Joint Session of Congress on Jan 6: rules of engagement

The Joint Session of Congress on Jan 6 is shaping up to be a very contentious session given competing slates of electors and other objections. There’s a lot of misleading information regarding how this process works and what the powers of the Vice President are. This brief note reviews the rules you need to know.

**Background: the Courts, Congressional challenges and the Caravan**

- During the spring and summer of 2020, election laws and rules in many states were changed due to COVID
  - Changes enacted by Federal/State court orders, state legislature amendments, Governors suspending deadlines during states of emergency and Chief Election Officer decisions (i.e., Sec’y of State)
- Some pre-election lawsuits successfully challenged attempts by lower courts/election officials to relax rules
  - In MN, WI, OH, SC, GA and AZ, Federal Courts (including US Supreme Court) and State Supreme Courts struck down attempts by lower courts and election officials to lengthen absentee ballot deadlines, mandate increased dropbox availability, lengthen “curing” deadlines and relax signature requirements
- The election itself: absentee ballot usage surged and at the same time, absentee ballot rejection rates were often lower than in prior elections, particularly in some swing states (see 2 exhibits below)
- After the election, the Trump campaign and unaffiliated groups responded with a flurry of lawsuits in multiple states. Courts have found these lawsuits to be without merit so far (one tally we’ve been following shows 36 defeats, 4 cases pending and 0 wins). The reasons cited by a bipartisan group of judges:
  - Unsubstantiated fraud claims
  - Self-serving witness statements and expert testimony with little evidentiary value
  - Individual incidents of fraud and/or clerical errors cannot be assumed to have taken place on a larger scale (i.e., high bar for proving such incidents were “dispositive” and would have changed results)
  - Lack of standing (i.e., Texas has no standing to sue other states for election handling)
  - “Laches”: a legal principle under which challenges to election procedures must be made in a timely manner and not after the fact (i.e., Wisconsin Supreme Court ruling on certain ballot challenges)

- **Even so, 100+ GOP House Reps and at least 13 GOP Senators**\(^1\) **may challenge Electoral College results in several states on Jan 6, and even if they do not, Congress must sort out any competing slates of electors that were cast on Dec 14**
- Trump supporters are planning a caravan to DC to coincide with the Jan 6 session

---

\(^1\) Senator Josh Hawley (R-MO), who once clerked for Chief Justice Roberts, was first. It will be interesting to see if Hawley comments on the accusations made against Justice Roberts’ character and judicial rulings by election lawyers that have been retweeted by Trump.
Joint Session on Jan 6: the Electoral Count Act will be in force, not 12th Amendment Contingent Elections

The US Constitution does not provide a framework for resolving electoral vote disputes. After a bitter post-Civil War election in 1876, the US faced the possibility of dueling inaugurations given disputes about valid electors. This led to a constitutional crisis and a compromise in which Rutherford B Hayes eventually became President. Congress then debated ways of avoiding such disputes in the future, and a decade later passed the Electoral Count Act in 1887. The ECA has only been used once to sort out competing slates: in 1961, when multiple slates were submitted for Hawaii (the outcome would not have affected JFK’s victory). It has also been invoked on multiple occasions to deal with objections to state submissions when competing slates were not involved.

Competing slates. The ECA requires the House and Senate to meet on Jan 6 and vote separately on competing slates, unless an unchallenged determination is made that one slate is entitled to Safe Harbor status, in which case it is automatically counted. Voting within each chamber follows ordinary rules: each member casts a single vote, rather than each state delegation casting a single vote. Democrats control the House by a very slim margin of ~10 seats. The Senate balance on Jan 6 will be 51R–48D for reasons related to Georgia runoff elections, one of which is a special election. Several GOP Senators have indicated that they will accept certified Biden electors instead of any uncertified Trump slates. In any case, it would only take 2 GOP Senators to accept Biden slates to doom a competing slate effort for Trump in the Senate.

Competing slate tie-break: if the two chambers disagree, the tie-breaker goes to the slate approved by the state’s governor (“highest Executive”). In PA/MI/WI/NV/AZ/GA, governors already approved the Biden slate. There are Jan 6 procedural issues that involve decisions by Vice President Pence such as determination of Safe Harbor status, but none of them rise to the level of the VP effectively being able to determine the outcome. So, using the common interpretation of the ECA and assuming Congress adheres to it, the only way for Trump to win would be for both chambers to accept 3 or more uncertified Trump slates which have not been signed by the state’s Governor, nor approved by the majority of any state legislature, nor mandated by any court.

Single slate objections. In states without competing slates of electors, members of Congress can still object to certified Biden slates on Jan 6. However, such an effort would be doomed to fail since objections to single slates require both chambers to discard. Given Democratic House control, that’s almost certainly not going to happen.

Last point: news stories on Contingent Elections described in the 12th Amendment (one vote per state in the House to pick the President) are often misleading. Contingent Elections would only occur in case of an Electoral College tie or if three or more candidates prevent the 270 threshold from being reached, in “faithless elector” scenarios, if the winner of the Electoral College died or became incapacitated before Jan 6, or if both chambers of Congress agreed to reject electoral votes on some other grounds.

2 Some scholars believe the Electoral Count Act is unconstitutional. Their main argument: the 12th Amendment grants authority directly to Congress to determine validity of electoral votes and procedures used to count them, so federal laws cannot impose restrictions on the scope of that authority. However, challenges to the ECA’s constitutionality would only be an issue if one chamber didn’t want to abide by its procedures; no members have indicated any desire to ignore it. If that were to happen one day, the US would be in no-man’s-land, with no way out except an eventual Congressional compromise, as in 1876. In that event, on January 20 the Speaker of the House (presumably Pelosi) would have the opportunity to resign from Congress and be sworn in as Acting President until Congress settled on rules and finished counting electoral votes.

3 The Democratic lead in the House is practically the smallest since 1901; see page 13 in the Outlook.

4 Courts could rule that slates should be decertified between now and Jan 6, but Congress is free to accept or reject such decisions since the Constitution ascribes to Congress the sole right to count electoral votes.

5 In faithless elector scenarios, appointed electors switch votes on Dec 14th to runner-up and other individuals so that no candidate wins a majority of appointed electors. Most states prohibit faithless electors but only 14 have effective enforcement that treat faithless electors as invalid and allow states to immediately replace them.
Other things to know, on the Courts:

- Charles Geyh from Indiana Law School described many of the Trump lawsuits as follows: “What we saw here were a bunch of overzealous lawyers trying to make the transition from the political realm, where facts and law have ceased to be very important, into the judicial realm, where the norms are still hard and fast”

- **That said, the US Supreme Court may eventually rule in favor of the Trump campaign on some issues**, although any such rulings would not impact the outcome of the election or Congress’ actions concerning electoral votes. The Court hasn’t decided whether to rule on challenges to the Pennsylvania Supreme Court 3-day extension of absentee ballot deadlines (note: post-Election Day ballots in Pennsylvania didn’t determine the outcome). The Supreme Court may rule that in future elections, **only State Legislatures can change election rules** as per authority ascribed to them in the Constitution, and that State courts cannot strike down state laws regulating federal elections for purportedly violating state constitutional restrictions

- Trump lawyers might also succeed in “**equal protection**” cases still pending that involve disputes around selective application of ballot-curing, ID requirements, etc. However, Wisconsin’s Supreme Court ruled against Trump on this issue last month, and even if some courts eventually find in favor of plaintiffs, requested remedies are unlikely (i.e., reallocating or decertifying state electors before Jan 6)

- **A Wisconsin case highlights the hurdles for successfully reversing results after the fact.** While a county clerk was prevented in March 2020 from telling all Dane County voters that they could self-designate as “indefinitely confined” due to COVID to avoid absentee ballot photo ID requirements, that message could still have circulated through other forums, allowing people to obtain absentee ballots without identification. The inability to prove how many voters took undue advantage of this approach (i.e., they were not really indefinitely confined) led the Courts to reject general election challenges based on this issue

Other things to know, on **Executive Orders**:

- Twitter is ablaze with references to Executive Order 13848 signed by Trump in 2018, but this Order only applies sanctions to foreign govt’s, companies and individuals who are determined by the Director of National Intelligence to have attempted to interfere with US elections. It has **no jurisdiction of any kind** over the handling of US election results or challenges to them

On the future of the **GOP**:

- Trump supporters intend to mount primary challenges against GOP politicians that do not support Jan 6 Joint Session objections. **How will most GOP politicians vote in the Joint Session?** I don’t know, but I’m reminded of the following Ben Franklin quote in Peter Stone’s 1776: “We must indeed all hang together, or most assuredly we shall all hang separately”

- Meanwhile, Democrats hold one of the smallest House majorities since 1900 and face the possibility of losing more House seats (as almost all Presidential parties have) at the 2022 midterm elections. As we illustrate on page 13 of the Outlook, instead of a “Blue Wave” the Democratic tide actually went **out** this year: our Partisan Balance Index of Congressional, Gubernatorial and State Legislature seats became more red after the election rather than more blue
IMPORTANT INFORMATION
This report uses rigorous security protocols for selected data sourced from Chase credit and debit card transactions to ensure all information is kept confidential and secure. All selected data is highly aggregated and all unique identifiable information, including names, account numbers, addresses, dates of birth, and Social Security Numbers, is removed from the data before the report’s author receives it. The data in this report is not representative of Chase’s overall credit and debit cardholder population.

Purpose of This Material: This material is for information purposes only. The views, opinions, estimates and strategies expressed herein constitutes Michael Cembalest’s judgment based on current market conditions and are subject to change without notice, and may differ from those expressed by other areas of J.P. Morgan. This information in no way constitutes J.P. Morgan Research and should not be treated as such.

GENERAL RISKS & CONSIDERATIONS
Any views, strategies or products discussed in this material may not be appropriate for all individuals and are subject to risks. Investors may get back less than they invested, and past performance is not a reliable indicator of future results. Asset allocation / diversification does not guarantee a profit or protect against loss. Nothing in this material should be relied upon in isolation for the purpose of making an investment decision. You are urged to consider carefully whether the services, products, asset classes (e.g. equities, fixed income, alternative investments, commodities, etc.) or strategies discussed are suitable to your needs. You must also consider the objectives, risks, charges, and expenses associated with an investment service, product or strategy prior to making an investment decision. For this and more complete information, including discussion of your goals/situation, contact your J.P. Morgan team.

NON-RELIANCE
Certain information contained in this material is believed to be reliable; however, JPM does not represent or warrant its accuracy, reliability or completeness, or accept any liability for any loss or damage (whether direct or indirect) arising out of the use of all or any part of this material. No representation or warranty should be made with regard to any computations, graphs, tables, diagrams or commentary in this material, which are provided for illustration/reference purposes only. The views, opinions, estimates and strategies expressed in this material constitute our judgment based on current market conditions and are subject to change without notice. JPM assumes no duty to update any information in this material in the event that such information changes. Views, opinions, estimates and strategies expressed herein may differ from those expressed by other areas of JPM, views expressed for other purposes or in other contexts, and this material should not be regarded as a research report. Any projected results and risks are based solely on hypothetical examples cited, and actual results and risks will vary depending on specific circumstances. Forward-looking statements should not be considered as guarantees or predictions of future events.

Nothing in this document shall be construed as giving rise to any duty of care owed to, or advisory relationship with, you or any third party. Nothing in this document shall be regarded as an offer, solicitation, recommendation or advice (whether financial, accounting, legal, tax or other) given by J.P. Morgan and/or its officers or employees, irrespective of whether or not such communication was given at your request.

J.P. Morgan and its affiliates and employees do not provide tax, legal or accounting advice. You should consult your own tax, legal and accounting advisors before engaging in any financial transactions.

LEGAL ENTITY, BRAND & REGULATORY INFORMATION
In the United States, bank deposit accounts and related services, such as checking, savings and bank lending, are offered by JPMorgan Chase Bank, N.A. Member FDIC. JPMorgan Chase Bank, N.A. and its affiliates (collectively “JPMCB”) offer investment products, which may include bank managed investment accounts and custody, as part of its trust and fiduciary services. Other investment products and services, such as brokerage and advisory accounts, are offered through J.P. Morgan Securities LLC (“JPM”), a member of FINRA and SIPC. Annuities are made available through Chase Insurance Agency, Inc. (CIA), a licensed insurance agency, doing business as Chase Insurance Agency Services, Inc. in Florida. JPMCB, JPM and CIA are affiliated companies under the common control of JPM. Products not available in all states.

In Luxembourg, this material is issued by J.P. Morgan Bank Luxembourg S.A. (JPMBL), with registered office at European Bank and Business Centre, 6 route de Treves, L-2633, Senningerberg, Luxembourg. R.C.S Luxembourg B10.958. Authorised and regulated by Commission de Surveillance du Secteur Financier (CSSF) and jointly supervised by the European Central Bank (ECB) and the CSSF. J.P. Morgan Bank Luxembourg S.A. is authorized as a credit institution in accordance with the Law of 5th April 1993. In the United Kingdom, this material is issued by J.P. Morgan Bank Luxembourg S.A.– London Branch. Prior to Brexit,(Brexit meaning that the UK leaves the European Union under Article 50 of the Treaty on European Union, or, if later, loses its ability to passport financial services between the UK and the remainder of the EEA), J.P. Morgan Bank Luxembourg S.A.– London Branch is subject to limited regulation by the Financial Conduct Authority and the Prudential Regulation Authority. Details about the extent of our regulation by the Financial Conduct Authority and the Prudential Regulation Authority are available from us on request. In the event of Brexit, in the UK, J.P. Morgan Bank Luxembourg S.A.– London Branch is authorised by the Prudential Regulation Authority, subject to regulation by the Financial Conduct Authority and limited regulation by the Prudential Regulation Authority. Details about the extent of our regulation by the Prudential Regulation Authority are available from us on request. In Spain, this material is distributed by J.P. Morgan Bank Luxembourg S.A., Sucursal en España, with registered office at Paseo de la Castellana, 31, 28046 Madrid, Spain. J.P. Morgan Bank Luxembourg S.A., Sucursal en España is registered under number 1516 within the administrative registry of the Bank of Spain and supervised by the Spanish Securities Market Commission (CNMV). In Germany, this material is distributed by J.P. Morgan Bank Luxembourg S.A., Frankfurt Branch, registered office at Taunus Tower 1 (TaunusTurm), 60310 Frankfurt, Germany, jointly supervised by the Commission de Surveillance du Secteur Financier (CSSF) and the European Central Bank (ECB), and in certain areas also supervised by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin). In Italy, this material is distributed by J.P. Morgan Bank Luxembourg S.A.– Milan Branch, registered office at Via Catena Adalberto 4, Milan 20121, Italy and regulated by Bank of Italy and the Commissione Nazionale per le Società e la Borsa (CONSOB). In the Netherlands, this material is distributed by J.P. Morgan Bank Luxembourg S.A., Amsterdam Branch, with registered office at World Trade Centre, Tower B, Stastruwijkstraai 1135, 1077 XX, Amsterdam, The Netherlands. J.P. Morgan Bank Luxembourg S.A., Amsterdam Branch is authorised and regulated by the Commission de Surveillance du Secteur Financier (CSSF) and jointly supervised by the European Central Bank (ECB) and the CSSF in Luxembourg; J.P. Morgan Bank Luxembourg S.A., Amsterdam Branch is also authorised and supervised by De Nederlandsche Bank (DNB) and the Autoriteit Financiële Markten (AFM) in the Netherlands. Registered with the Kamer van Koophandel as a branch of J.P. Morgan Bank Luxembourg S.A. under registration number 71651845. In Denmark, this material is distributed by J.P. Morgan Bank Luxembourg, Copenhagen Br, filial af J.P. Morgan Bank Luxembourg S.A. with registered office at Kalvebod Brygge 39-41, 1560 København V, Denmark. J.P. Morgan Bank Luxembourg, Copenhagen Br, filial af J.P. Morgan Bank Luxembourg S.A.is authorised and regulated by Commission de Surveillance du Secteur Financier (CSSF) and jointly supervised by the European Central Bank (ECB) and the CSSF. J.P. Morgan Bank Luxembourg, Copenhagen Br, filial af J.P. Morgan Bank Luxembourg S.A. is also subject to the supervision of.
In Hong Kong, this material is distributed by JPMCB, Hong Kong branch. JPMCB, Hong Kong branch is regulated by the Hong Kong Monetary Authority and the Securities and Futures Commission of Hong Kong. In Hong Kong, we will cease to use your personal data for our marketing purposes without charge if you so request. In Singapore, this material is distributed by JPMCB, Singapore branch. JPMCB, Singapore branch is regulated by the Monetary Authority of Singapore. Dealing and advisory services and discretionary investment management services are provided to you by JPMCB, Hong Kong/Singapore branch (as notified to you). Banking and custody services are provided to you by JPMCB Singapore Branch. The contents of this document have not been reviewed by any regulatory authority in Hong Kong, Singapore or any other jurisdictions. This advertisement has not been reviewed by the Monetary Authority of Singapore. JPMorgan Chase Bank, N.A., a national banking association chartered under the laws of the United States, and as a body corporate, its shareholder’s liability is limited.

JPMorgan Chase Bank, N.A. (JPMCBNA) (ABN 43 074 112 011/AFS Licence No: 238367) is regulated by the Australian Securities and Investment Commission and the Australian Prudential Regulation Authority. Material provided by JPMCBNA in Australia is to “wholesale clients” only. For the purposes of this paragraph the term “wholesale client” has the meaning given in section 761G of the Corporations Act 2001 (Cth). Please inform us if you are not a Wholesale Client now or if you cease to be a Wholesale Client at any time in the future.

JPMS is a registered foreign company (overseas) (ARBN 109293610) incorporated in Delaware, U.S.A. Under Australian financial services licensing requirements, carrying on a financial services business in Australia requires a financial service provider, such as J.P. Morgan Securities LLC (JPMS), to hold an Australian Financial Services Licence (AFSL), unless an exemption applies. JPMS is exempt from the requirement to hold an AFSL under the Corporations Act 2001 (Cth) (Act) in respect of financial services it provides to you, and is regulated by the SEC, FINRA and CFTC under US laws, which differ from Australian laws. Material provided by JPMS in Australia is to “wholesale clients” only. The information provided in this material is not intended to be, and must not be, distributed or passed on, directly or indirectly, to any other class of persons in Australia. For the purposes of this paragraph the term “wholesale client” has the meaning given in section 761G of the Act. Please inform us immediately if you are not a Wholesale Client now or if you cease to be a Wholesale Client at any time in the future.

This material has not been prepared specifically for Australian investors. It:

• may contain references to dollar amounts which are not Australian dollars;
• may contain financial information which is not prepared in accordance with Australian law or practices;
• may not address risks associated with investment in foreign currency denominated investments; and
• does not address Australian tax issues.

With respect to countries in Latin America, the distribution of this material may be restricted in certain jurisdictions. We may offer and/or sell to you securities or other financial instruments which may not be registered under, and are not the subject of a public offering under, the securities or other financial regulatory laws of your home country. Such securities or instruments are offered and/or sold to you on a private basis only. Any communication by us to you regarding such securities or instruments, including without limitation the delivery of a prospectus, term sheet or other offering document, is not intended by us as an offer to sell or a solicitation of an offer to buy any securities or instruments in any jurisdiction in which such an offer or a solicitation is unlawful. Furthermore, such securities or instruments may be subject to certain regulatory and/or contractual restrictions on subsequent transfer by you, and you are solely responsible for ascertaining and complying with such restrictions. To the extent this content makes reference to a fund, the Fund may not be publicly offered in any Latin American country, without previous registration of such fund’s securities in compliance with the laws of the corresponding jurisdiction. Public offering of any security, including the shares of the Fund, without previous registration at Brazilian Securities and Exchange Commission–CVM is completely prohibited. Some products or services contained in the materials might not be currently provided by the Brazilian and Mexican platforms.

References to “J.P. Morgan” are to JPM, its subsidiaries and affiliates worldwide. “J.P. Morgan Private Bank” is the brand name for the private banking business conducted by JPM.

This material is intended for your personal use and should not be circulated to or used by any other person, or duplicated for non-personal use, without our permission. If you have any questions or no longer wish to receive these communications, please contact your J.P. Morgan team.

© 2021 JPMorgan Chase & Co. All rights reserved.