A Mail Addressee and Opener: The President of the Senate and Counting Electoral Votes

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The American vice presidency's remarkable recent growth has brought it into the White House inner circle but has left untouched the President of the Senate's infrequent and ceremonial role of presiding over the counting of the electoral vote. Appropriately so. Even as the vice president's executive branch role has expanded, constitutional and statutory change has further contracted this entirely ceremonial quadrennial function.

Most are probably unaware that the vice president presides when Congress counts electoral votes every four years. That's not surprising. The Constitution's text doesn't give the President of the Senate that role. Instead, it assigns the "President of the Senate" two specific and rather demeaning functions regarding electoral votes. It states that the signed and certified lists of electoral votes prepared in each State shall be "directed to the President of the Senate" and that "[t]he 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." As such, the Constitution treats the President of the Senate simply as mail addressee and opener.

The Constitution further contracts these menial assignments. It doesn't designate the President of the Senate to preside over the joint session where the electoral college certificates are opened and counted. As will be seen below, that role derives from practice and statute. The two meager assignments the Constitution gives the President of the Senate require an address and an opener, not a gavel. They confer constrained responsibilities but no power or discretion.

In fact, the Twelfth Amendment, and its predecessor (which was essentially identical regarding the President of the Senate) further signal the constricted role assigned the Senate president and the tight, almost embarrassing, checks on his or her behavior. The Constitution prohibits the President of the Senate from opening the "sealed" electoral certificates upon receipt by directing performance of that act "in the presence of the Senate and House of Representatives." The constitutional command that the President of the Senate open "all" of the certificates in that chaperoned ceremony confines his or her performance even more narrowly. The officer has no discretion regarding what to open and must perform publicly to safeguard against the votes disappearing or being altered.

The Constitution's text signals that the President of the Senate doesn't count the votes. After assigning to the President of the Senate the physical task to "open all the Certificates" the next clause uses passive voice regarding tabulating the votes ("and the Votes shall then be counted"), thereby signaling that the opener is not the counter. Here, as elsewhere, in various forms and dimensions, the Constitution separates power and checks and balances conduct to minimize authority and promote accountability. The "President of the Senate"

then disappears from the constitutional provision and the Vice President appears simply as one of the two electees of the described proceedings.

Practice and statute, not constitutional text, make the President of the Senate the presiding officer of the joint session but impose extraordinary checks on a perfunctory role. Although the first Senate elected a president, Senator John Langdon, for the "sole purpose of opening and counting" the electoral votes, the President of the Senate soon lost the counting function. The Presidential Succession Act of 1792 provided when Congress would meet after each election at which point the received certificates would be "opened," the votes "counted," and the president and vice president ascertained and announced consistent with the Constitution.[1] In the first years, the Senate president may have read the votes but the tellers the two houses appointed "examined and ascertained the votes" and presented them to the presiding officer to read.[2]

By the beginning of the 19th century,[3] the Senate president apparently simply opened the certificates and delivered them to the tellers "who, having examined and ascertained the number of votes, presented a list" of the results to the presider which he read.[4] On very rare occasions, the president made rulings but generally on non-dispositive matters and consistent with statutory or other authoritative guidance.

The Electoral Count Act (hereinafter, ECA), which Congress passed in 1887, designates the President of the Senate as the "presiding officer" of the joint meeting of the House of Representatives and Senate, but goes to lengths to limit that role.

Its multiple checks confine the President of the Senate on all sides. It provides that the electors prepare six separate certificates of the votes cast for president and vice president which they shall seal and transmit one to the President of the Senate by registered mail, and a total of five to the state's Secretary of State, the National Archivist, and to a federal district judge for the district where the electoral votes were cast with provision for some of these to be sent to the President of the Senate if his or her copy goes astray. Not only does the proliferation of electoral certificates deter tampering, the ECA provides that if a state's certificate doesn't arrive by the fourth Wednesday in December, the Senate president is dutybound to request the state's Secretary of State transmit it as expeditiously as possible and that the district judge transmit the list by special messenger. In the President of the Senate's absence, the National Archivist inherits the requesting responsibility.

The ECA confirms that the President of the Senate does not count the votes. Instead, four tellers, two from each house of Congress, previously appointed, are handed "as they are opened by the President of the Senate" "all" of the "papers and certificates and papers purporting to be certificates of electoral votes." The tellers are "previously appointed" not by the Senate President at the session; the certificates are passed to these independent tellers "as they are opened" so the presiding officer cannot tamper with them; the President must turn over "all" of the documents; and he does not ascertain their authenticity since those required to be immediately handed to the tellers are all papers

"purporting to be certificates of electoral votes." The tellers, not the President of the Senate, read the certificates "in the presence and hearing" of the two houses.

The ECA also circumscribes the President's presiding role. She cannot even determine the order of opening the certificates since the statute commands that chore be done alphabetically beginning with "A." Upon the reading of each certificate or paper, the President of the Senate is obligated ("shall") to call for objections, which the ECA carefully prescribes must be in writing, signed by a member of each house, be concise, and presented without argument. When all objections to a state's electors have been made, the Senate withdraws to its chamber so the two houses can separately address the objections raised. The ECA prescribes when votes count or not. The presiding officer of the joint gathering may preserve order but debate is not allowed. When the call of states is complete, the tellers make a list which they deliver to the President of the Senate. Like a ventriloquist's dummy, he or she reads it. The ECA denies the presiding officer any ability to interpret the results.; he is an "automaton."[5]

Although vice presidents have often presided over the joint assembly, including when seeking re-election as vice president or election as president, they have not exploited that position to advance their prospects. On the contrary, vice presidents have followed laws adverse to their own and their partisan interests and have even proposed accepting contested electors pledged to their rivals. Notwithstanding the provocative insinuation of the title *Thomas Jefferson Counts Himself Into the Presidency*, I do not find the evidence, including that the two distinguished authors present, to support such a sweeping suggestion. The Senate Journal reports that the tellers, not Vice President Jefferson, examined and counted the certificates[6] and, as the article reports, the technical irregularity in the form of Georgia's votes was publicly known at the time yet generated no apparent contemporaneous objection. It seems incredible that Federalists would have silently acquiesced and in fact elected Jefferson in the House if they thought he had acted improperly.

In January, 1961, Vice President Richard M. Nixon, presiding over the electoral count, suggested resolving an anticipated dispute regarding the three Hawaii electors by accepting the three pledged to his opponent, Senator John F. Kennedy. Nixon declared that he had "knowledge" and was "convinced that he [was] supported by the facts" and that, without intending to create a precedent or to avoid a delay of the electoral vote count, suggested that the certificate of Kennedy electors were properly appointed and "[i]f there be no objection" should be counted instead of those pledged to him and his running mate, Ambassador Henry Cabot Lodge.[7] Significantly, Nixon acted only with unanimous consent so the absence of objection, not his act, impacted the three votes because, predictably, no one protested. Kennedy had sufficient electoral votes to prevail without Hawaii's votes so Nixon's gesture had symbolic, not determinative, significance.

In 2001, Vice President Al Gore stopped a co-partisan from speaking about the presidential election Gore was about to lose[8] and ruled that any objection or

other matter must be presented in writing by a senator and representative to be considered.[9] Gore repeatedly ruled speeches by his supporters improper and objections to Florida electors of his opponent, Governor George W. Bush, insufficient since not signed by a senator as well as a member of the House.[10] In 2017, Vice President Joe Biden repeatedly stopped debate and ruled out of order objections against electoral votes in favor of Republican Donald J. Trump for want to a senator co-signing the objection.[11]

The behavior of Vice Presidents Nixon, Gore and Biden is consistent with the expectation that public officials will act consistent with "constitutional morality." The ideal that an individual will not be judge of his or her own cause is implicit in the constitutional doctrine of the rule of law. Just as a vice president could not constitutionally preside over his or her own impeachment trial, a vice president could not make a contested ruling to secure his or her own election.

The constitutional values behind the Twentieth Amendment, which was ratified in 1933, provide more recent weight against a vice president making a dispositive ruling that favored his or her ticket. That Amendment stands for the constitutional ideal that those who participate in Congress's count of the electoral vote and related decision-making regarding the election of a president and vice president should reflect a current electoral mandate. The Amendment changed the beginning and ending dates of terms of members of Congress and of the President and Vice President in part so those who counted the electoral votes and conducted any contingent elections for president and vice president would possess a recent mandate, and not be lame ducks. For the vice president whose re-election or promotion was at issue to participate in a dispositive way would offend the Amendment's animating constitutional principle.

Of course, constitutional provisions, like other law, are not self-executing. They depend upon officials possessing and acting consistent with a proper sense of constitutional propriety, upon citizens insisting that constitutional norms be followed, upon the checks and balances inherent in a constitutional democracy, and ultimately upon the deterrent history's judgment provides.

One thing is totally clear. The President of the Senate has only tightly constrained, formal authority, and lacks discretion to make self-interested, dispositive rulings.

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1 3 ANNALS OF CONG. 1342 § 5 (1793).

2 3 ANNALS OF CONG. 645 (1793). *See also* 6 ANNALS OF CONG. 2096–98 (1797).

3 *See also* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887,* 56 U. FLA. L. REV. 541, 552 (2004) (concluding that Congress assumed counting function "certainly by 1800.")

4 10 ANNALS OF CONG. 743-44 (1801).

5 Siegel, *supra* note 3, at 642.

6 10 Annals of Cong. 743-44 (1801) (reporting that Jefferson opened and handed

the certificates to the tellers who "examined and ascertained the number of votes" and reported same to him).

[7] 107 CONG. REC. 290 (1961).

[8] 147 CONG. REC. 101–02 (2001).

[9] *Id.* at 102.

[10] *Id.* at 104–06.

[11] 163 H. CONG. REC. 186–89 (daily ed. Jan. 6, 2017).