

THE ROLE OF THE TWELFTH AMENDMENT, THE ELECTORAL COUNT ACT (ECA), STATE LEGISLATURES IN THE PROCESS OF ELECTING A PRESIDENT

The following CLC document may be used by members of the media to guide/formulate storytelling and story coverage regarding these important topics ahead of the 2020 election.

Does the Vice President have any role in deciding any issues concerning the counting of electoral votes?

When electoral votes for President are counted at a joint session of both Houses of Congress, the Vice President only presides over the session in an administrative role. The Vice President has **NO** power to decide controversies that might arise over counting electoral votes in the joint session.

What power does the Twelfth Amendment give the Vice President?

The Twelfth Amendment only notes that the President of the Senate – usually the Vice President – “shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall be counted.” In essence, the VP’s only role is to “open the certificates” or electoral votes of each state during the joint session of Congress. Nothing more.

Does the Twelfth Amendment give the Vice President power to count the votes?

The Twelfth Amendment gives the Vice President **NO** other task or authority. He is not charged with counting the votes, as the Constitution provides “the votes shall then be counted” after the Vice President opens them but does not designate the Vice President to do so.

What powers does the Electoral Count Act (ECA) provide the Vice President?

Much like the Twelfth Amendment, the ECA appoints the Vice President as “presiding officer” of the joint session of Congress at which the electoral voters are counted. The ECA assigns the Vice President four specific roles in the joint session of Congress:

- preserving order and decorum (including by prohibiting any debate);
- opening and handing vote certificates to the tellers;
- asking if there are objections;
- and announcing the results of votes on objections and the overall electoral vote count

In sum, under the Constitution and federal law, the Vice President has NO decision-making power over the counting of electoral votes in the joint session of Congress.

Can you provide an overview of the Electoral Count Act (ECA)?

The ECA sets forth the mechanics, timeline, and dispute-resolution procedures for general presidential elections pursuant to the framework set forth in the Constitution. In addition to setting a timeline for selecting electors and transmitting their votes to Congress, the ECA establishes certain dispute-resolution procedures for the counting process in Congress—including when it receives competing slates of electoral votes from the same state. It is worth noting that some aspects of these procedures are ambiguous, many are not.

Can you clarify the role of the Electoral College in electing a President of the U.S.?

The president is technically chosen by the Electoral College, which is composed of electors from each state. The candidates having the greatest number of total votes in each state win the electoral votes for that state. The

candidates that are fastest to cross the 270 electoral vote threshold shall become president and vice president. For more than a century, all 50 states have followed the democratic practice of selecting their electors based on the popular vote. In July 2020, the [Supreme Court ruled](#) unanimously that a state may require presidential electors to support the winner of its popular vote and may punish or replace those who don't.

What is the timeline/process for selecting electors and transmitting Votes to Congress as prescribed in the ECA?

The ECA sets forth various dates and deadlines for appointing electors, casting electoral votes, and transmitting them to Congress. These provisions also impose certain affirmative duties on state governors, electors, and others to ensure timely delivery of electoral votes. The following is a summary of these deadlines and duties:

- Election Day (Tuesday, November 3, 2020). The ECA requires all states to appoint electors—i.e., to hold their presidential elections—on “the Tuesday next after the first Monday in November.”
- Safe Harbor Deadline (Tuesday, December 8, 2020). A state's slate of presidential electors qualifies for “safe harbor” status if, at least six days before the electors meet to cast their votes, the state makes a “final determination” of any dispute by “judicial or other methods or procedures” pursuant to state law enacted prior to Election Day.
- Certificate of Ascertainment. As soon as practicable after the election, the “executive of each State” (often the governor) must “ascertain” and certify his or her state's election results and its chosen slate of electors. The state's executive must send this “certificate” under state seal to the Archivist of the United States and six “duplicate-originals” to the electors themselves no later than December 14, when the electors meet to cast their votes.

- Meetings of the Presidential Electors (Monday, December 14, 2020).
Electors meet in their respective states on the same day (“the first Monday after the second Wednesday in December”) to cast their votes in a place determined by the state legislatures. A state may fill any vacancies in its slate of electors (due to an elector’s sickness or death, for example) on this day. At the meetings, electors must tally their votes separately for president and vice president.

There is a lot of talk regarding the safe-harbor provision, what is its significance?

The safe-harbor provision refers to a state’s timely determination of disputes regarding appointment of its electors. As noted above, the safe-harbor deadline is December 8, 2020. If a state’s pre-existing procedures fail to resolve the dispute, the ECA preserves Congress’ discretion to decide, by separate action of both chambers, which purported slate of electoral votes to count, and provides a tiebreaker in the event the chambers disagree.

As noted, if no candidate has a majority of electoral votes, then the House of Representatives chooses the President and the Senate chooses the Vice-President pursuant to the Twelfth Amendment.

What is the procedure for counting electoral votes and resolving counting disputes in congress as directed in the ECA?

On Wednesday, January 6, 2021, at 1:00 p.m ET., the two chambers of Congress will meet in a joint session to count electoral votes from all states as directed by the ECA. The vice president is required to open, in alphabetical order by state, “all the certificates and papers purporting to be certificates of the electoral votes.” After the votes are recorded, the vice president then calls for objections.

How can a member of Congress challenge a state's electoral vote as directed in the ECA?

Members of Congress may object to a state's electoral votes in writing only. The objection must "state clearly and concisely, and without argument, the ground [for the objection]" and "be signed by at least one Senator and one member of the House of Representatives." After every objection for a given state has been received and read, the House and Senate meet separately to consider the objections pursuant to the ECA and each chamber's own procedural rules. The chambers may not move on to the next state until all objections have been "finally disposed of."

What is the course to take if a state submits two or more competing electoral returns?

If a state submits multiple competing returns that purport to be supported by a safe-harbor determination, the prevailing slate is the one both chambers find to be supported by a final determination of the proper state decision-maker. Those votes are then counted and recorded as such.

What happens in the event of a state submitting two competing returns and *neither* is supported by a timely safe-harbor determination?

In such event, the counted votes are those cast by electors that both Houses separately decide are "lawful electors appointed in accordance with the laws of the State."

In the event that two chambers *disagree* as to which votes of multiple competing returns to count; they must resort to the ECA's tiebreaker to resolve the dispute, which counts whichever votes were cast by electors certified by "the executive of the State," which is commonly the state's Governor. This provision, known as the governor's tiebreaker, operates as a "fail-safe to prevent state disenfranchisement."

What happens if there's no elected president by noon ET, January 20, 2021?

In such case known as an incomplete election, the ECA provides that the vacancy shall be filled by an “acting president” (with the Vice President (if one has been elected) first in line, followed by the Speaker of the House and the president pro tempore of the Senate). Note that in such an event, the incumbent president does not stay in office. Rather, the “acting president” will hold the office until the results of the presidential election are resolved.

What happens in an election by Congress if no candidate has a majority of electoral votes?

The Twelfth Amendment provides that if no candidate has a majority of electoral votes, then Congress will decide among the top three candidates who received the most electoral votes. The House of Representatives chooses the president from among the three candidates who received the most electoral votes. Each state's House of Representative's delegation receives one vote, and a majority (26) is needed to win. The Senate chooses the vice president from among the two candidates who received the most electoral votes for that position.

STATE'S ROLE IN ELECTING A PRESIDENT

Can a state legislature override the state voters' will when submitting presidential electors to Congress?

No, a state legislature cannot appoint its preferred slate of electors to override the will of the people of each state after Election Day.

The president is chosen by the Electoral College, which is composed of electors from each state. The U.S. Constitution delegates to state legislatures the power to select the *manner* for appointing electors and to Congress the authority to decide *when* that appointment must occur.

This longstanding, nationwide practice has persisted unbroken for more than a century, and today, every state selects its presidential electors through a popular vote, following the will of the people through an election to be held the first Tuesday in November every four years.

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