

## Five Questions on the Transition of Power

### WHAT HAPPENS IF A STATE MISSES THE DEADLINES SET BY FEDERAL LAW TO APPOINT ELECTORS?

There are multiple deadlines that are relevant here:

- **December 8:** This is the deadline for states to resolve disputes concerning the appointment of electors in order to have those appointments treated as “conclusive” by Congress.
  - *Note: There is a strong incentive for states to resolve election disputes by this date, but doing so is not required by federal law (though it may be required by state law in some states).*
- **December 14:** Electors meet in their respective states on the same day to cast their votes.
  - *Note: Even if a state misses the Safe Harbor deadline, it can still resolve disputes and certify the results before the Electoral College meets. If a state has not resolved disputes and appointed electors in time for them to vote on this date, the state risks being disenfranchised.*
- **December 23:** If Congress has not received a state’s certificate of electors by this date, the President of the Senate or the Archivist must request it from the Secretary of State.
- If conflicting slates of electors are submitted, Congress deals with the dispute (see question 3).

(See page 3-4 of [The Electoral Count Act & The Process of Electing a President](#))

### WHAT HAPPENS IF A STATE DOESN’T APPOINT ELECTORS AT ALL?

- The Twelfth Amendment does not explicitly address how to calculate a majority if one or more states fail to appoint electors at all, or if Congress rejects a state’s electoral votes.
- If states fail to appoint electors, the Twelfth Amendment’s clear command to use the “whole number of Electors appointed” as the denominator would control, and the state’s allocated electoral votes should be subtracted from the total in calculating a majority.
- The Twelfth Amendment is unclear, however, about how to deal with votes rejected by Congress as a result of some sort of objection or other dispute. In that circumstance, Congress will have rejected votes claimed to be by “appointed” electors. The question, in essence, is whether the rejected electors are still considered appointed even though Congress has not recognized them as such (in which case, they would not be subtracted from the denominator), or whether the rejection by Congress effectively nullifies the appointment (in which case they

would be subtracted from the denominator). Both views were raised during the debates over the ECA when it was being drafted, but the question was ultimately left unresolved.

(See page 9, footnote 66 of [The Electoral Count Act & The Process of Electing a President](#))

## HOW DOES CONGRESS DEAL WITH DISPUTES ABOUT ELECTORAL VOTES?

- On Wednesday, January 6, 2021, at 1:00 p.m., the two chambers of Congress will meet in a special joint session to count electoral votes as directed by the ECA. Although electoral vote certificates are opened and votes are officially counted at this joint session in the presence of both chambers, the ECA directs the two chambers to divide and meet separately when objections are raised to any particular electoral votes. After the two chambers consider such disputes, they reconvene in the joint session to resume counting.
- Ultimately, through this process, the ECA requires that:
  - If there is only one submission of electoral votes from a state, Congress must count those votes unless both chambers agree to reject them for reasons specified in the statute (and discussed below).
  - If there is more than one submission of electoral votes from a state, the question ultimately is whether the chambers agree on which slate to accept. If the chambers agree to accept a particular slate, those electoral votes count. If the chambers agree to reject a particular slate, then those electoral votes do not count. If the chambers disagree as to which slate to accept, then the prevailing votes are those that were cast by electors certified by “the executive of the State.” This provision, known colloquially as the governor’s tiebreaker, operates as a “fail-safe to prevent state disenfranchisement.”

(For more details on the procedures that govern in the joint session and the rules that apply when the two chambers meet separately to consider objections before reconvening in the joint session, see page 5-8 of [The Electoral Count Act & The Process of Electing a President](#))

## WHEN IS A CONTINGENT ELECTION TRIGGERED AND WHEN IS AN "ACTING PRESIDENT" NAMED?

- **Contingent Election:** If no presidential ticket has the majority of electoral votes at the end of the process Congress undertakes (described above), the Twelfth Amendment provides that the House of Representatives will choose the president and the Senate will choose the vice president.

- **Acting President:** If there is no clear winner by noon on January 20th, federal law provides for an “acting president” until disputes are resolved (the Speaker of the House is first in line assuming a Vice President is also undecided). The current president does not stay in office.

(See page 9 of [The Electoral Count Act & The Process of Electing a President](#))

### **THE TASK FORCE EXPLAINS THAT A STATE LEGISLATURE CAN'T SIMPLY IGNORE THE POPULAR VOTE AND APPOINT ELECTORS ITSELF — BUT WHAT IF IT DOES?**

- A state legislature overriding the popular vote after the election would violate federal law and raise serious constitutional (due process and equal protection) concerns. Legal challenges are therefore inevitable and it is likely that the courts will decide what happens next. (See [A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election](#))
- If a slate of electors from a state legislature does reach Congress, how Congress should proceed will depend on a number of things, including whether the slate of electors appears to satisfy the Safe Harbor requirements and whether there is only slate from the state or whether there are multiple slates. But, ultimately, it is likely that Congress will have to decide whether to count the electoral votes. The ECA provides guidance for Congress in each of these scenarios. (See pages 6-8 of [The Electoral Count Act & The Process of Electing a President](#))