

November Election

By Bill Hobby

The next President and Vice President of the United States have not yet been elected, nor will they be elected when the votes in Florida and Oregon have been counted, nor will they be elected when the electors meet in the state capitols December 18 and cast their votes. They will not be elected until a joint session of Congress canvasses the electoral votes next January 6.

Vice President Gore will preside over that joint session, usually a ceremonial occasion—but who knows about this time? As President of the Senate, Vice President Gore rules on points of order. Electors vote separately for President and Vice President, “one of whom, at least, shall not be an inhabitant of the same state with themselves”. Suppose member of Congress rose to a point of order against the 32 votes cast by Texas’ electors on the grounds that both Governor Bush and Secretary Cheney were both inhabitants of Texas? Suppose a point of order were raised that Florida’s 25 electoral votes were cast improperly on account of an alleged irregularity in the popular vote count. The first point of order would be particularly sensitive because Vice President Gore and Governor George W. Bush would be parties at interest. The latter point of order would be particularly sensitive because Vice President Gore and Governor Jeb Bush would be parties at interest.

The difference between the Gore-Bush totals will doubtless be less than 25 (or 32). In either case, Vice President Gore would be put in the position of ruling on his own future. What might he do? Almost certainly he would vacate the chair, probably in favor the President Pro Tempore—with the understanding that the Pro Tem would overrule. (As you recall, the Vice President in a Presidential impeachment trial vacates the chair in favor the Chief Justice.)

Rulings of the chair can be appealed, but how? Legislative bodies often have rules for voting on appeals from the chair, sometimes requiring multiple seconds and extraordinary majorities. But here we are talking about a Joint Session, governed by Joint Rules, if any. Would an appeal from the chair require a majority of both houses to prevail? If so, how might the vote be taken? Does each Senator have one vote (as when the Senate elects a Vice President of the United States)? Does each House member have one vote or does each State have one vote (as it does when the House elects a President of the United States)? Joint Sessions are usually for ceremonial purposes and rarely conduct meaningful business. Such rules are unlikely to exist. I’ll bet the Congressional Parliamentarians are researching precedents as we speak.

What role would the Supreme Court play? Probably none. The Supreme Court has decided twice in recent years to stay out of Congress’s business in internal matters like apportionment. A ruling of the chair on a Congressional function such as canvassing is pretty internal. The governing principle here is comity: You mind your business and I’ll mind mine.

The late Governor Mel Carnahan of Missouri opposed Senator John Ashworth for re-election to the U.S. Senate. Carnahan got 51% of the votes two weeks after he died in a plane crash. Was Carnahan elected? The Constitution says, “No person shall be a Senator... who shall not, when elected, be an inhabitant of that state for which he shall be chosen”. Will a vacancy exist when Senator Ashworth’s term expires in January? If so, can the Governor Carnahan’s successor appoint Mrs. Carnahan to the vacant seat? If the governor appoints her, will she be seated? The Constitution says “Each House shall be the judge of the elections, returns and qualifications of its own members...”. Senator Ashworth, properly concerned with legitimacy, will not contest the election, so the issue is moot, but nonetheless interesting.

There are even some Texas Constitutional issues. When Governor Bush vacates the Governor’s office Lieutenant Governor Rick Perry will become Governor and vacate the Lieutenant Governor’s office. This will be the first the Lieutenant Governor’s office has been vacant since the passage of two constitutional amendments affecting that event. The President Pro Tempore of the Texas Senate, Senator Rodney Ellis (D-Houston), will convene the Texas Senate within thirty days of the vacancy to elect a new presiding

officer. Does that election require a two-thirds vote (as much Senate business does) or a simple majority? Will Senators vote by secret ballot or by roll call? As with the federal constitutional issues, new precedents will be set.

What about the Electoral College?

Is a victory “legitimate” if the electoral vote (EV) winner got a few less popular votes (PV) than the opponent? Sure. Neither popular nor electoral vote counts are perfect. Voting machines break down. Ballot boxes are lost. Polling places open or close early or late. Electoral vote counts aren’t perfect either. See next paragraph.

What about “faithless electors”? Occasionally electors do not vote for the nominee of the party that elected them, or for anybody who is even on the ballot. An elector voted for Ronald Reagan in a year that Reagan was not the ballot. An elector voted for Lloyd Bentsen for President when he was a candidate for Vice President. Normally that makes no difference, but this is the closest election in history. Some states attempt to bind electors to vote for their party’s candidate, but electors are elected officials just like members of Congress. A state can hardly bind a member of Congress to vote in a certain way. Certainly the authors of the Constitution, who abhorred the concept of political parties (“faction”), would have been horrified at any such idea. Electors in some states vote by secret ballot. Such electors may be “faithless” to they voters in the primary, but are doing what the Founding Fathers intended by voting their convictions.

A look into the future: Governor Bush’s electoral majority would be greater if he carried the same states in 2004 as he did this year. He carried every state that will gain Congressional seats and electoral votes in the next apportionment.

History repeats itself but never exactly. Tuesday’s election will be one we will never forget.

Originally published November 2000.