

# ***HOW WE ELECT PRESIDENTS AND VICE PRESIDENTS TODAY***

***A Review of the Electoral College Process and Related Questions***

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## ***HISTORY OF THE ELECTORAL COLLEGE***

Having agreed upon the basic structure for the new national government, which embodied the concepts of Separation of Powers and Checks and Balances, the delegates to the Constitutional Convention of 1787 struggled for weeks to decide how the president, in whom they would vest all the executive power of the new national government, should be elected.

After a prolonged and heated debate, the concept of a president elected by national popular vote was rejected – the eligible voters of the time simply could not be trusted with such a responsibility. Sectional differences among the delegates prevented them from agreeing on any plan supported by the other faction. The conflicting interests of big states vs little states, industrial vs agricultural, slave states vs free states, could not be compromised.

Time was growing short. A committee was formed to develop and return a plan to the Convention.

The plan that emerged from the committee provided something for each sectional interest and factional concern. As one of its final acts just before adjournment, the Convention delegates quickly approved the plan that we now know as the “Electoral College.”

The approved plan for the election of the president by an Electoral College, is now found in Paragraphs 2, 3, and 4 of Article II, Section 1 of the draft document that became the Constitution.

# **ARTICLE II, SECTION 1 OF THE CONSTITUTION: THE PRESIDENT**

Article II, Section 1 contains eight key paragraphs:

Paragraph 1 delegates the “Executive Power” [of the U.S. government] to the President and limits the term of Office:

- *“The Executive Power shall be vested in a President of the United States of America.”*
- *“He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows:”*

Paragraph 2 establishes the Electoral College:

- *“Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in Congress ...”*

Paragraph 3 defines the sole purpose of the Electoral College – to elect the president and vice president:

- *“The electors shall meet in their respective states and vote by ballot for President and Vice President.”*

*(Original text revised by the Twelfth Amendment)*

## ***FURTHER PROVISIONS OF ARTICLE II, SECTION 1 . . .***

Paragraph 4 of Section 1 provides ...

*“The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.”*

Paragraph 5 defines the eligibility requirements for those seeking to become the President:

- Must be a natural born citizen, or a citizen at the time the Constitution was adopted;
- [Note: The 14th Amendment, ratified in 1865, declared all *persons born or naturalized* in the United States are citizens of the United States];
- Must be at least 35 years of age upon assuming the office;
- Must have resided in the United States for at least fourteen years.

Paragraphs 6, 7, and 8 of Section 1 provide for:

- Presidential Succession;
- The Salary of the President; and
- The mandatory Oath of Office the President must affirm.

## ***THE ELECTORAL COLLEGE, NOT THE PEOPLE, ELECTS THE PRESIDENT AND VICE PRESIDENT***

Paragraph 3 defines *how* the Electoral College elects the President and Vice President. In 1803, Congress approved an Amendment to Paragraph 3 clarifying some of its provisions and adding others. The proposed Amendment was ratified as Amendment XII in 1804. The following incorporates the provisions of the Twelfth Amendment. Here are the key points.

- The electors shall meet in their respective states and vote by separate ballots for President and Vice President by name;
- They shall make distinct lists of all persons voted for as President and as Vice President, and the number of votes for each .
- They shall sign and certify the lists and transmit them to the President of the Senate .
- The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.
- The person having the greatest number of votes for President shall be President if the number of votes received are a majority of the number of electors appointed.
- If no person has received a majority, then from the persons having received the highest number, but not exceeding three on the list of those voted for as President, the House of Representatives shall immediately "choose" the President, by ballot. [Note: "immediately" is not defined; New House members are not sworn in until noon on January 3rd, or later.]
- But in choosing the President, the votes shall be taken by states, each state having one vote.
- A quorum of at least one representative from two-thirds of the states [now 34] is required, and a simple majority vote [26 of 50] is necessary for choosing the President.
- If the House of Representatives fails to elect a President before the next January 20th, then the Vice President shall act as President.

## ***AND IF THE ELECTORAL COLLEGE FAILS TO ELECT A PRESIDENT . . .***

- If the Electoral College has failed to elect a president in the time allowed, the electors continue the count to elect a vice president.
- If a vice president receives a majority vote in the Electoral College, the votes for vice president would be signed, certified, and sealed, and forwarded to the Senate president, in the normal manner, along with the votes for president.
- If the Electoral College has failed to elect a president, the House of Representatives then meets to elect the president. This election is called a “contingent election. There are no statutory rules for this process, except for the manner of voting: each state delegation has one vote per state.
- There must be a quorum of states consisting of two-thirds of the states (34) with at least one Representative. A candidate for president who receives a majority of the states’ votes is elected.
- If no candidate receives a majority of the states’ votes by Inauguration Day, the newly elected vice president would be sworn in and would serve as “acting” president until the House resolves its deadlock.
- Finally, if both the Electoral College and the House failed to elect a president and a vice president by Inauguration Day, then under the Twentieth Amendment rules of succession, the Speaker of the House would become “acting” president.

# ***JUST HOW DEMOCRATIC IS THE ELECTORAL COLLEGE?***

Almost from its inception, there have been growing criticisms of the Electoral College. Many Constitutional scholars openly assert that the Electoral College is “anti-democratic”. In his latest book, *No Democracy Lasts Forever*, Constitutional scholar Erwin Chemerinsky writes: “... fifty years ago, certain changes in our society and political system began to occur that caused the Electoral College and the Senate to emerge *as a more significant threat* to our democracy.”

These are political and societal changes Chemerinsky describes as responsible for this growing threat:

- Beginning in the 1970s, the American population began to shift so that certain states gained disproportionately more residents than others.
- At the same time a political realignment began - the Southern states left the Democratic coalition (following the Civil Rights reforms), and the two political parties coalesced around *ideology* rather than sectional geography.
- Along with political realignment, the population began to segregate into “red states” and “blue states,” with a small number of “purple,” or evenly divided states.
- When the Constitution was adopted, the largest state had only 12 times the population of the smallest. Today the largest state has *68 times* the population of the smallest - that means the votes of the citizens of Wyoming are 68 times more “powerful” than that of California citizens, at least in terms of U.S. Senate representation. This disproportionate representation carries over into the voting of the Electoral College.

## ***IN THE ELECTORAL COLLEGE, THE LOSER OF THE POPULAR VOTE MAY BE ELECTED PRESIDENT***

The societal and political changes described in the previous slide have made it *more likely* that a presidential candidate who loses the popular election can win in the Electoral College and become president.

- In five of the past 46 presidential elections: 1824, 1876, 1888, 2000, and 2016, the winner of the national popular vote for president *did not win* in the Electoral College.
- By the election of 1828, every state had enacted laws requiring the state’s electors to be pledged to vote for *the winner* of the state’s primary election.
- But, with only two exceptions, the states adopted a “Winner Take All” rule that awards 100% of the electoral votes to the winner of the state’s primary election, even if the winner had *less than a majority of votes*.
- The “Winner Take All” rule *negates* the voting preferences of *a substantial portion* of voters.
- And the “segregation” of voters into “red” and “blue” states has resulted in *the margin of victory* in the Electoral College being determined by the *preferences of the voters in just a handful of “purple” states* – the “battle ground” or swing states, more or less evenly divided along party lines.



## ***OUR LONG TRADITION OF PEACEFUL TRANSITIONS IS BROKEN***

In 1787, George Washington was revered as a military hero, a person of high moral and ethical standards, and a political leader who did not covet political power. He was the unanimous choice as our first president in the Electoral College of 1789. In April, he was sworn in. In 1792, he was again elected unanimously by the Electoral College. However, at the end of his second term, Washington rejected the urgings of his contemporaries to run again, and he voluntarily retired from politics.

Washington set precedent for a *two-term limit* and a *peaceful transition* to the next president. In a time of deep economic crisis and World War II however, Franklin D Roosevelt ran and was elected president four times. He died in 1944, in the middle of his fourth term. In 1947, Congress approved the Twenty-second Amendment to the Constitution, ratified in 1951. The Twenty-second Amendment restored the two-term limit: “No person shall be elected to the Office of President more than twice ....”

In 2016, Donald Trump first ran for office of president. Trump lost the national popular vote to Hillary Clinton by a margin of 46% to 48%. Yet, he was elected president by a vote of 304 to 227 in the Electoral College. On his bid for reelection in 2020, Trump broke the tradition for peaceful transitions.

# ***THE 2020 ELECTION OPENED NEW THREATS TO OUR DEMOCRACY***

In 2020, Trump again lost the national popular vote in his bid for reelection, this time to Joe Biden by a margin of 47% to 51%.

But as the Electoral College was meeting to begin voting, Trump attempted to subvert the Electoral College vote with a scheme to submit “alternate” lists of electors,” i.e. lists of electors who were not certified by the state. He argued some state elections were fraudulent, and the certified electors of those states were wrongly selected. Further, that under Paragraph 2 , Section 1 of Article II, the legislatures could choose their own electors. The courts rejected these claims for lack of any evidence, and that the states were bound by law on selection of electors.

On January 6, 2021, Trump attempted to prevent his own Vice President, Mike Pence, from “counting” the certified voting lists of the states in the presence of the Senators and Representatives. The day before, Trump had called a rally of his MAGA followers. They came well armed, and Trump exhorted them to go to the Capitol where the votes were being counted, and “to fight like hell” to disrupt and delay the vote count so the election would be thrown into the House of Representatives where Trump would be elected.

Ultimately, the attempted insurrection failed. Trump became the first U.S. President to break the tradition of peaceful transfer of power. But the attempted insurrection has raised the threat level to our democracy. Had Trump succeeded, it would have had dire consequences. It could have ushered in a new era of autocratic rule by force. And it exposed weaknesses and gaps in the procedures for choosing electors; for certifying and delivering the electoral votes to the vice president; and the procedure for counting electoral votes.

# ***CONGRESS STRENGTHENS THE ELECTORAL COUNT ACT PROCEDURES***

In 1887 Congress enacted the Electoral Count Act (ECA) for the purpose of minimizing the role of Congress in resolving disputes and uncertainties around state presidential elections by providing a clear framework the states could follow for resolving disputes at the state level, certifying results, and sending those results to Congress.

Following the 2020 election and attempted insurrection, Congress recognized the ECA of 1887 needed updating and strengthening. In December 2022, Congress enacted the Electoral Count Reform Act (ECRA) of 2022. Here are the reforms in the ECRA:

- States must appoint electors on a specified date: i.e. the Tuesday after the first Monday in November; exceptions are allowed only for *force majeure events*.
- State governors must certify the appointment of electors, pursuant to state laws in effect *before* election day, no later than 6 days *before* the Electoral College meets.
- Congress must accept a governor's certification as sufficient, *unless ordered* otherwise by a state or federal court.
- The Electoral College must meet on the first Tuesday after the first Wednesday in December.
- Federal courts (three judge panels) may determine claims under federal law brought by candidates on an expedited basis.
- Clarifies that the Vice President's role in electoral vote-counting is limited to ministerial duties.
- Raises the signature requirements for Congressional challenge to object to a state's electoral votes from 1 Senator + 1 Representative to *one-fifth of the members of each chamber*.
- Limits challenges to two: (1) the elector was not *properly certified*; or (2) an elector's vote was not *properly given*.
- Clarifies that, if Congress rejects the appointment of any electors as unlawful, the number of electors used to determine a majority *is reduced accordingly*.

## ***CAN WE AMEND THE CONSTITUTION TO FIX OR REPEAL THE ELECTORAL COLLEGE?***

Article V provides only two ways for amending the Constitution:

1. The approval by two-thirds of both houses of Congress to propose an amendment; or
2. Approval by the legislatures of two-thirds of all states to call a Convention to propose amendments.

In either case, proposed amendments *must be ratified* by the legislatures of *three-fourths* (38) of the states.

Since 1789, there have been *more than 700 attempts* to amend the Electoral College provisions of the Constitution– more attempts than any other subject for amendment. *Only two* of these attempts have been successful:

- In 1804, the 12th Amendment was ratified to clarify the Electoral College voting procedure; and
- In 1961, the 23rd Amendment was ratified giving the District of Columbia three electoral votes.

For the foreseeable future, the prospects for amending the Constitution *for any purpose* are dim.

## ***OTHER MEANS FOR IMPROVING THE DEMOCRATIC NATURE OF THE ELECTORAL COLLEGE?***

Paragraph 2 of Art. II, Section 1, provides that each state may direct the manner in which its electors are appointed.

Under the provisions of Paragraph 2, each state has authority to change how it selects electors. But if they wish to do so, *it must be completed before the election*. Every state has required the selection of electors who are pledged to vote for the candidates winning the state primary election. At present, every state but two allocate their electors by the "Winner Take All" rule.

- Two states, Maine and New Hampshire, apportion their electors according to the primary winners in each of the state's congressional districts. Other states could adopt district apportionment. Apportionment by district is a more equitable and democratic method and it would more closely reflect popular vote preferences.
- In a more radical approach, 18 states have signed a compact, *a contingent agreement*, in which they have promised, subject to conditions precedent, to enact laws requiring their electors to be pledged to vote for the winner of the national popular election. The compact is called the National Popular Vote Plan.

## ***THE NATIONAL POPULAR VOTE PLAN***

In concept, the National Popular Vote Plan (NPV) is simple. The participating states agree among themselves that, when enough states constituting a majority (i.e. 270) of the Electoral College votes join the NPV compact, each state then will require its electors be pledged to vote for the winner of the national popular vote.

To date, eighteen states have adopted laws that will “spring” into effect when enough states, representing a majority of Electoral College votes, have joined the compact. The eighteen states comprise 228 Electoral College votes. The individual states and their (votes) are:

California (54), Colorado (10), Connecticut (7), Delaware (3), District of Columbia (3), Hawaii (4), Illinois (19), Maine (4), Maryland (10), Massachusetts (11), Minnesota (10), New Jersey (14), New Mexico (5), New York (28), Oregon (8), Pennsylvania (19), Rhode Island (4), Vermont (3), and Washington (12).

States representing an additional 42 Electoral College votes are still needed to trigger the NPV.

## ***REMAINING OBSTACLES FOR IMPLEMENTING THE NATIONAL PUBLIC VOTE PLAN***

Although the NPV advocates have achieved 84% of their goal of 270 Electoral College votes, obtaining the remaining 42 votes necessary is a daunting challenge.

The states that have joined so far, and have enacted the contingent laws, are all Democratic (Blue) majority states, and the District of Columbia. Yet, none of the Republican (Red) majority states have agreed to sign up.

The remaining Blue states, who would be the most likely candidates to join, currently represent only 41 Electoral College votes – one vote short of the required total. One “purple” state, North Carolina with 16 Electoral College votes), has an equal number of Democratic and Republican members of the U.S. House of Representatives – seven each. But at present, both the North Carolina State Legislature is heavily Republican by a margin of 60% to 40%.

Other obstacles may lie ahead. Some legal scholars have concluded that the Compact may not be legal under the Constitution. There is the legal doctrine of sovereignty that holds legislative bodies cannot contract away their sovereign rights or duties.

Others point out the NPV compact is not enforceable. There is nothing the group could do if, for example, one or more of the compact states decided to repeal the laws it enacted to conform to the compact.

# ***ELECTORAL COLLEGE VOTING TIMELINE***

Here is the schedule of key events for the Electoral College:

- November 5, 2024 - Election Day
- December 5, 2024 - County Registrars must certify results to Secretaries of States
- December 11, 2024 - The governors issue Certificates of Ascertainment (election results verification)
- December 17, 2023 - Electors meet in respective State Capitols and vote; sign and seal the votes
- December 25, 2024 - Electoral Votes must be received by the Senate President
- January 6, 2025 - Vice President counts the votes in presence of Senators and Representatives
- If the Electoral College has failed to choose a president, the House begins the process for election.
- January 20, 2025 - Inauguration Day, President and Vice President take oath of office at noon.



## ***THE 2024 PRESIDENTIAL ELECTION WILL NOT BE LIKE 2020 . . .***

For good reasons, many voters are concerned about the outcome of the 2024 presidential election. Donald Trump is making his third bid for the office, having lost the popular vote in the two earlier races. His unprecedented efforts to subvert the Electoral College vote count, and his "call to arms" on January 6th to instigate an insurrection, are seared into our memories. But the 2024 election will differ from the 2020 election in important ways.

- In the event he loses the popular election once again, Trump has already laid the groundwork for claiming fraud and making attempts at subverting the Electoral College vote and count. We must assume he will attempt to do so.
- But the ECRA has strengthened the laws. No longer will there be any uncertainty about how delegates are to be chosen; how their votes are recorded and certified; and how the certified votes are counted. If any attempt is made to substitute electors, or to subvert either the vote or the vote count, courts are prepared to respond quickly.
- Unlike 2020, in this election Trump is not the sitting president – Joe Biden is. And Kamala Harris will conduct the ministerial vote count. In the eyes of the law, *and in reality*, Trump is just an ordinary citizen in this election.
- Security services and law enforcement are forewarned, and able to anticipate possible attempts at subversion, insurrection, or violence - and they are better prepared.
- Yes, we are likely to see instances of violence, of what type and severity remains to be seen. But we are much better prepared than in 2020. Our institutions will remain intact.

## ***KEEP IN MIND WHILE WE AWAIT THE ELECTION RESULTS . . .***

- Most polling in the media suggests the election will be a close one. Yet, Harris is likely to win the popular vote, and perhaps by a large margin. The red states will vote for Trump, the blue states for Harris.
- Because of the “Winner Take All” laws, and the handful of states that are evenly divided, the Electoral College vote will be determined by which candidate captures the most popular votes in the battleground states.
- Polls do not predict outcomes. They are snapshots at a moment in time of opinions among a very small sample. Polls are a useful tool for some things, but they are misused when in predicting winners. So-called “horse-race” polls are useful only for the profit-seeking polling companies, and the news media that leverage them for readership impact.
- The stakes in this election could not be higher. If Trump is elected, he will no doubt carry out his mission of revenge, and destruction of the institutions of government that protect our republic. He will use his office to escape accountability for his crimes, and to further enhance his power.
- Trump’s efforts would likely be tolerated by the Supreme Court justices that he and Mitch McConnell have appointed.
- On the other hand, if Harris wins, or even if she doesn’t, Trump will soon fade away. But his MAGA movement will continue for some time, perhaps under the leadership of J D Vance.
- For better, or for worse, for the past 200 years, ***the future of our democratic republic is in the hands of we, the American voters.***

**THANK YOU!**

**... AND IF YOU HAVEN'T YET VOTED,  
PLEASE DO SO NOW!**