CONSTITUTIONAL LAW AND FEDERAL PROCEDURE FOR CONGRESSIONAL CHALLENGE TO PRESIDENTIAL ELECTORS

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This document is intended to be of assistance to the United States Congress, in understanding the legal basis for a challenge of the Electors from the State of Florida in the Presidential election of 2000.

We have established the following facts:

1. Congress has the power and obligation to determine whether Electors are "regularly chosen" by each State, and to reject slates of Electors not selected in accordance with the laws of their respective States. The precise times, dates, standards, procedures and manner of the determination are set forth by Federal statute, providing a clear roadmap in law for Congress as to how to proceed.

2. The current slate of Electors from Florida being submitted to Congress on January 6, 2000 was not chosen in accordance with Florida state law, as substantiated by decisions of both the Florida Supreme Court and the United States Supreme Court.

3. In addition, the manner of selection of the Florida Electors violated the United States Constitution in important respects, a fact also confirmed by decision of the United States Supreme Court.

4. These Electors may therefore be rejected by majority votes of the House and the Senate.

5. Careful evaluation of these facts is vital to the integrity of the rule of law in the United States, to basic principles of the Constitution and of democracy, and to future generations.

We have been careful to document these points, and to avoid discussion of many of the partisan and political opinions and allegations of fact which, while important, are either not germane or not provable, from a legal standpoint.

The matters discussed here are sufficient, in and of themselves, to require Congress to consider them carefully, and, after the debates mandated by law, to reject the Florida Electors.

We offer this information in full realization of the seriousness of its import, in full respect for the sole independent right of the House and of the Senate to weigh all factors involved and to make their determinations according to the Constitution and Federal law.

Our role is that of patriots concerned for the integrity and future of the American vision of democracy, and not as advocates for any candidate. The vitality of the law transcends the particular political fortunes of any man or party.

KEY ISSUES
BEFORE THE HOUSES OF CONGRESS
CONCERNING THE REGULARITY OF APPOINTMENT
OF ELECTORS FROM THE STATE OF FLORIDA

I. CONGRESS MUST DETERMINE IF A STATE HAS "REGULARLY" CHOSEN ELECTORS PURSUANT TO STATE LAW AND THE UNITED STATES CONSTITUTION.

If a State fails to appoint Presidential Electors "regularly," i.e. pursuant to its State Laws and the United States Constitution, Electors from that State may not have their votes counted. 3 U.S.C. §§ 6, 15. According to this federal law and the Constitution, Article II, §1, and Amendment XII, it is the sole role of Congress, presided over by the President of the Senate, to make the final determination as to whether a State's Electors have been "regularly" chosen by State Law and the United States Constitution.[1]

II. GENERAL CONSTITUTIONAL FRAMEWORK

The general framework for a challenge to a State's Electors is set out in the Constitution of the United States:

> "**Each State shall appoint, in such Manner as the Legislature thereof may direct**, a Number of Electors [for President and Vice President of the United States]. . . .The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.[2]

United States Constitution, Article II, Section 1 (emphasis added).

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1 The Constitutional and Statutory Procedures and Guidelines for such a determination are set out respectively in Parts II, IV, and IX below.

2 For the Election of 2000, Congress has determined "the Time of chusing the Electors" to be November 7, 2000, 3 U.S.C. § 1; Congress has determined "the Day on which they shall give their Votes" to be December 18, 2000, 3 U.S.C. § 7.

> "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 . . . "
>
> "--The President of the Senate[3] 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 the President, **if such number be a majority of the whole number of Electors appointed**; . . . --The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, . . ."

United States Constitution, Amendment XII (emphasis added).

In sum, the Constitution places the election of the President and Vice-President of the United States in the hands of two (and only two) institutions: State Legislatures before Election Day and Congress thereafter. The power may constitutionally be delegated to other branches of government, as described in Part III below, but since 1887, Congress has reserved this power unto itself.

III. THE ORIGINS OF THE 1887 FEDERAL LAW ON PRESIDENTIAL ELECTIONS: THE DISPUTED ELECTION OF 1876

The disputed Presidential Election of 1876, its resolution, and the 1887 federal law passed by Congress in response, evidence the proper authority of Congress to resolve issues regarding disputed slates of Electors.

Prior to 2001, Republican Rutherford B. Hayes "was the only president to hold office by decision of an extraordinary commission of congressmen and Supreme Court justices appointed to rule on contested electoral ballots." Encyclopædia Britannica.[4] In the Election of 1876, Democrat Samuel J. Tilden won the popular vote but came one vote shy of an electoral-vote majority. Hayes, the second-choice popular candidate, was twenty votes short of an

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3 "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." United States Constitution, Article I, Section 3.

4 Historical information is drawn in part from excerpts of entries on "Electoral Commission" and "Rutherford B. Hayes" in Encyclopædia Britannica (1999-2000 Brittanica.com, Inc.), attached as Appendix 1 hereto, from which all the historical quotations in this Part are taken.

electoral majority and “almost certainly lost” the popular vote in Florida, whose electoral votes were disputed along with those of three other states. “For more than six weeks maneuvering and acrimony prevailed in Congress and out, punctuated by threats of civil war.” Encyclopædia Britannica.

A commission of five Republican members of Congress, five Democratic members of Congress, and five Supreme Court justices (three Republicans and two Democrats) was appointed by Congress and delegated Congressional powers to resolve the problem. On a straight party-line 8-7 vote, the Electoral Commission awarded Hayes every one of the twenty disputed electors from the four states, allowing him to prevail in the electoral college by one vote. When Democrats, in “outrage and bitterness,” threatened violence and civil war, Hayes secretly pledged to Southern white Democrats that he would remove Federal troops from the South and restore “traditional white Democratic supremacy” there. While this mollified the (white) South, Northern Democrats referred to Hayes as "His Fraudulency" throughout his four-year term.

Following the fiasco of 1876, the United States Supreme Court lost legitimacy in the eyes of the American public that took several decades to rebuild. In 1887, Congress, determined never again to delegate away to federal judges its Constitutional authority (shared with the States) to be the final arbiter in close Presidential elections, see legislative history to 3 U.S.C §§ 1 et seq., passed a comprehensive, detailed code on Presidential Elections that attempts to explicitly and exhaustively regulate every conceivable electoral anomaly. This 1887 Code, with few revisions, governs the substance and procedure of the Congressional role in Presidential Elections today.

IV. GENERAL STATUTORY FRAMEWORK OF THE 1887 LAW

Congress may, by vote of both houses, entirely reject a state’s electoral slate if the electoral vote has not been “regularly given” by state electors “lawfully certified.” 3 U.S.C.

§ 15.[5] Certification is only lawful if the ascertainment of votes cast for elections or the determination of elections contests is conducted pursuant to state law. 3 U.S.C. § 6.[6] Thus, if pre-existing state law is *not* followed in the counting of votes and the determination of elections contests, there can be no lawful certification under 3 U.S.C. § 6 and, under 3 U.S.C. § 15, Congress may reject the electoral votes.

In the present case involving the Florida Electors, Congress has the legal right and duty to intervene because the slate of Electors sent to the Electoral College by the State of Florida was certified outside the "safe harbor" set by 3 U.S.C. § 5. This code section, which ordinarily precludes Congressional inquiry into a State's conclusive determination of an election controversy, does so only if a "final determination" is made prior to December 12, 2000 and if the election challenge is resolved pursuant to "laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5.[7]

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5 3 U.S.C. § 15 provides (emphasis added):

"[N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but **the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.**

6 3 U.S.C. § 6 provides (emphasis added):

It shall be the duty of 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,** to . . . set[] forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person . . . and if there shall have been any final determination in a State **in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State**, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made;

7 3 U.S.C. § 5 provides (emphasis added):

If any State shall have provided, by **laws enacted prior to the day fixed for the appointment of the electors**, for its **final determination** of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made **at least six days before the time fixed for the meeting of the electors**, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the

[Footnote Continued On Next Page]

In its decision of December 12, 2000, the United States Supreme Court did not – as may be commonly but erroneously believed – finally determine the election contest. It remanded the issue to the Florida Supreme Court, which issued its remand opinion following the December 12 "safe harbor" deadline on December 22, 2000. See Appendix 2. Furthermore, as will be discussed in Part V below, it is clear that the certification of Florida electors was not done pursuant to "laws enacted prior to the day fixed for the appointment of the electors."

V. FLORIDA'S ELECTORS WERE NOT ASCERTAINED AND CONTESTED IN ACCORDANCE WITH FLORIDA LAW.

From the beginning of our republic until today, the United States Supreme Court has consistently held that State Supreme Courts have the final authority on all state court decisions that rest on adequate and independent state grounds. In fact, the United States Supreme Court is without jurisdiction to even take such a case for review, much less reverse it. See, e.g., Herb v. Pitcairn, 324 U.S. 117 (1945). The U.S. Supreme Court thus only has power to intervene if Florida law conflicts with Federal Law or violates the United States Constitution. The Florida Supreme Court's "status as the ultimate arbiter of conflicting Florida Law," Palm Beach County Canvassing Board v. Harris ("Harris II") (Florida Supreme Court, December 11, 2000), remains undisturbed.

The United States Constitution places the responsibility on the respective Legislatures of the several states for directing the "Manner" of Elector appointment, with the only restriction being said "Manner" must be determined prior to Election Day ("when Congress may determine the Time of chusing the Electors"). The Legislatures of the 50 states (including Florida) have, either via legislation or state constitutions (in Florida's case, both) delegated the ultimate authority to interpret their states' laws, including laws on the appointment of Presidential Electors, to their respective states' highest courts.

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> Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

In sum, in the present case, unless Florida's laws are unconstitutional (see Part VI below), it is the sole province and duty of the Florida Supreme Court to say what Florida law is regarding the ascertainment and contest of Florida's Presidential Electors, based on its interpretation of Florida statutes. And the Florida Supreme Court held in both the protest ("ascertainment" under 3 U.S.C. § 6) and contest phases of the election challenge that the election result certified by Secretary of State Katherine Harris was not determined in the manner the Legislature had directed, i.e. was not in accordance with Florida Law. See discussion below.

In the protest phase, the Florida Supreme Court issued an opinion clarifying and interpreting contradictory Florida law on handcounts of ballots and requiring Harris to certify handcounts pursuant to Florida law. Palm Beach County Canvassing Board v. Harris ("Harris I") (Florida Supreme Court, November 21, 2000), later history described below ("We conclude that the Division [of Election]'s advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).").

Although Harris I was vacated by the United States Supreme Court and remanded for clarification, the Florida Supreme Court released Harris II on December 11, 2000 (prior to the US Supreme Court decision the next evening, December 12, 2000, in Bush v. Gore). The remanded opinion came to the same conclusions regarding Harris's rejection of handcounts as being contrary to law[8] and further "identified the right of Florida's citizens to vote and to have elections determined by the will of Florida's voters as important policy concerns of the Florida Legislature in enacting Florida's election code." Harris II, slip. op. at 31. The United States Supreme Court has never reversed Harris II, and it stands as good law, including its holding that the Florida Department of State "did not exercise its discretion within the

[8] "Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute." Harris II, slip op. at 14-15.

confines of the law. As a result, Palm Beach County, and potentially other counties, were thwarted in their efforts to complete the manual recount." Harris II, slip op. at 29-30.

In the contest phase, the Florida Supreme Court similarly ruled, under Florida law, that the contest determination of Leon County Court Judge N. Sanders Sauls, refusing to manually review uncounted ballots, was a violation of Florida law on election contests. The Florida Supreme Court ordered immediate handcounts of undervotes throughout the State of Florida in order to rectify this situation:

> "In tabulating the ballots and in making a determination of what is a 'legal' vote, the standard to be employed is that established by the Legislature in [the Florida] Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.' § 101.5614(5), Fla. Stat. (2000)."

Gore v. Harris ("Gore I") (Florida Supreme Court, December 8, 2000), slip. op. at 40, later history described below.

The United States Supreme Court stayed and ultimately reversed Gore I, holding while the standard set by the Florida Legislature "for the count of legally cast votes is to consider 'the intent of the voter,'" and "[t]his is unobjectionable as an abstract proposition," the "absence of specific standards to ensure its equal application" rendered Florida law unconstitutional pursuant to the equal protection clause of the Fourteenth Amendment, unless new "adequate statewide standards" are subsequently "adopt[ed]." Bush v. Gore, 531 U.S. ___ (2000), slip. op. at 7, 11. On December 12, 2000, the case was reversed and remanded to the Florida Supreme Court "for further proceedings not inconsistent with this opinion." Id. at 13.

On December 22, 2000, the Florida Supreme Court issued its remanded decision in Gore v. Harris ("Gore II"), holding as follows:

> "The standard we directed be employed in the manual recount was the standard established by the Legislature in the Florida Election Code, i.e., that a vote shall be counted as a 'legal' vote if there is a "clear indication of the intent of the voter." See id. at S1118 (citing section 101.5614(5), Florida Statutes (2000)). The 'intent of the voter' standard adopted by the Legislature was the standard in place as of November 7, 2000, and a more expansive ruling would have raised an issue as to whether this Court would be substantially rewriting the Code after the

> election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 (1994)."

Gore II, slip. op. at 2, reprinted in Appendix II hereto. The Florida Supreme Court further held that the United States the Supreme Court's mandate requiring the future "development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature." Gore II, slip. op. at 3, reprinted in Appendix II hereto.

In sum, Florida's electors were neither ascertained nor contested in the manner required by the Legislature under Florida Law. Yet the Constitution only allows Florida's electors to be appointed "**in such Manner as the Legislature thereof may direct**." Article II, Section 1 of the United States Constitution (emphasis added). Thus, according to Florida's highest legal arbiter (and undisputed by the U.S. Supreme Court), this Constitutional mandate was never fulfilled.

Florida's failure to ascertain or contest electors in accordance with Florida's law not only violates Article II, § 1 of the Constitution, it also means that Florida's electors were never lawfully certified under 3 U.S.C. § 6 and therefore may be rejected by Congress under 3 U.S.C. § 15.

VI. FLORIDA'S ELECTORS WERE NOT CERTIFIED IN ACCORDANCE WITH THE UNITED STATES CONSTITUTION.

In addition to Florida's Article II violation (by not appointing Electors in the Manner as the Florida Legislature directed), the United States Supreme Court found the Florida certification by Secretary of State Harris – the very certification at issue before this Congress -- to include votes counted, and votes not counted, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. See, e.g., Bush v. Gore, 531 U.S. at ___, slip op. at 9 ("uneven treatment . . . part of the new certified vote totals"). The United States Supreme Court made clear that even the slightest distinction in standards between the counting of votes by different judges and canvassing boards, each trying to determine a "clear indication

of the intent of the voter," was a constitutional violation of the highest magnitude. Indeed, it was a violation grave enough to stop vote-counting all together. Bush v. Gore, *passim*.

Based on the U.S. Supreme Court analysis, Florida's certified count contains all of these equal protection problems and more. First, as the Court specfically pointed out, the counting of ballots included in Florida's certified count used unconstitutional "standards for accepting or rejecting contested ballots" that "might vary not only from county to county but indeed within a single county from one recount team to another." Bush v. Gore, slip op. at 8.

In addition, even more severe equal protection problems, undisputed by all sides, have been unearthed that the high court failed to address. Some manual recount results were admitted and certified by Harris (e.g., Seminole County), and some were not (e.g., Palm Beach County). Some machine recount results were admitted by Harris (e.g., most of Florida) and some were not (e.g. Nassau County). In some counties using optical-scanning equipment, voters who wrote in the name of vice-presidential candidates had their votes for president disqualified (e.g., Lake County); in other such counties, these votes, despite the identical voter error, were counted nonetheless (e.g., Orange County).[9] In some counties (e.g., Volusia County), a private partisan firm's faulty "felons list" illegally disenfrachised thousands of purported but not actual felons, while in some counties (e.g., Madison County, where the elections supervisor was wrongly placed on the list herself), the faulty "felons list" was ignored.[10]

Indeed, recent independent reports from just Lake, Broward, Gadsen, and Hillsborough Counties alone evidence that the failure of the Legislature to timely adopt a uniform standard as required by the Constitution almost certainly changed the ultimate Florida

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9 Orlando Sentinel, http://www.mediasense.com/itsnotover/congressbrief/Orlando-Sentinel.pdf

10 Salon Magazine, http://www.salon.com/politics/feature/2000/12/04/voter_file/index.html ("Madison County's elections supervisor, Linda Howell, had a peculiarly personal reason for distrusting the central voter file: She had received a letter saying that since she had committed a felony, she would not be allowed to vote. Howell, who said she has never committed a felony, said the letter she received in March shook her faith in the process.")

election result.[11] These results do not include the 170,000 votes which the United States Supreme Court complained were never counted, due primarily to inadequate (punch card) voting systems. See Bush v. Gore, slip. op. at 9.[12]

With election officials under the press of deadlines to file fast and accurate election reports, it was argued before the U.S. Supreme Court that county canvassing committees in Florida might adopt a practical strategy, of "includ[ing] whatever partial counts are done by the time of final certification." See Bush v. Gore, slip. op. at 10. The U.S. Supreme Court squarely rejected that argument: "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." Bush v. Gore, 531 U.S. at ___, slip op. at 10.

In sum, as held by the United States Supreme Court in Bush v. Gore and as confirmed by undisputed evidence and various press accounts, the Florida certification of electors before this Congress is not only violative of Florida law; it violates the United States Constitution as well.[13]

VII. LEGAL IMPLICATIONS FOR REJECTION OF FLORIDA'S UNLAWFUL ELECTORAL SLATE; PRECEDENT FOR EXCLUSION OF A STATE FROM THE ELECTORAL PROCESS

The Twelfth Amendment to the U.S. Constitution provides that candidates for President and Vice-President with the greatest number of votes are elected, "if such number be a majority of the whole number of Electors appointed." But the number of Electors appointed

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11 Salon Magazine, http://www.salon.com/politics/feature/2001/01/03/recount/index.html

12 Punchcard voting systems systematically discard at least five, if not ten times the ballots of optical-scanning systems. The usual location of inadequate voting systems in poorer districts caused a systematic bias against the Democratic candidate, in an order of magnitude greater than either candidate's margin of victory in Florida. A thorough discussion of technical and operational problems associated with the Vote-o-Matic punch-card system in use in several Florida counties was prepared by Computer Professionals for Social Responsibility, at http://www.cpsr.org/issues/vote-o-matic.html.

13 Additional credible allegations of negligent or intentional impropriety in the conduct of the Florida Election of 2000 are discussed in Appendix 3 hereto.

does not include those appointed in violation of law. As 3 U.S.C. § 6 makes clear, appointments are only valid if done pursuant to State Law and the U.S. Constitution. If a state's electoral slate is not "lawfully certified," no electors are lawfully appointed, and any votes cast by them may be rejected by Congress. 3 U.S.C. § 15. If Congress rejects the Florida electoral slate as not certified according to law, the election of the President and Vice-President would be determined by whomever receives a majority of the 513 appointed electors lawfully certified and appointed.[14]

There is a precedent in American history for Congress not counting states' electoral votes. In the Election of 1864, during the Civil War Between the States, eleven Southern states failed to appoint electors. In the Election of 1868, following the conclusion of the War, Virginia, Mississippi, and Texas were still denied re-entry to the Union, due to these states' failure to ratify the Fourteenth Amendment to the U.S. Constitution, and these states therefore lost the right to participate in the choosing of Presidential Electors that year. Despite the lack of duly-appointed electors by these Southern states, President Lincoln was re-elected in 1864, and President Grant was elected in 1868, by "a majority of the whole number of Electors appointed." U.S. Constitution, Amendment XII.

VIII. PROCEDURE FOR REJECTING UNLAWFUL ELECTORAL VOTES

A. Place and Time

The procedures in the 1887 Federal Law on Presidential Elections are quite explicit, with even the exact seating of the officials ordained by law. 3 U.S.C. § 16. Both the Senate and House shall meet in the Hall of the House of Representatives precisely at 1:00 p.m. on January 6, 2001. 3 U.S.C. § 15. The President of the Senate (the current Vice-President) shall preside and shall open all ballots in alphabetical order. Id.

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[14] In the event Florida's electoral votes are rejected by Congress, Vice President Albert Gore, Jr. would win the Presidency, and Senator Joseph Lieberman would win the Vice-Presidency, by a margin of 267 to 246 votes in the Electoral College.

B. Procedure for Written Objections

Upon reading each of the states' ballots in alphabetical order, the President of the Senate is required by law to "call for objections, if any." 3 U.S.C. § 15. "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." 3 U.S.C. § 15.

"While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw [to consider objections]." 3 U.S.C. § 18.

C. Consideration of Objections

"When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision." 3 U.S.C. § 15. Note that all objections must be presented at the same time to each State's slate of Electors. For example, all objections to Florida's slate of Electors must be submitted at once, but objections to another State's electoral votes occurring later in the roll call may be made at a later time.

"When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate." 3 U.S.C. § 17. As the statute speaks in the singular ("an objection or question" rather than "objections or questions"), each objection or question shall have its own debate, lasting up to 2 hours for each. Then the question shall be put to a vote. Then the next objection shall be considered, and so forth.

As noted above, “the two Houses concurrently may reject” any electoral votes when they agree that the votes have not been “regularly given” by electors whose appointment has been certified in accordance with Florida law. 3 U.S.C. §§ 15, 6.

D. Duration of Consideration of Objections

“Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon.” So, the joint session may be continued to Monday, January 8, 2001. "But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses [January 11. 2001], no further or other recess shall be taken by either House.” 3 U.S.C. § 16.

Respectfully submitted,

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ENCYCLOPÆDIA BRITANNICA

Electoral Commission (of 1876)

(1877), in U.S. history, commission created by Congress to resolve the disputed presidential election of 1876 between Republican Rutherford B. Hayes and Democrat Samuel J. Tilden. For the first time since before the Civil War the Democrats had polled a majority of the popular vote, and preliminary returns showed Tilden with 184 electoral votes of the 185 needed to win, while Hayes had 165. Three states were in doubt: Florida, Louisiana, and South Carolina, with 19 electoral votes among them. The status of one of Oregon's three electors--that had already been given to Tilden--was also in question. Hayes and most of his associates were ready to concede when a New Hampshire Republican leader, William E. Chandler, observed that if Hayes were awarded every one of the doubtful votes, he would defeat Tilden 185-184. Both parties claimed victory in all three Southern states and sent teams of observers and lawyers into all three in hopes of influencing the official canvass.

The responsibility for resolving the conflicting claims rested with Congress--which was more evenly divided between the parties than it had been in decades. The U.S. Constitution provided that each state send its electoral certificate to the president of the Senate, who "shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." But it shed no light on whether Congress might, in a disputed election, go behind a state's certificate and review the acts of its certifying officials or even if it might examine the choice of electors. If it had such powers, might it delegate them to a commission?

The impasse continued on December 6, the appointed date for electors to meet in the states. When Congress convened the next day there were rival reports from the doubtful states. For more than six weeks maneuvering and acrimony prevailed in Congress and out, punctuated by threats of civil war. Finally, Congress created an Electoral Commission (Jan. 29, 1877) to pass on the contests. The Commission was given "the same powers, if any," possessed by Congress in the matter, and its decisions were to be final unless rejected by both houses.

The Commission was to have five members from the House of Representatives, five from the Senate, and four members from the Supreme Court. Congressional and court contingents were divided evenly between Republicans and Democrats, and the four associate justices were to name a fifth, tacitly but universally understood to be the noted independent from Illinois, David Davis. At this stage the Republican-controlled legislature of Illinois elected Davis to the state's vacant U.S. Senate seat, and he refused the commission appointment, although he stayed on the Supreme Court until March 3. Thereupon the four justices picked their colleague Joseph P. Bradley, a Republican whose record made him acceptable to the Democrats.

Bradley leaned toward Tilden's convincing claim to the Florida vote, the Commission's first action, but Republican pressures swayed him, and the Florida tally went to Hayes, who had almost certainly lost it in fact. Thenceforward all votes followed Florida, on a straight party-line 8-7 basis. (Hayes's claim to Oregon was clearly legitimate, and fraud and intimidation by both parties had been widespread in Louisiana and South Carolina.) The final vote was reported to Congress on February 23. After a week of ominous bluster, which Tilden did much to quiet among his aggrieved followers, a tumultuous session of Congress convened March 1 to count the electoral vote and after 4 Am the next day declared Hayes elected; he was sworn in on the following day. The verdict was received bitterly by Democrats in the North and philosophically by those in the South, who had been promised by Hayes's allies that federal troops would be removed promptly from the former Confederate states, as in fact they were before the end of April. The threats of violence that had recurred throughout the dispute came to naught, giving a welcome sense of assurance to both factions that, even so soon after the Civil War, self-government and domestic peace were not incompatible.

Excerpted from:**ENCYCLOPÆDIA BRITANNICA**

Hayes, Rutherford B.

RUTHERFORD BIRCHARD HAYES: 19th president of the United States (1877-81), who brought post-Civil War Reconstruction to an end in the South and who tried to establish new standards of official integrity after eight years of corruption in Washington, D.C. He was the only president to hold office by decision of an extraordinary commission of congressmen and Supreme Court justices appointed to rule on contested electoral ballots.

Hayes's unblemished public record and high moral tone offered a striking contrast to widely publicized accusations of corruption in the administration of President Ulysses S. Grant (1869-77). An economic depression, however, and Northern disenchantment with Reconstruction policies in the South combined to give Hayes's Democratic opponent, Samuel J. Tilden, a popular majority, and early returns indicated a Democratic victory in the electoral college as well. However, Hayes's campaign managers challenged the validity of the returns from South Carolina, Florida, and Louisiana, and as a result two sets of ballots were submitted from the three states. The ensuing electoral dispute became known as the Tilden-Hayes affair. Eventually a bipartisan majority of Congress created a special Electoral Commission to decide which votes should be counted. As originally conceived, the commission was to comprise seven Democrats, seven Republicans, and one independent, the Supreme Court justice David Davis. Davis refused to serve, however, and the Republican Joseph P. Bradley was named in his place. While the commission was deliberating, Republican allies of Hayes engaged in secret negotiations with moderate Southern Democrats aimed at securing acquiescence to Hayes's election. On March 2, 1875, the commission voted along strict party lines to award all the contested electoral votes to Hayes, who was thus elected with 185 electoral votes to Tilden's 184. The result was greeted with outrage and bitterness by some Northern Democrats, who thereafter referred to Hayes as "His Fraudulency."

As president, Hayes promptly made good on the secret pledges made during the electoral dispute. He withdrew federal troops from states still under military occupation, thus ending the era of Reconstruction (1865-77). His promise not to interfere with elections in the former Confederacy ensured a return there of traditional white Democratic supremacy. He appointed Southerners to federal positions, and he made financial appropriations for Southern improvements.

Excerpted from:**ENCYCLOPÆDIA BRITANNICA**

Tilden, Samuel J(ones)

In 1876 Tilden was the Democratic nominee for the presidency. The bitterly fought campaign ended in a disputed election in which Florida, Louisiana, South Carolina, and Oregon reported two sets of returns. To settle the controversy, an Electoral Commission was created by Congress. Tilden reluctantly consented to the formation of the commission but failed to provide vigorous and direct leadership in the crisis. The commission decided all questions by a strictly partisan vote, thus giving the presidency to the Republican candidate, Rutherford B. Hayes. There is evidence that the Republicans entered into a secret deal with Southern Democratic leaders to withdraw Federal troops from the South (where they were safeguarding Reconstruction) if the disputed electoral votes could be counted for Hayes. Tilden, who had received a clear majority of the popular vote, nevertheless accepted the verdict to avoid possible violence.

APPENDIX 2: FLORIDA SUPREME COURT'S PER CURIAM OPINION ON REMAND IN BUSH V. GORE (December 22, 2000)

The following three-page Opinion on Remand of the Florida Supreme Court (December 22, 2000) is followed by 28 pages of concurring opinions. The full document is available here: http://www.flcourts.org/pubinfo/election/

Supreme Court of Florida

No. SC00-2431

ALBERT GORE, JR., and JOSEPH I. LIEBERMAN,
Appellants,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,
Appellees.

[December 22, 2000]

PER CURIAM.

This case is before the Court on remand from the United States Supreme Court. See Bush v. Gore, No. 00-949 (U.S. Dec. 12, 2000).[1] In our previous opinion, we ordered the Circuit Court of Leon County to tabulate by hand 9000 contested Dade County ballots. See Gore v. Harris, 25 Fla. L. Weekly S1112, S1117 (Fla. Dec. 8, 2000). This Court further held that relief would require manual recounts in all Florida counties where undervotes existed which had not

[1]This opinion follows our dismissal of this cause by order of December 14, 2000.

previously been subject to manual tabulation. See id. at S1114, S1117-18. The standard we directed be employed in the manual recount was the standard established by the Legislature in the Florida Election Code, i.e., that a vote shall be counted as a "legal" vote if there is a "clear indication of the intent of the voter." See id. at S1118 (citing section 101.5614(5), Florida Statutes (2000)). The "intent of the voter" standard adopted by the Legislature was the standard in place as of November 7, 2000, and a more expansive ruling would have raised an issue as to whether this Court would be substantially rewriting the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 (1994).

The per curiam opinion of the Supreme Court held that the Florida statutory standard for the manual examination of ballots violates equal protection rights. See Bush, slip op. at 7. Although the Supreme Court found the legislatively prescribed standard to be unobjectionable as an abstract proposition and starting principle, it noted "[t]he problem inheres in the absence of specific standards to ensure its equal application." Id. The Supreme Court specified that in order for a manual recount to continue:

> It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable

> procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. § 101.015 (2000).

Id., slip op. at 11-12. The Supreme Court ultimately mandated that any manual recount be concluded by December 12, 2000, as provided in 3 U.S.C. § 5. See id., slip op. at 12. In light of the time of the release of the Supreme Court opinion, these tasks and this deadline could not possibly be met. Moreover, upon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature.

Accordingly, pursuant to the direction of the United States Supreme Court, we hold appellants can be afforded no relief.

It is so ordered.

SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
WELLS, CJ., concurs in result only with an opinion.

APPENDIX 3:

A PARTIAL INDEX OF ALLEGATIONS OF IMPROPRIETY IN THE CONDUCT OF THE FLORIDA ELECTION

compiled by democrats.com

Substantial, credible allegations of impropriety in the conduct of Florida's Presidential Election before, during and after November 7, 2000 have been made by public officials, the press, public advocacy organizations, and private individuals. Many of these allegations have not yet been sufficiently proved, to the high legal standard sufficient to merit consideration by Congress at this time to cause the disqualification of the Florida Electors.

Yet Congress should be aware of these allegations, because as a group they form a pattern, consistent across time, place and legal jurisdiction, of inconsistent, questionable and, in some cases, likely discriminatory actions taken during the course of the election. This pattern is sufficient to raise reasonable doubt in the mind of an objective person as to the fairness of the election, and the investigations continue.

It is likely that many of these allegations will, in the future, be proven to a high legal standard. These allegations are the source of considerable discussion and concern by the public, and they are a major factor in a rising cynicism regarding the legal functions of government and the integrity of the electoral process. Therefore, it should be a high priority for Congress to ensure that these allegations in Florida and nationwide are thoroughly investigated. Resolving the inherent and serious problems in our voting processes should be a high priority for Congress, the President, the State of Florida, and all other officials of the United States and the several States, so as to ensure the sanctity of "the consent of the governed" as the basis for legitimate authority and confidence in our democratic institutions.

For convenience, an index to some of these allegations of improper procedure is provided here.

1. Before the election, Florida Secretary of State Katherine Harris spent $4 million of taxpayer funds to hire a firm to purge voters who were allegedly felons. The list of "felons" included 8,000 American citizens – mostly minorities – who committed only misdemeanors, and thousands of innocent people – again mostly minorities – with the same names as felons. By this action up to 58,000 U.S. citizens were denied due process and the right to vote.

2. Secretary Harris unlawfully certified the election results from 20 of Florida's 67 counties without requiring – as mandated under Florida law for elections decided by one half of one percent or less – that they conduct automatic machine recounts.

3. Secretary Harris unlawfully accepted and certified the results of hand recounts in six Florida counties that produced more than 400 votes for George W. Bush while rejecting the results of hand recounts in other counties.

4. In Duval County, a pre-election purge of the voter rolls unlawfully removed at least 22,000 voters – mostly African-Americans -- who voted in the primary election in August 2000 but were denied the right to vote in November. Another 27,000 votes cast on election day were discarded, primarily in African-American sections of Jacksonville,representing as much as one-fourth of the votes in certain precincts. The Supervisor of Elections unlawfully withheld these facts from local Democrats until the deadline for requesting a recount in Duval County had passed.

5. The county canvassing board in Lake County rejected all ballots in which the voter not only correctly penciled in his or herPresidential choice in the appropriate oval beside the candidate's name but also emphasized that choice by writing in the candidate's name or the Vice-Presidential choice, just below a line that carries the instruction "WRITE IN." This is a violation of the state of Florida's election law directing that ballots be counted where the clear intent of the voter is evident.

6. Investigations by news organizations in Miami-Dade County have uncovered several hundred ineligible persons, including non-American citizens, who were permitted to vote on election day. These investigations of only a fraction of the Miami-Dade election districts suggest several thousandineligible persons may have been allowed to vote. In addition, methods used to secure and vote absentee ballots

specifically found by the Florida Supreme Court to be unlawful in 1998 were repeated in the 2000election, resulting in an as-yet-unknown number of fraudulent ballots.

7. There is persuasive evidence in Broward County of the introduction of pre-punched ballots into certain precincts, the creation of false absentee ballots, and unlawful activities to suppress voter turnout including the purposeful assignment of non-working voting machines to precincts that have strong African-American populations.

8. Election supervisors in Seminole and Martin Counties have admitted to providing favorable treatment for Republican voters who requested absentee ballots that was denied to Democratic and independent voters. Republican election workers were permitted to correct incomplete absentee ballot requests, and those requests were honored even when the Republican election workers failed to correctly complete the forms.

9. The election supervisor in Okaloosa County directed that optical scanning machines be programmed not to reject erroneous ballots, resulting in an inflated number of uncounted and overcounted ballots.

10. Examination by democrats.com of ballots in four other Florida counties has produced evidence of post-election ballot tampering, apparently intended to reduce the number of overvotes (Jackson County), massively inflated number of overvotes in only the presidential race (Gadsden), and statistical anomalies in the election results (Liberty and Calhoun Counties).

11. The NAACP convened public hearings on Nov. 11, 2000 in Miami after receiving hundreds of complaints from minority voters in Florida as well as nationwide. The Association made a public record of these complaints by submitting them to the Justice Department on November 16. For details, see http://www.naacp.org/

This catalog is not intended to be complete or definitive; other substantial, credible allegations of election impropriety have been made, by a number of organizations.

APPENDIX 4:

Sample Written Objections to Unlawfully-Certified Slate of Electoral Votes Submitted by the State of Florida

in the Presidential Election of 2000

[3 U.S.C. § 15]

beginning on following page

107th Congress of the United States

OBJECTION

We, a Senator and a Member of the House of Representatives of the United States of America, do hereby object to the electoral votes proffered from the State of Florida for President of the United States and for Vice-President of the United States on the ground that the electoral votes so proffered have not been regularly given by electors whose appointment has been certified in accordance with Florida Law. 3 U.S.C. §§ 15, 6.

/s/ _____

Senator _____

/s/ _____

Congressman/woman _____

107th Congress of the United States

OBJECTION

We, a Senator and a Member of the House of Representatives of the United States of America, do hereby object to the electoral votes proffered from the State of Florida for President of the United States and for Vice-President of the United States on the ground that the electoral votes so proffered have not been regularly given by electors who were appointed in such Manner as the Legislature of Florida directed prior to November 7, 2000, the Time Congress determined for the choosing of the Electors. Article II, Sec. 1 of the United States Constitution

/s/ _____

Senator _____

/s/ _____

Congressman/woman _____

107th Congress of the United States

OBJECTION

We, a Senator and a Member of the House of Representatives of the United States of America, do hereby object to the electoral votes proffered from the State of Florida for President of the United States and for Vice-President of the United States on the ground that the electoral votes so proffered have not been regularly given by electors who were lawfully appointed by election by the voters in Florida in such a manner as to be consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment, Section 1 of the United States Constitution.

/s/ _____

Senator _____

/s/ _____

Congressman/woman _____

107th Congress of the United States

OBJECTION

We, a Senator and a Member of the House of Representatives of the United States of America, do hereby object to the electoral votes proffered from the State of Florida for President of the United States and for Vice-President of the United States on the ground that the electoral votes so proffered have not been regularly given by electors who were lawfully appointed by election by the voters in the absence of illegal disenfranchisement of a portion of the Florida electorate.

/s/ _____

Senator _____

/s/ _____

Congressman/woman _____

107th Congress of the United States

OBJECTION

We, a Senator and a Member of the House of Representatives of the United States of America, do hereby object to the electoral votes proffered from the State of Florida for President of the United States and for Vice-President of the United States on the ground that the electoral votes so proffered have not been regularly given by electors who were lawfully appointed by the voters in an election free from systematic discrimination and inadequate and unequal voting systems that placed in doubt the true outcome of the election.

/s/ _____

Senator _____

/s/ _____

Congressman/woman _____