

Maintaining Election Integrity and Preparing for the Possibility of a Contested Presidential Election

Voters choose how their state’s electoral votes will be cast for president. However, under federal law, there is a never-used exception if an election has “failed”; in that case, the state legislature would determine how to appoint electors, such as by rescheduling the election.

There are concerns that there could be an attempt to abuse this provision by intentionally delaying the certification of vote counts so state legislatures can falsely declare that the election has “failed” and ignore voters to cast the state’s Electoral College votes for their preferred candidate. Such an effort would be illegal, violating both federal law and the U.S. Constitution.

While not a likely occurrence, should such an effort be made, it is important to understand both the legal framework for Electoral College vote counting and the potential actions that can be taken to help ensure that the state’s electoral votes reflect the state’s popular vote, a core tenet of our election system. Most importantly, courts must act in good faith to speedily resolve any litigation in a nonpartisan manner, and governors should certify a slate of electors by the “safe harbor” deadline of December 8.

Legal Framework:

The Electoral Count Act (ECA) sets forth the framework for how Congress counts Electoral College votes should they be disputed. States determine how to select their slates of electors and every state has given that power to the people via the popular vote. Under the ECA, those votes determine the slate of electors; the only exception would be if the election “failed to make a choice on the day prescribed by law,” which has never happened in U.S. history. In the case of a failed election, the state legislature would determine how to select the electors.

Under the ECA, if a state certifies its electors by December 8 (known as the “safe harbor” date) based on preexisting rules set out by the state, then that slate of electors is “conclusive” for purposes of the congressional counting process. If there is concern raised about a state’s slate of electors – for example because they were not certified by December 8 or more than one slate of electors was certified -- the ECA provides for Congress to resolve the issue. If both houses of Congress agree on which slate of electors to count, that resolves the issue. But if the two houses disagree, then the slate certified by the governor of the state (or in some cases the secretary of state) is the one that is counted under the ECA.

In addition to the procedures for dealing with competing slates of electors, the 12th Amendment of the Constitution sets forth a process for resolving a scenario in which neither candidate receives a majority of electoral votes: in that case, the House votes on the president (with each state delegation having a single vote) and the Senate votes on the vice president (with each senator having one vote).

Notable Dates:

December 8, 2020: under the ECA, the safe harbor date for states to certify a slate of electors

December 14, 2020: the date on which electors cast their vote for president and vice president

January 3, 2021: the date on which the new Congress starts

January 6, 2021: the date on which Congress counts the electoral votes

Key points:

1. Efforts to undermine vote counting are best mitigated through quick action at the state level. The longer these efforts persist, the more problematic they become.
2. On Election Day voters have made their decision. After Election Day, the only step left is for election officials to tally the votes. It is the *people* who choose the president, not the state legislature or Congress.
 - An extended vote-counting period is a normal part of the process and does *not* mean the election has “failed to make a choice.”
 - Our nation has never had an election failure in modern history – including in times of war, natural disasters, and even a pandemic. As highlighted by the bipartisan [National Task Force on Election Crises](#), “the United States has held elections amidst the Civil War, the 1918 Influenza Pandemic, the Second World War, and Hurricane Sandy, among other crises. Despite the challenges these events presented to the electoral process, the United States was able to complete the elections in each instance.”
3. Efforts to delay the counting of votes past December 8—whether through frivolous lawsuits, baseless allegations of irregularities, or other means—can and should be resolved before the safe harbor deadline. Governors should certify a slate of electors by the safe harbor deadline.
 - Courts acting in good faith can and should quickly resolve any litigation in a non-partisan manner.
4. State legislatures cannot simply appoint presidential electors unilaterally – they must follow state law that lets voters decide. Any attempt to declare Election Day “failed” merely because of continued vote-counting would violate multiple provisions of federal law, including key constitutional protections.

Key sources:

- National Task Force on Election Crises (bipartisan experts), “[The Electoral Count Act and the Process of Electing a President.](#)”
- National Task Force on Election Crises (bipartisan experts), “[A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election.](#)”
- Charles Curtis & Mark Medish, “[Navigating a Contested Election, the Electoral Count Act and 12th Amendment: How to Ensure a Fully Counted Outcome.](#)”
- Stephen A. Siegel, “[The Conscientious Congressman’s Guide to the Electoral Count Act of 1887.](#)”
- Congressional Research Service, “[Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress.](#)”
- Campaign Legal Center (non-partisan), “[Can a State Legislature Overturn Presidential Election Results?](#)”