

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL:            **SCR 2-A**

SPONSOR:       **Senator Sullivan**

SUBJECT:        **Manner of Selection of Presidential Electors**

DATE:            **December 8, 2000**        REVISED:        \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Bradshaw	EE	Favorable
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

SCR 2-A directs that the manner of appointing Florida’s electors for President and Vice President of the United States in the year 2000 be by appointment of the Florida Legislature. The concurrent resolution appoints 25 electors who were previously selected by the Republican Party and have pledged their votes for the Republican candidates for President and Vice President of the United States. SCR 2-A also incorporates a number of procedural and technical requirements from federal and Florida law in connection with the process of electors casting their votes.

## II. Present Situation:<sup>1</sup>

On Tuesday, November 7, 2000, the State of Florida conducted its general election for President and Vice President of the United States. The overall difference in the total votes cast for each candidate was less than one-half of one percent of the total votes cast for that office. This triggered an automatic recount pursuant to section 102.141(4), Florida Statutes. The unofficial returns from the general election and the mandatory statewide recount, respectively, are as follows:<sup>2</sup>

Candidates	Initial Returns (11/8)	Mandatory Recount (11/15)
Bush/Cheney	2,909,135	2,910,492
Gore/Lieberman	2,907,351	2,910,192
<b>Bush Lead</b>	<b>1,784</b>	<b>300</b>

<sup>1</sup> The historical facts stated in this portion of the analysis were drawn substantially from the Select Joint Committee on the Manner of Appointment of Presidential Electors, *Report and Recommendations* (December 4, 2000).

<sup>2</sup> Letter from L. Clayton Roberts, Director, Division of Elections, Department of State, to The Honorable Tom Feeney, Speaker, The Florida House of Representatives (November 22, 2000).

Following the automatic recount, the Florida Democratic Executive Committee requested a manual recount be conducted in several counties pursuant to section 102.166(4), Florida Statutes. The Palm Beach County Canvassing Board had concerns that it would not be able to certify results of the manual recount by the statutory deadline of 5 p.m. on November 14, 2000, and requested an advisory opinion from the Division of Elections interpreting the deadline set forth in sections 102.111 and 102.112, Florida Statutes. On November 13, 2000, the Division of Elections issued Advisory Opinion DE 00-10, stating that absent unforeseen circumstances, returns from the county must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

On Monday, November 13, 2000, the Florida Secretary of State issued a statement that she would not accept returns of the manual recounts received by the Florida Department of State after Tuesday, November 14, 2000, at 5 p.m. On the same day, the Volusia County Canvassing Board filed suit in the Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking declaratory and injunctive relief. The presidential candidates and the Palm Beach County Canvassing Board, among others, were allowed to intervene. The trial court held that although the November 14 deadline was mandatory, the Secretary of State had discretion to accept amended returns received late. It further directed the Secretary to consider all “attendant facts and circumstances” in determining whether or not to ignore late-filed returns. Subsequent to the court ruling, each supervisor of elections was asked by the Secretary of State to submit, by November 15, 2000, a written statement of “the facts and circumstances” that would justify certification of amended returns after the statutory deadline. Only four county canvassing boards responded. After reviewing the submitted statements, the Secretary of State announced on Wednesday, November 15, 2000, that she would not accept the amended returns but rather would rely on the earlier certified returns of the four counties. The Secretary of State further stated her intent to certify the results of the presidential election on Saturday, November 18, 2000, to include the results of the overseas absentee ballots due by 5 p.m., November 17, 2000.

On November 17, 2000, the Florida Supreme Court accepted jurisdiction of an appeal of an Order of the Circuit Court of the Second Judicial Circuit in Leon County, Florida, denying a motion to compel the Secretary of State to accept amended returns. The Court enjoined the Secretary of State and the Elections Canvassing Commission from certifying the results of the presidential election until further order.

Subsequently, the Florida Supreme Court addressed the following issues:

- Under what circumstances may a county canvassing board authorize a countywide manual recount pursuant to section 102.166(5), Florida Statutes;
- Must the Secretary of State and the Elections Canvassing Commission accept such recounts when the returns are certified and submitted by the county canvassing board after the seven day deadline set forth in sections 102.111 and 102.112, Florida Statutes.

On November 21, 2000, the Court concluded that it must invoke its equitable powers and fashion a remedy that would allow a fair and expeditious resolution of the questions presented. *Palm Beach Canvassing Bd. v. Harris*, Nos. SC00-2346, SC00-2348, SC00-2349 (November 21,

2000). The Court extended the filing date for amended certifications to 5 p.m. on Sunday, November 26, 2000, and ordered the Elections Canvassing Commission to include amended returns accepted through that date. The Bush campaign appealed the decision to the United States Supreme Court, which agreed to hear the case. *Bush v. Palm Beach County Canvassing Board, et al.*, (U.S. Supreme Court, Case No. 00-836)(constitutionality of Florida Supreme Court decision).

On Sunday, November 26, 2000, the State Elections Canvassing Commission certified the final returns of the election as follows:

<b>Candidates</b>	<b>Official Returns (Certified 11/26)</b>	<b>Unofficial Returns Including Overseas Ballots (11/18)</b>
Bush/Cheney	2,912,790	2,911,872
Gore/Lieberman	2,912,253	2,910,942
Bush Lead	<b>537</b>	930

Subsequently, the Governor signed a Certificate of Ascertainment of Presidential Electors that was then communicated by registered mail under the seal of the State to the Archivist of the United States, pursuant to 3 U.S.C. section 6.

On December 4, the U.S. Supreme Court unanimously agreed to vacate and remand the case of *Bush v. Palm Beach County Canvassing Board, et al.*, (U.S. Supreme Court, Case No. 00-836) to the Florida Supreme Court for further clarification. Essentially, the U.S. Supreme Court wanted to know whether the Florida Supreme Court based its decision on an interpretation of Florida election law or the right to vote guaranteed by the state constitution, and the extent to which such an interpretation would be circumscribed by federal constitutional and statutory considerations.

The Gore campaign and the Bush campaign, as well as numerous other parties, have filed additional lawsuits challenging different aspects of the Presidential election in Florida. Some of these lawsuits are still pending resolution by the various state and federal courts involved.

On Friday, November 24, 2000, John McKay, President of the Florida Senate, and Tom Feeney, Speaker of the Florida House of Representatives, announced that a select joint committee would be formed for the purpose of examining issues surrounding the 2000 Florida Presidential Election. The Select Joint Committee on the Manner of Appointment of Presidential Electors (“the Joint Committee”) was charged with reviewing the Florida Legislature’s responsibilities and options with respect to the appointment of Florida’s 25 electors. The Joint Committee met in Tallahassee from November 28-30, 2000, and heard testimony from numerous constitutional scholars, law professors, election law experts, and the public. A summary of the testimony and actions of the Joint Committee are contained in a joint report entitled, Select Joint Committee on the Manner of Appointment of Presidential Electors, *Report and Recommendations* (December 4, 2000).

After discussion of the testimony presented to the Joint Committee, the following motion was moved by Senator John Laurent and adopted by the Joint Committee on an 8-5 vote:

[Comments and motion by Senator Laurent]

It is clear from the expert testimony presented to this Committee that the Legislature has the fundamental obligation under Article II of the United States Constitution to ensure that Florida's electors are counted on January 6 when Congress counts the votes of the Electoral College. Based on the entire testimony presented to this Committee, there appears to be a significant risk that all of Florida's voters may be disenfranchised if the Legislature does not act to fulfill its responsibility. If the election controversies and contests now pending are not finally and conclusively determined by December 12, there can be no assurance that Congress will count the votes of Florida's 25 electors. From the testimony presented, it appears likely that the determination necessary to ensure Congress counts the votes will not occur by December 12 and that, even if made, such determination may not be conclusive because of post-election changes in the election laws.

I, therefore, move that this committee recommend to the President of the Senate and the Speaker of the House of Representatives that the Legislature convene in special session to determine the manner in which the electors of this state shall be appointed and to consider, and if necessary, take such other action to ensure that Florida's 25 electoral votes for President and Vice President in the 2000 Presidential Election are counted.

I further move that a special session be held as soon as practicable with such action to be accomplished by appropriate legislative means.

Representative Ken Gottlieb moved a substitute motion that the Legislature take no action to interfere with the lawful ongoing election process created prior to the election of November 7, 2000. The Joint Committee on a 5-8 vote defeated that motion.

Federal Constitutional and statutory provisions identified in Joint Committee discussions are detailed in Section IV.D., *Other Constitutional Issues* (see below).

### **III. Effect of Proposed Changes:**

SCR 2-A directs that the manner of appointing Florida's electors for President and Vice President of the United States in the year 2000 be by appointment of the Florida Legislature. The concurrent resolution appoints 25 electors who are the same electors certified on November 26, 2000, and pledged to the Republican candidates for President and Vice President of the United States. SCR 2-A also incorporates a number of procedural and technical requirements from federal and Florida law in connection with the process of electors casting their votes.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The United States Constitution grants the state legislatures plenary power in the matter of the appointment of Presidential electors. Art. II, § 1, cl. 2, U.S. Const.; *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). A state legislature may direct that the appointment of electors be made pursuant to a popular vote of the electors. However, the U.S. Supreme Court has acknowledged that the state legislature has a right to resume the power to choose electors “at any time,” irrespective of state constitutional or statutory provisions to the contrary. *McPherson*, 146 U.S. at 35. Federal law provides that whenever a state has held an election and failed to make a choice of electors, “on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” 3 U.S.C. § 2.

The federal statutes governing Congress’ counting of the electoral votes are extremely complex and represent uncharted legal waters. No court has yet interpreted these provisions of federal law.

Federal law provides that where a state has laws in existence on the date of the election for resolving controversies or contests arising out of the election, and a “final determination” of all such contests and controversies has been made by, in this case, December 12, 2000, the state’s appointment of Presidential electors is “conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.” 3 U.S.C § 5. Florida’s Presidential electors must vote in Tallahassee on December 18 to comply with federal and state law. 3 U.S.C. s. 7; § 103.051, Fla. Stat. (2000).

Title 3 section 15 of the U.S. Code essentially provides that when Congress receives a single slate of electors from the executive of a state, Congress must count that slate provided the electors were lawfully certified and their votes were “regularly given.” Congress may reject the electors’ votes if both houses agree that the votes were not regularly given. If there is more than one slate of electors from a state, a process is triggered whereby both houses of Congress must agree on a given slate. If both houses cannot agree, then section 15 dictates that the slate certified by the *executive* of the state is the slate of electors that must be counted. If there are two slates certified by the executive, and Congress fails to agree on a slate, and as a result of such failure no candidate receives a majority of the votes of the electors appointed, then the U.S. House of Representatives would determine the President by a majority vote of state delegations --- with each state delegation having one vote. U.S. Const., Amendment XII.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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