contests offers a number of advantages. It insures that questions which are suitable only for judicial decision are heard by a tribunal versed in the law and accustomed to the role it must play. It utilizes the federal judiciary. State judges and other state officials are often subject to election and may be dependent upon a local political leader with national ambitions. Federal judges, on the other hand, having life tenure, are less likely to be influenced by partisan considerations.[100] Other advantages are procedural. Congress can provide a schedule for filing, hearing and decision of all contests. Since this schedule and other rules of procedure applied by the federal courts will be uniform, a contest in any state will be decided according to a single standard and within the time requirements of the electoral system.

For maximum fairness and effectiveness the plan must contain certain features. Selection of judges on an impartial basis must be provided for in advance, perhaps by requiring each circuit to establish an election contest calendar prior to the election.[101] The importance of the questions to be

100. Federal judges owe their positions to executive appointment with the advice and consent of the Senate, but they have life tenure during good behavior and may be removed only by impeachment. U.S. CONST. art. II, §§ 2, 4; art. III, § 1; art. I, §§ 2, 3.

101. In England, where contested seats in Parliament are tried before a two judge election court, all the judges of the King's Bench Division meet annually to select three of their number to serve on a special rota for the court during the coming year. Supreme Court of Judicature Act (Consolidation), 1925, 9 & 10 Geo. 5, c. 64, § 67. See Representation of the People Act, 1949, 12 & 13 Geo. 6, ch. 68, §§ 119-137. *Cf.* SCHOFIELD, PARLIAMENTARY ELECTIONS 503-544 (3d ed. 1959). Efforts to introduce

decided and their potential for conflict with state authority might justify trial before a special three judge court.[102] The court should have jurisdiction of all questions arising out of the popular election which affect the validity of votes and the accuracy and fairness of the count and canvass. To preserve state control over the manner of appointment the court would be bound to apply state election law in these matters.[103] The court's jurisdiction should further extend to questions of the eligibility of the electors under the Constitution. It should be made clear that an objection on these grounds is waived unless it is raised during the contest proceeding. In addition to the ordinary powers of a trial court to compel testimony and subpoena documents, the court should have express power to order the preservation of the ballots for a recount under the direction of a court-appointed master.[104]

A maximum of sixty days should be allowed between election day and the date of meeting of the electors. A complaint could be filed at any time after the election and until ten days after the completion of the state canvass. Answer and hearing should follow within ten days at most. This period is none too long for settling a controversy in a major state, but the nation cannot afford a longer period of uncertainty between administrations. At this point the interest in continuity of government must prevail even over the interest in an absolutely accurate result. The shortness of the time limit will be alleviated to some extent by procedures designed to achieve the maximum speed commensurate with fairness and accuracy. Moreover, the short time

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such a system for congressional contests have been unsuccessful. Haynes, *op cit. supra*, note 94, at 122n.

102. These factors led to the present requirement that a three judge court sit on proceedings where injunction of state action is sought. 28 U.S.C. §§ 2281-2284 (1958). See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 47-48, 843-849 (1953).

103. Federal courts apply state substantive law in many cases in which they serve as the forum for the enforcement of state-defined rights. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (Diversity jurisdiction); Hess v. United States, 361 U.S. 314 (1960) (Admiralty); cases and sources cited in Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033-34, nn.87-89 (1953) (National bank winding-up, trade-mark infringement, tax appeal, bankruptcy). Congress in deciding contested congressional elections, has often claimed the power to view state law as merely advisory in such questions as the validity of ballots. HAYNES, *op. cit. supra* note 94, at 155; H.R. REP. 513, *supra*, note 94, at 22, 69-70. This power is justified in the complete control over its own elections and contests which the Constitution vests in Congress. U.S. CONST., art. I, §§ 4, 5. Since there is no such federal control provided over the appointment of electors, the courts should be limited to the liberty which they now exercise in appropriate cases to interpret state law freely in the absence of a clear state pronouncement on the point in question. 1 MOORE, FEDERAL PRACTICE ¶¶ 0.307-0.309 (2d ed. 1959).

104. To insure that the recount is carried out as quickly and impartially as possible, great care must be exercised in the selection of the personnel who actually count the ballots. In the most recent contest in the House, this chore was performed by auditors from five regional offices of the federal General Accounting Office. H.R. REP. 513, *supra*, note 94, at 12. If it is objected that what are essentially executive employees should not participate in the count of the presidential vote, then the court might be authorized to assign private accountants to the job.

limitations will tend to prevent the bringing of exploratory contests without specific claims of mistake or fraud. Provision for direct appeal to the Supreme Court within the time limit should be made.

To eliminate the double return problem altogether, the court rather than the state governor should certify the electors to Congress, even in states where no contest has been brought. Upon completion of the canvass the final state canvassing authority should certify its results to the appropriate court. If a contest has been, or is filed, the court should hear it and certify the result to Congress. If no contest is filed within ten days after the final state canvass is received, the court should forward the state certificate with the endorsement that it is uncontested. In any case Congress will be bound to accept as duly appointed and as eligible those electors named in the certificate of the court, subject to the action of the Supreme Court on appeal.

Certain questions will necessarily remain for Congress to decide. As previously noted, no other authority can determine the right of a state to participate in an election, or of a given government to represent it.[105] If such a situation arose, the court might properly refuse jurisdiction. As long as there are electors, there will be the possibility that they will carry out their trust in a fraudulent or erroneous manner. The vestigial nature of the office and the publicity attendant on any effort to corrupt them decrease the probability that such problems will arise. If they do come up, they must be left to Congress. A tribunal can be appointed to find the facts, but the action which Congress will take on the findings is not as clear as in the case of a contested election. Whether a given deviation is sufficient ground for disfranchizing all who voted for a challenged elector is a policy question which only Congress should answer.[106] Finally, if for some reason the judicial system failed to reach a result, the old problems would be present. This situation, too, is an unlikely one. Should it come to pass, Congress would have to decide the underlying questions as best it could.

In those questions which are remitted to Congress, the present provision for acceptance only by the separate and concurrent vote of the two Houses should be retained. No plan can eliminate the political motivations of individual legislators. When the two Houses act as legislative bodies, however, individual prejudice is at one remove from the final decision, and they may serve as a check on one another. If the Houses are divided, they reflect a divided sentiment in the country. In these circumstances it is better that a vote not be counted at all than that one House be able to dictate a result.

105. *Supra*, p. 5; note 30.

106. All of these problems would be resolved by what one political scientist has pointed out to be the simplest and least controversial of all Electoral College reforms—eliminating the office of elector. Burns, *A New Course for the Electoral College*, New York Times, Dec. 18, 1960 (magazine), p. 10, at 28. President Kennedy proposed such a change as a Senator in 1957. S.J. Res. 132, 85th Cong., 1st Sess. The Kennedy plan is again pending in the Senate. See *infra*, note 117.

The effect of the rejection of votes on the number needed for a majority should be made clear.[107] If it is found that there was no valid election in a state, then no electors were appointed there, and the number needed for a majority should not include the votes of that state. Likewise, the votes of a state excluded from the count by Congress for failure to comply with the conditions of statehood do not reflect electors who have been appointed, and should reduce the majority figure accordingly. When votes are rejected for reasons that do not have to do with failure of appointment, rejection should have no effect on the majority.[108]

A statutory provision for federal court jurisdiction of contests over the appointment of presidential electors could be enacted by Congress under the Constitution as it now stands. Until the passage of the Electoral Count Act of 1887 Congress had always refused to look into the facts of a state election. It was often suggested, however, that Congress could, by legislation passed prior to the election, give itself the power to do so. The Electoral Count Act may be construed as an expression of this view.[109] If Congress itself can step in to protect the national interest in honest and accurate election results, there would seem to be nothing to prevent the delegation of the task to the federal courts.

The power of Congress to establish federal jurisdiction over contests in presidential elections has never been ruled on by the courts. In the absence of specific provision it is clear that no such jurisdiction exists.[110] The Supreme Court has recognized that state power over the appointment of electors is broad enough to justify state prosecution of violations of state law in presidential elections.[111] This state jurisdiction is not exclusive, however. The federal courts would undoubtedly take jurisdiction of a criminal or civil proceeding under the appropriate Civil Rights Acts, based on a discriminatory deprivation by state action of the right to vote in a

107. See *supra*, note 95.

108. The distinction may be difficult to make. Has an ineligible elector been "appointed"? When votes are rejected merely because the Houses disagree, has the state appointed electors? Questions of interpretation such as this must await an actual case.

109. See H.R. REP. No. 31, *supra*, note 23, at 84-88; *cf.*, *supra*, note 54.

110. See State ex rel. Barker v. Bowen, 8 S.C. 382 (1876). Congress has given the District Courts jurisdiction of election disputes in which the sole question arises out of the denial of the right to vote on account of race, creed, color, or previous condition of servitude. The offices of elector, Senator, representative, and state legislator are excluded from these provisions, however. 28 U.S.C. § 1344 (1958). The provision has been held to bar federal jurisdiction over a contest in a primary election for United States Senator. Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948), *cert. denied*, 336 U.S. 904 (1949). After the 1960 presidential election jurisdiction over a contest proceeding was refused by the United States District Court for the Southern District of Texas. New York Times, Dec. 13, 1960, p. 23, col. 1 (city ed.).

111. In re Green, 134 U.S. 377 (1890). As to the variety of methods of appointment permissible, see McPherson v. Blecker, 146 U.S. 1 (1892).

presidential election.[112] Moreover, the court has upheld statutory criminal penalties for individual action which interferes with the lawful conduct of presidential elections. This decision was justified on the ground that Congress has inherent power to protect the vital structure of the nation by preserving the purity of elections.[113]

With this inherent power Congress may provide a means for settling contests over the appointment of electors. Each state has a right to control the manner of appointment of its electors, but this right does not permit a state to determine that it shall appoint no electors, or that its appointment process shall be tainted with fraud or error. Any candidate for the office of elector, or any voter for that office, as a citizen of the United States, has a right to insist that the states carry out their function in a manner that will insure the integrity of the national government. That right is one granted by the federal Constitution. The mere fact that the Constitution provides that the right shall be made effective through state law does not deprive the federal courts of jurisdiction. There are numerous other situations in which rights that are defined by state law may be enforced in federal court.[114] In each such instance a national interest is present which establishes the right to federal enforcement. Diversity jurisdiction embodies a national interest in providing justice for citizens outside of their own states.[115] The interest involved in admiralty is that in having a single forum to dispense a uniform maritime law.[116] Here, the clear national interest is in preserving national stability through a fair and accurate presidential election.

Although there are strong arguments in favor of congressional power to provide by statute for electoral contests, it would be desirable to make the necessary changes by constitutional amendment. Legislation is now pending in Congress for amendments which would provide other much-needed reforms in the electoral system.[117] If an amendment is finally passed that alters the

112. See Nixon v. Herndon, 273 U.S. 536 (1927); *cf.* James v. Bowman, 190 U.S. 127 (1903); see Wilkinson, *The Electoral Process and the Power of the States*, 47 A.B.A.J. 251, 252-3 (1961).

113. Burroughs v. United States, 290 U.S. 534 (1934). The decision was based on the broad language of *Ex Parte* Yarborough, 110 U.S. 651 (1884), which did not distinguish between congressional and presidential elections in holding that Congress could legislate to preserve the rights of citizens that were essential to the continuance of the government. These cases may be distinguished from Walker v. United States, 93 F.2d 383 (8th Cir. 1937), *cert. denied*, 303 U.S. 644; *reh. denied*, 303 U.S. 668 (1938) in which it was held that a conspiracy against the right to vote for presidential electors could not be prosecuted under a federal statute making conspiracy to injure a citizen in his constitutional rights a crime. The latter case holds only that the citizen's individual right to vote is not protected by the Constitution, since it is subject to the control of the state legislatures. The power of Congress to protect the integrity of elections remains unchallenged.

114. See *supra*, note 103.

115. See HART & WECHSLER, *op. cit. supra*, note 102, at 892-893.

116. *Id.* 20-21, 789-790.

117. See S. 102, a proposal for "a commission to study and propose improvements

system in such a way that the requirements for contest provisions will be radically changed, the location of the power to resolve contests under it should be made explicit. Even if the basic structure of the electoral system is altered only in minor detail, the chance to make a new provision for contests should not be overlooked. At the very least, an amendment should provide that Congress may resolve, or pass legislation to resolve, all controversies arising out of the count or canvass of the popular vote.[118] While such a provision would finally settle the question of the location of the power to resolve disputes, it would not insure a timely and accurate resolution in every contest. Even if Congress were to pass legislation, there is good reason to expect that in a real crisis the provisions might be evaded or ignored altogether. Clearly, if the President approved, legislation providing an *ad hoc* political solution for a particular crisis could be passed, whatever prior statutes said. For this reason a constitutional amendment should make clear that contests involving the popular vote are to be decided by the federal courts in a trial on the merits. The plan could then be implemented by legislation similar to that suggested in the absence of constitutional change.

In a government of divided powers, no judicial decision, however fair, can prevent Congress from exercising its political authority in the election of a President. On the other hand, a Congress which hopes to preserve political stability cannot exercise its authority in a manner that is so clearly erroneous or self-seeking that it is offensive to the electorate at large. A legislative scheme that provides stringent measures for the fair decision of election contests will act as a check on arbitrary action. If Congress ignores or evades such a scheme, it carries a heavy burden of demonstrating that it has governed fairly. The present system for resolving contests imposes no such burden. Fair-minded men could reach a fair result under it, but unfair

in the methods of nominating and electing the President and Vice President"; S.J. Res. 1, a proposal for a Constitutional amendment to abolish the electoral college altogether in favor of direct popular election, including power in Congress to provide by legislation for the settlement of controversies; S.J. Res. 2, a proposed amendment to abolish the electors and to apportion the electoral vote among the candidates according to the proportion of the popular vote each has received; S.J. Res. 4, a proposal similar to S.J. Res. 2, with the proviso that if no candidate gets at least 40% of the vote a combined session of the House and Senate will choose the President and Vice President; S.J. Res. 12, a proposed amendment that would divide the states into equal districts in which each person votes for a district elector and for two electors at large; S.J. Res. 17, a proposal similar in effect to S.J. Res. 1, *supra*, with no provision for settling controversies and with some additional features S.J. Res. 28, a reintroduction of S.J. Res. 2, 81st Cong., 1st Sess., in the form in which it passed the Senate in 1950, a proposal generally similar to S.J. Res. 4, *supra*; S.J. Res. 113, a proposal embodying the Kennedy plan, *supra*, note 106. Similar measures have been introduced in the House. Hearings began before the Senate Constitutional Amendments sub-committee on May 23, 1961. New York Times, May 24, 1961, p. 13, col. 1 (city ed.). For a general discussion of the various proposals, see Margolin, *op. cit. supra*, note 99.

118. The only measure presently pending which deals with the problems of contests has such a provision. S. 102, *supra*, note 117.

men could easily act to serve their own interests. In either case there is no certainty that the result reached is the true one.

The President of the Untied States will increasingly require strength based on national and international respect if he is to guide the nation through times of mounting crisis. This respect will not come to one who is elected under the slightest suspicion of error or fraud. To insure that no electoral contest will mar or disrupt the orderly succession to the presidency in the difficult future, Congress must give to the federal courts the power to reach a timely, final, and binding decision of all controversies.