



The Electoral College



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The Electoral College

Under popular conception, Americans proceed to the ballot box every four years and cast ballots for who they believe should be President of the United States for the next term. However, this understanding fails to include an integral component of the process – the Electoral College. The Electoral College is an indirect procedure under the Constitution of electing the President and Vice President. The Electoral College is made up of representatives (electors) selected in every state and the District of Columbia who, in mid-December of each Presidential election year, cast their votes according to the laws in their states for one of the nominees for President and one of the nominees for Vice President. These votes are then transmitted to the National Archivist and Congress where, on January 6 following the election, they are read and ratified by the new Congress. The Presidential and Vice Presidential nominees who receive more than 270 of these Electoral College votes then officially become the President-elect and Vice President-elect, and, on January 20 (or 21, when January 20 falls on a Sunday), are sworn into office.

This system, derived in 1787 as one of many compromises contained in our Constitution, may seem complicated, but it contains many strengths, and perhaps a few weaknesses, that have continued to operate over the past almost 250 years. During the Constitutional Convention in Philadelphia, the framers debated many options for choosing the nation’s highest office. Some wanted popular elections, while others wanted Congress to make the choice without public input. The compromise made falls somewhere between these two options. In the Federalist Papers, Alexander Hamilton summed up how he and many of the framers may have felt about the system, noting “that if the manner of it be not perfect, it is at least excellent.”¹

The Electoral College has evolved since its establishment in 1787. Constitutional amendments have altered the Electoral College, and over time states and Congress have modified the ways they have implemented it via statute. The Electoral College has passed many difficult tests during the Presidential elections of America’s history.

This white paper explains the origins of the Electoral College, and the ways in which it has changed since its introduction almost 250 years ago. It also considers past elections in which the Electoral College was tested by unique circumstances or exceptionally tight races. Finally, the paper points out vulnerabilities in the system, and explains how, despite being tested, the Electoral College has continued to endure.

Creating the Electoral College

Today’s Electoral College looks surprisingly like the one used in George Washington’s first election to the presidency. Only the 12th Amendment in 1804 and the 23rd Amendment in 1961 have modified the Electoral College’s structure. All other modifications to the Electoral College process as outlined in the Constitution were accomplished through Federal and state statutes, including as recently as 2022.

The Constitutional Convention

The Electoral College was conceived of and adopted at the 1787 Constitutional Convention. But in the deliberations leading up to its adoption, the delegates debated several different options for selecting the President of the United States.

¹ The Federalist No. 68 (Alexander Hamilton).

Popular Vote

Delegates agreed in principle that the public should have a voice in the process. However, if the people were allowed to vote directly for President, many delegates feared that there would be numerous candidates receiving votes; this disaggregation of votes would then diminish the stature of the eventual winner. This concern stemmed from the belief that citizens of one state would not know much about the candidates from other states and that the public would naturally vote for the “favorite sons” of their home states; the President would then likely be chosen with a very small plurality of votes from a state with a large population.

Additionally, delegates believed that a national popular election was impractical. For example, would the states still conduct their own elections, or would there be a national body responsible for conducting elections? Would a majority of the vote be required to win the presidency?

Congressional Appointment

Another idea considered by a vote of the delegates was to allow Congress to choose the President. Some believed the President should be subservient to the Congress and, as such, dependent on it for their election and reelection. Others believed that the Congress would be the most informed electorate about the potential Presidential candidates, an arguably patronizing attitude towards the citizenry.

It did not take long for the delegates to change their thinking. Instead of seeing the benefit of a President subordinated to the Congress that elects him, James Madison, a delegate from Virginia and later President of the United States, believed that such a system would lead away from checks and balances: “[T]he election of the Chief Magistrate would agitate & divide the legislature so much that the public interest would materially suffer by it. Public bodies are always apt to be thrown into contentions, but into more violent ones by such occasions than by any others. [T]he candidate would intrigue with the Legislature, would derive his appointment from the predominant faction, and be apt to render his administration subservient to its views.”² He argued that a President would be unwilling to oppose the Congress if doing so would result directly in his electoral defeat.

There was also the chance that political deals would be struck between congressmen and the future President. Gouverneur Morris, a delegate from Pennsylvania and later a United States senator from New York, believed that “[i]f the Legislature elect, it will be the work of intrigue, of cabal, and of faction: it will be like the election of a pope by a conclave of cardinals, real merit will rarely be the title to the appointment.”³ The person elected to the presidency would be the one most willing to promise the most to members of Congress to buy their votes and not necessarily the fittest person for the job.

The delegates also briefly considered permitting the governor of each state to cast a single vote for President, the winner of which would take office. However, this proposal was quickly rejected, as lacking the necessary representative nature desired by the delegates, similar to the issues with Congressional appointment.

²Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Volume 2. New Haven: Yale University Press, 1911. Pg. 109.

³ Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Volume 2. New Haven: Yale University Press, 1911. Pg. 29.

Electoral College

Having rejected the idea of Congress appointing or governors electing the President, as well as a national popular vote, the delegates next contemplated creating a separate institution to elect the President composed of some other group of individuals – an Electoral College.

The first idea outlined for a separate electoral body was to have the state legislatures appoint electors based on congressional representation. The public would be included in the Presidential election via their votes for state legislators. However, state legislatures were sitting political bodies just like the national legislature, and the delegates worried these would be subject to the same dealmaking which Morris warned.

To minimize this concern, the delegates allowed the states to decide how to select their electors. In essence, each state would choose for itself whether it preferred a popular election for the electors or would rather have the state legislature appoint them without public input.

Additionally, the electors would meet only once. It was thought that by keeping the electors decentralized and temporary, they were less likely to be influenced in their votes. The electors were not a permanent sitting political body so it would be difficult for a Presidential candidate to promise them something beyond the election. The President also would not have to appease them for reelection as a new group of electors would be composed for each Presidential election.

The compromise resulted in a complex process for electing the President. However, it was thought to be the only option that satisfied all the delegates' concerns.

The Original Electoral College

The system settled on by the delegates is outlined in Article II, Section 1 of the Constitution and was used during the first four Presidential elections of the United States. The language settled upon by the delegates allocated certain responsibilities to the federal government and others to the states.

Elements of Electoral College Governed by Federal Law:

- **The fundamental structure of the Electoral College system.** The framers decided that the number of electors from each state would equal the number of its congressional delegation. This method of allocating electors built on an earlier compromise during the Constitutional Convention made to decide the structure of Congress. Under that compromise, all states were allotted two senators, and the number of their representatives was based on a state's population as determined by the decennial census. This compromise addressed the concerns of large and small states.
- **Electors must meet in their home states and never as a unified body.** The framers believed that by keeping the electors scattered throughout the country, they reduced opportunity for corruption among electors in influencing the outcome of an election.
- **Each elector was guaranteed two votes, one of which had to be cast for a candidate not from their state.** The framers believed it likely that each state would have a "favorite son" participating in each Presidential contest and that the electors in each state would vote for that candidate. Each elector's second vote would go to a candidate with a national presence outside their respective state.

Elements of Electoral College Governed by States:

- **Qualifications of electors.** The Constitution included little about the qualifications electors must have. It explicitly prohibited any officer of the United States—including all Federal employees and members of Congress—from serving in the Electoral College. Later, the 14th Amendment would ban anyone from being an elector who “engaged in insurrection or rebellion” against the United States during the Civil War. Otherwise, states were permitted broad discretion in selecting their electors.
- **How to appoint electors.** State legislatures were given the power to decide how to select their electors. Their options include popular election or direct appointment by the state legislature.

The Constitution also specified how the process operated after the states appointed their electors. The states made a list of all the candidates receiving votes from the electors. The list was signed and certified in the state and transmitted to the President of the Senate (the Vice President of the United States). The Vice President presided over a joint session of Congress to count the electoral votes of all the states. After the votes were read to Congress, the candidate who received an absolute majority of all the electoral votes was declared the President. The candidate who won the second highest number of electoral votes became the Vice President.⁴

If there was a tie in the Electoral College, the House of Representatives chose the President from the tied candidates. If no candidate received a majority of the electoral votes, the House of Representatives chose the President from among the five candidates who received the most votes of the electors. In both cases, each state had one vote for President and at least two-thirds of the states were required for a quorum. An absolute majority of the total states in the nation was required to win the presidency. After the President was elected, if there remained a tie in the Electoral College for the Vice presidency, the Senate chose the Vice President from the candidates who were tied.

The Electoral College after Constitutional Amendment

This system was far from perfect, the faults of which were shown after the elections of 1796 and 1800. In 1796, the electors from the “winning” party split their votes for Vice President, resulting in an unexpected winner – Thomas Jefferson – getting the most votes and becoming Vice President. In 1800, the Electoral College vote resulted in a tie, which meant the House of Representatives was charged with deciding who the next President would be. After 36 rounds of voting, a winner was finally elected. To address this shortcoming, state legislatures started discussing ways to prevent this dilemma from occurring again, ultimately resulting in the adoption of the 12th Amendment in 1804.

The 12th Amendment gives each elector two votes in the Electoral College, but specifies that one vote is for President and the other for Vice President. This amendment led to the system of a Presidential candidate and Vice Presidential candidate running as a team that exists in Presidential elections today. If no Presidential candidate receives a majority of the electoral votes, the selection process in the House of Representatives remains similar to the original one. However, instead of choosing from among the candidates with the five highest totals of electoral votes, the House of Representatives chooses from among the three candidates receiving the most votes.

⁴ This provision, U.S. Const. art. II, § 1, cl. 3, was amended by the 12th Amendment.

The candidate for Vice President who receives a majority of the votes for Vice President is elected Vice President. If none of the candidates receives an absolute majority, the Senate chooses from between the top two finishers and each senator has one vote.

How Has the Electoral College Evolved?

The Electoral College has changed in other ways since its inception almost 250 years ago. Most notable are how states choose their electors and coordinate the scheduling of elections.

Choosing Electors

The Constitution allows that “[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors...”⁵ This clause leaves to the states the choice of appointment of electors by the state legislature or through popular elections. Appointment was a popular choice in early America, but by 1832, all electors except those from South Carolina were chosen by popular vote. While state legislatures still retain the power to appoint electors, no elector has been appointed without a popular election since 1876 when Colorado entered the Union only three months before Election Day.⁶

Forty-eight states and the District of Columbia currently award electoral votes through a winner-take-all system based on the popular vote in their state; the other two states (Maine and Nebraska) have a system that appoints at least some electors based on the winner of Congressional districts.

There have been recent efforts to change the way individual states allocate electoral votes. For instance, Colorado voters considered a proposition in 2004 to award the state’s electoral votes in proportion to the statewide popular vote. California considered changing the way its state’s electoral votes are awarded to follow the Nebraska and Maine system and award the votes by congressional district. Both states’ voters rejected the change.

Finally, there is an ongoing effort to create an interstate compact between the legislatures of as many states as required to achieve a majority of electoral votes.⁷ These state legislatures would agree to award their electoral votes to the winner of the national popular vote irrespective of the popular votes in their states.

Scheduling Elections

The Constitution says that “[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”⁸

However, the states originally set their own election dates for Federal contests. In 1792, Congress passed a law that mandated only that the election for President occur sometime within a 34-day window before the first Wednesday in December every fourth year.⁹

Giving states so much time to cast their electoral votes may have seemed less worrisome in 1792 when communication between the states was slow. But as communication among states began to improve, it

⁵ U.S. Const. art. II, § 1, cl. 2.

⁶ Fortier, John C. ed. *After the People Vote: A Guide to the Electoral College*. Third Edition. Washington, DC: AEI Press, 2004. Pg. 4.

⁷ National Conference of State Legislatures, *National Popular Vote*, available at <https://www.ncsl.org/elections-and-campaigns/national-popular-vote> (last accessed April 5, 2024).

⁸ U.S. Const. art. II, § 1, cl. 4.

⁹ 2 Cong. Ch. 8, March 1, 1792, 1 Stat. 239.

became clear that there could be a distinct benefit to a state voting later in the process, with a close election potentially decided by a state legislature appointing electors late in the window.

It was not until 1845 that Americans in all states were required to cast their ballots for President on the same day. Since then, Federal law directs that “[t]he electors of President and Vice President shall be appointed, in each state, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”¹⁰

The Electoral College Endures Many Tests

Several elections have tested the resiliency of the Electoral College. The following examples show how the Electoral College has been challenged in the past and continued to endure as a stable system for choosing the President.

The election of 1824 was contested between four candidates who identified themselves as members of the Democratic-Republican Party: Andrew Jackson, John Quincy Adams, William H. Crawford, and Henry Clay. Each of the candidates had staunch support in distinct parts of the country, and the Electoral College vote splintered among the four of them. There were 261 total electoral votes. Jackson received the most votes after the initial count but, with only 99, was far short of the majority needed to become President. Adams came in second with 84 votes and Crawford and Clay followed with 41 and 37 votes, respectively.

The 12th Amendment, passed after the controversy in 1800, slightly altered the method of selecting the President in the House of Representatives. Each of the 24 state delegations had one vote and could choose from among the three candidates receiving the most electoral votes. On the first ballot in the House of Representatives, John Quincy Adams received the votes of 13 states and was elected President even though he had received fewer initial electoral votes than Andrew Jackson.

The election of 1836 is unique in that this election was also the only one in United States history that the Senate chose the Vice President. At the time, there were 294 electoral votes, and 148 votes were required to win the electoral college. While Martin Van Buren won Virginia’s 23 electoral votes for the presidency, the Commonwealth’s electors refused to vote for his running mate, Richard Mentor Johnson, for Vice President. Johnson was left one vote short of the required 148 votes for election to the Vice presidency. The provisions of the 12th Amendment required the Senate to pick the Vice President from the two candidates receiving the most electoral votes, resulting in Johnson easily being elected to the Vice presidency.

The election of 1876 led to one of the more important statutes governing the Electoral College. Samuel Tilden won the popular vote by more than 3 percent nationwide over Rutherford B. Hayes and seemed for a time to have won the vote of the Electoral College as well. There were several disputed slates of electors. Officials in Florida, Louisiana, and South Carolina certified opposing slates of electors and sent them to Congress. The Vice President, a Republican, was to preside over the counting of the votes of the Electoral College, but the Democrats claimed that it would be unfair. The Democrats argued that the concurrence of both houses of Congress was needed to adjudicate any disputed Electoral College votes. Since the House of Representatives was Democratic, withholding the concurrence would most likely

¹⁰ 3 U.S.C. § 1.

result in not counting the electoral votes from any states in dispute. That would mean a victory for Tilden over Hayes.

In January 1877, only five weeks before Inauguration Day, Congress passed legislation establishing a 15-member Electoral Commission composed of five members from each house of Congress and five Supreme Court Justices. All the commission's votes resolving disputes split along partisan lines 8-7 in favor of the Republicans. Hayes ultimately won the Electoral College by a one-vote margin, 185-184. Many historians say these votes were taken due to an informal understanding that Hayes would remove all Federal troops from the South. This action effectively ended Reconstruction.

The response to these disputes was the Electoral Count Act of 1887, creating a safe harbor deadline for states, whereby each state was guaranteed that Congress would accept its election results if the state met the safe harbor deadline to decide any intrastate election disputes.

The election of 2000 also turned, in part, on a quirk of the Electoral College. The election in Florida was contested until December 12, in part due to the impending safe harbor deadline under the Electoral Count Act. The courts acknowledged that Florida's certified results would not be contested by the Congress if they were resolved by the safe harbor deadline. That is, when it came time to count the votes, the Electoral College results would be seen as legitimate by the Congress if they were submitted by this deadline. This is one of several reasons that the recounting of votes in Florida was halted by the Supreme Court.

The election of 2020 ended in challenges to Electoral College votes in Congress. While not the first time that objections to the validity of state votes had been raised (prior instances included 1864, 1872, 1876, 2000, 2004, and 2016), several states saw efforts to appoint "alternate" slates of electors that served as the basis for many of these objections. In response, Congress passed the Electoral Count Reform and Presidential Transition Improvement Act in 2022,¹¹ the contours of which will be discussed below.

The Electoral College of Today

On the first Tuesday after the first Monday of November in each Presidential election year, the country casts its votes for the President, but even after certification, the result will not be official. The date of the popular vote is only the first step in a process that will not conclude until January 6 of the following year. Several steps will take place along the way—some of which will happen in relative obscurity—to officially elect the President of the United States. The entire process is outlined in Title 3, Chapter 1 of the U.S. Code.

Each state has a number of electors equal to the number of representatives and senators it has in the United States Congress. Before the Presidential election, the political parties submit their "slates" of electors to the states. Whichever party wins the state's popular vote will have its slate of electors comprise the Electoral College of that state.

At least six days prior to the meeting of the Electoral College, the governor of each state transmits to the archivist of the United States the certified election results with the names of the chosen electors.¹² These are known as "certificates of ascertainment" and the individuals on the list must be selected

¹¹ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. P, tit. I, 136 Stat. 4459, 5233 (2022).

¹² 3 U.S.C.A. § 5(a)(1) (2023).

according to state law in place prior to Election Day. It is currently unclear what consequence would follow from a failure to meet this mandatory deadline.¹³

The Electoral College then meets in 51 separate state locations on the first Tuesday after the second Wednesday of December.¹⁴ Each elector casts one vote for President and one vote for Vice President.¹⁵ The assembled electors in each state create six certificates with two distinct lists of election results: one list will include all of the electoral votes for President; the other list will include the electoral votes for Vice President.¹⁶ After creating the certificates, each state's group of electors sends identical copies of their certificate to the President of the Senate (the Vice President of the United States), two to the secretary of state of their state, two to the archivist of the United States, and one to the judge of the district in which the electors are assembled.¹⁷

On January 6 of the year following a Presidential election year, at 1:00 p.m.,¹⁸ the Vice President of the United States presides over a joint session of Congress. The certificates from the electors of each state are opened in alphabetical order by state and read aloud to the recently convened Congress. After the votes are counted, the Vice President announces the results and calls for any objections. All objections must be made in writing and include the signature of at least one-fifth of the House of Representatives and one-fifth of the Senate. Without objection and if candidates for the presidency and Vice presidency have received at least 270 of the 538 Electoral College votes, the election results are finally official.¹⁹ In the case of objections, the houses of Congress adjourn to their respective chambers and debate the objection, casting a vote whether to overrule the objection, decided by a simple majority.

Vulnerabilities of the Electoral College

The Electoral College has some potential vulnerabilities aside from the well-known instances of splits in the popular and electoral votes. First, in many states the electors are not bound by any law to vote for the candidate to whom they are pledged. Electors who fail to vote for the candidate they were elected to vote for are called "faithless electors." They are rare and have never decided the outcome of an election. The other weakness of the Electoral College system is the amount of time it takes to complete the process and the risk of death or resignation of a President-elect.

Faithless Electors

There have been numerous instances of an elector not voting for the candidate to whom he or she was pledged, including seven in the 2016 election. These votes have never affected the outcome of the election.

¹³ Kate Hamilton, *State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond* 133 Yale L.J. Forum 2023 (available at <https://www.yalelawjournal.org/forum/state-implementation-of-the-electoral-count-reform-act-and-the-mitigation-of-election-subversion-risk-in-2024-and-beyond>) (last accessed Feb. 1, 2024)

¹⁴ 3 U.S.C. § 7.

¹⁵ 3 U.S.C. § 8.

¹⁶ 3 U.S.C. § 9.

¹⁷ 3 U.S.C. § 11.

¹⁸ 3 U.S.C. § 15.

¹⁹ 3 U.S.C. § 15.

In 2020, the United States Supreme Court issued an opinion in *Chiafalo v. Washington* that permitted states to enforce state laws that punished electors who did not vote for the candidate selected by the state's voters.²⁰

As of 2023, 33 states and the District of Columbia had state laws that bound their electors to vote for the candidate to whom he or she is pledged.²¹

Death or Resignation of a Candidate or President-elect

The most worrying deficiency of the Electoral College was exposed in 1872 when Horace Greeley, a major party candidate, died after the popular election and before the meeting of the Electoral College. There are three scenarios with different rules should a winning candidate die or resign after the popular vote and before Inauguration Day on January 20.

Scenario 1

This is the scenario that caused confusion after Greeley's death between the popular vote and the Electoral College vote. Both major political parties currently have rules that allow them to replace their candidates on the ballot after the party convention.²² If, for example, Republican X won a majority of pledged electoral votes on Election Day but died before the Electoral College met, the Republican Party would tell the electors pledged to Republican X to vote for replacement Republican Y, who might be the Vice Presidential nominee, depending on party rules. There may not be a legal problem with this replacement, but the party is unable to force its pledged electors to vote a certain way. Whether or not the electors would follow the national party's instructions is unclear.

Scenario 2

The most difficult scenario occurs should the winning candidate die or resign between the meeting of the Electoral College in mid-December and the counting of the electoral votes by Congress in January. Assume that Democrat X received a majority of the Electoral College votes when the electors met in mid-December, but dies before Congress officially counts the votes from the states. Congress has at least two options.

The first option is to count all the votes as received from the states. In our example, Democrat X received a majority of the votes and would be declared the President-elect of the United States. On Inauguration Day, the provisions of the Presidential Succession Act of 1947 would go into effect and the Vice President-elect would become the President of the United States.

The second option is for the Congress to follow the 1872 Horace Greeley precedent and invalidate all the electoral votes for the deceased candidate. In this instance, there is likely to be a Vice President-elect but no candidate with a majority of votes for presidency. The Presidential contest would be thrown to the House of Representatives where the state delegations would only be able to consider the other candidate(s) receiving electoral votes.

²⁰ 591 U.S. ___, 140 S. Ct. 2316 (2020)

²¹ National Conference of State Legislatures, *The Electoral College*, available at <https://www.ncsl.org/elections-and-campaigns/the-electoral-college> (last accessed Feb. 1, 2024).

²² Charter and Bylaws of the Democratic Party, Article III, Section 1 and Rule 9 of the Republican Party, Filling Vacancies in Nominations.

It is possible in this example that the losing Republican candidate for President would be the only eligible choice in the House of Representatives. Third parties rarely receive electoral votes and none has done so since 1972. If the Democrat X were ineligible and no third party candidate won any electoral votes, the state delegations could only choose the Republican candidate. However, if a majority of state delegations (26) refuse to vote for this candidate, there would be no President to inaugurate on Inauguration Day. The Presidential Succession Act of 1947 would go into effect and the Vice President would become the President of the United States.

Scenario 3

The final scenario occurs if the President-elect dies or resigns after the electoral vote is counted by Congress but before Inauguration Day. The Presidential Succession Act of 1947 would go into effect on Inauguration Day.

Conclusion

The Electoral College has mostly worked well for the history of our country. Even in close elections, it gives one candidate a majority of electoral votes with which to claim a mandate to govern. While it is not a direct election of the President, the public has considerable influence in the outcome and much more than in parliamentary systems in which the ruling political party chooses the executive.

Aside from modest statutory changes, the Electoral College has not been structurally changed by Constitutional amendment since 1804. There have been attempts to change or abolish the Electoral College through the years. Still, while the Electoral College may be a system that some people today and the founding fathers at the Constitutional Convention regarded as imperfect, it remains likely the way Americans will continue to elect our President for years to come.