1. The calendar accepts as given the congressionally specified dates concerning presidential elections. Thus, the calendar begins on a Tuesday, as Congress has specified “the Tuesday next after the first Monday in November” as the date on which the voters in each state cast their ballots for presidential electors.1 3 U.S.C. § 1. The calendar continues until “the first Monday after the second Wednesday in December next,” which is the date that Congress has set for the official meeting and vote of the presidential electors in each state. Id. § 7. Article Two of the U.S. Constitution requires that this date “shall be the same throughout the United States,” and in his decisive opinion resolving the disputed 1876 presidential election, Justice Joseph Bradley interpreted this constitutional requirement as precluding any state proceedings (judicial or otherwise) that would undo the state’s appointment of the presidential electors who cast their votes on the constitutionally uniform date.2

1 Of course, state legislatures need not let their citizens vote for the office of presidential elector. Instead, under Article II of the U.S. Constitution, state legislatures may choose to appoint their states’ presidential electors directly, as occurred in some states early in U.S. history. An assumption underlying this calendar is that all states will continue their longstanding practice of permitting their voters to cast ballots for presidential electors, with the expectation that the electors will perfunctorily vote for the presidential candidate to whom they have pledged themselves. Because of its triggering mechanism, as explained in ¶ 3, this model calendar applies only to the states that make all of their presidential electors “winner take all” statewide offices (as currently all states but Maine and Nebraska do). A separate triggering mechanism would need to be developed for a system (as Pennsylvania and Wisconsin were at one point considering for 2012) whereby each congressional district in the state is allocated one presidential elector with the remaining two “at large” offices corresponding to the state’s two U.S. Senators. Likewise, a separate triggering mechanism would need to be developed were a state to adopt some sort of proportional system, pursuant to which a presidential candidate winning a proportion of the statewide popular vote would cause the candidate to receive a corresponding proportion of the state’s presidential electors.

2 Justice Bradley issued his opinion not as a member of the Supreme Court but instead as the swing vote on the 15-member Electoral Commission that Congress created to resolve the disputed Hayes-Tilden election of 1876. Thus, although Bradley’s vote caused the Commission to split 8-7 in favor of Hayes, and although Bradley delivered an opinion explaining his interpretation of the Constitution as the basis for his decision, it is uncertain what precedential status Bradley’s view of Article Two’s uniform date requirement has for future disputed presidential elections. Moreover, when Congress met to count the votes in the 1960 presidential election, Vice-President Nixon (sitting in his capacity as President of the Senate under the Twelfth Amendment) accepted the Electoral votes from Hawaii that had been cast on behalf of then-Senator John Kennedy, even though the presidential electors pledged to Kennedy had not been officially confirmed to their office under Hawaii law until after the constitutionally uniform date for the meeting and vote of the electors in each state. On that date in 1960, duly appointed presidential electors pledged to Nixon’s
2. **Safe-Harbor Deadline.** The Electoral Count Act of 1887, passed to avoid the kind of congressional deadlock that threatened to leave the disputed 1876 presidential election unresolved on Inauguration Day, provides that Congress will treat as “conclusive” any resolution of a dispute over ballots cast for presidential electors if that resolution occurs “at least six days before the time fixed for the meeting of the electors” (provided also that the resolution is made pursuant to a state statute enacted before the date on which citizens cast their ballots for presidential electors). This provision is known as “the Safe-Harbor Deadline,” and given the congressionally specified dates mentioned in ¶1 (above), the six days before the meeting of the presidential electors is always a Tuesday exactly five weeks after the citizens of each state have cast their ballots for presidential electors. This model calendar assumes that states will wish to take advantage of the Safe-Harbor Deadline and thus develops a schedule that can resolve a dispute over ballots cast for presidential electors within this five-week period.

3. The current draft of the calendar incorporates the concept of a “triggering mechanism,” to put into effect the expedited procedures that make meeting the Safe-Harbor Deadline possible. The assumption is that these expedited procedures would not apply to non-presidential elections or even to presidential elections where the undisputed winner is known the day after the ballots for presidential electors are cast in November (as has occurred most of the time), and in those circumstances the canvassing of returns can take place at a more leisurely pace if a state wishes.

4. The current draft of the calendar is accompanied by a set of proposed model rules for a state legislature to enact in order to put this “triggering mechanism,” as well as the procedures and deadlines that it triggers, into law.

5. The expedited procedures in the current draft of the calendar allow two weeks for the completion of the canvass. This is a change from the previous draft, which allowed only one week. Feedback from several election administrators on that earlier draft prompted this change.

candidacy had cast their votes for him, but a later recount in the state had shown that the slate of presidential electors pledged to Kennedy had received more ballots cast by citizens on Election Day. As President of the Senate in early January 1961, Nixon had before him from Hawaii alternative certificates, one showing that he had received the state’s Electoral votes, the other showing that Kennedy had. Hawaii’s Electoral votes, however, were inconsequential in determining that Kennedy had received the constitutionally required majority necessary to be declared president without sending the election to the U.S. House of Representatives. Therefore, as a gesture of magnanimity, but explicitly declaring that he wished to set no precedent, Nixon announced that he was accepting Hawaii’s Electoral votes cast for Kennedy rather than the ones cast for him. In this respect, Nixon’s ruling was the opposite of Justice Bradley’s, as under Bradley’s interpreting of Article Two only the Electoral votes from Hawaii cast for Nixon would have been constitutionally permissible. In any event, the model calendar assumes that Justice Bradley is correct and that all disputes concerning which slate of presidential electors is entitled to hold that office must be resolved by the constitutionally uniform date for the meeting and vote of the presidential electors in each state.
6. The current draft incorporates an innovation developed in response to feedback on the previous draft: no ballots that were not counted on Election Day but which are deemed eligible to be counted during the canvass (such as provisional ballots or absentee ballots that are timely if they arrive during the canvass) are to be opened and counted (and thus commingled with previously counted ballots) until after completion of judicial review proceedings on the validity of ballot-eligibility determinations made during the canvass. Instead, these ballots (still in their secrecy envelope) are put in a pile “to be counted” at the end of the canvass, and are actually opened and counted if they are still deemed eligible to be counted at the end of the expedited judicial review process. (Ballots deemed ineligible to be counted during the canvass can also be counted at the end of the judicial review process, if the final judicial determination is that they are eligible.) Benefits of this approach include:

   a. maintaining secrecy of the voter’s choice throughout the duration of the dispute,
   b. the ability to “retrieve” ballots if the judiciary reverses a determination that a particular ballot is eligible during the canvass,
   c. the development of judicial procedures, including ballot-specific burdens of proof, that are distinctly appropriate for ballot-eligibility determinations, but which may not be as well-suited for judicial review of a recount, or judicial review of issues relating to already counted ballots; and
   d. maintaining a thicker “veil of ignorance” over the ultimate outcome of the election, during the duration of the dispute, thereby minimizing the pressures for candidates and their attorneys to engage in litigation tactics designed to either maintain or overcome a lead.

Because of this innovation, the certification of the canvass is not a certification that a particular candidate (or, technically, that candidate’s slate of presidential electors) “won” the election in that state—at least as long as the number of uncounted ballots at the end of the canvass (as will almost always be true if these expedited procedures have been triggered) is greater than the margin by which the leading candidate is ahead.

7. The current draft of the calendar schedules the recount of the previously counted ballots at the same time as the judicial review of the canvass. In theory, the recount of previously counted ballots could begin even earlier, on the day after Election Day, as soon as the expedited procedures are triggered. But local election officials will be busy with the canvass, which needs to be their highest priority during the first two weeks. Consequently, the model rules simply call for the State Recount Board to make good use of the two-week period of the canvass in preparing for the start of the recount that immediately follows the canvass (assuming that the triggering conditions, as specified by the model rules, requires the recount to go forward).

8. The current draft contemplates a separate, very curtailed judicial proceeding in the event that legal issues arise relating to the conduct of the recount of previously counted ballots. The recount, it should be noted, is limited solely to the question of whether the
The initial count of the ballot was accurate in recording the voter’s intent; it does not involve questions of the ballot’s eligibility to be counted (or the voter’s eligibility to cast the ballot). Therefore, the judicial review of the recount is much narrower in scope than judicial review of the canvass.

9. The current draft also contemplates a third form of judicial proceedings, involving potential issues going to the eligibility of the counted ballots or otherwise questioning the validity of the count as a representation of the electorate’s will. (Such issues would include fraud or a systemic breakdown of the voting process on Election Day.) The procedures and burden of proof appropriate for these issues (often associated with a traditional post-certification judicial “contest” of an election’s final result) are different than those associated with judicial review of eligibility determinations made with respect to previously uncounted ballots during the canvass. The model rules tailor these procedures accordingly.

10. All three forms of judicial proceedings occur in the first instance in a special three-judge Election Court specifically designed to implement this expedited calendar. The deadlines and procedures associated with each of the three types of proceedings are coordinated to maximize efficiency in this Election Court, which should have discretion to further tailor its proceedings to meet the deadlines specified in the model rules.

11. The current draft provides for an appeal to the state supreme court from the rulings of the Election Court with respect to each of the three different types of judicial review proceedings. This feature of the current draft differs from the previous draft, which left virtually no time for any meaningful role by the state supreme court. This draft, by contrast, devotes a whole week to the possibility of appellate review in the state supreme court. Various comments on the previous draft considered this revision necessary to assure the legitimacy and efficacy of the entire five-week calendar. (The schedule is structured so that appellate review with respect to all three different forms of judicial proceedings in the Election Court can occur at the same time, in a single consolidated appellate proceeding.)

12. The current draft of the five-week calendar, however, still leaves no extra time for separate appellate proceedings in the U.S. Supreme Court, or separate trial-like proceedings in federal district court. The hope and expectation is that if a state follows this model calendar, including the role provided for the state supreme court, there will be no need for U.S. Supreme Court review or other federal court intervention. Alternatively, if necessary, the U.S. Supreme Court can

   a. Either “borrow” some or all of the time set aside for the state supreme court (preempting the state supreme court, if the U.S. Supreme Court sees an issue of federal law emerging from the Election Court that requires its attention)
   b. Or use the six days between the Safe-Harbor Deadline and the meeting of the Electoral College to address any pressing federal issues.