



# The Electoral College

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The U.S. president is indirectly elected by the citizenry through a “college of electors” devised in 1787 by the framers of the Constitution. The electors’ role is to meet once in each of their respective States or the District of Columbia to pick the next president. New electors are chosen for each election, and at the conclusion of their duties, they disband.

How did we inherit such a system? It is the result of a hard-fought compromise reached by the framers of the Constitution during the Constitutional Convention of 1787. 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 they 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.”<sup>1</sup>

The Electoral College has evolved since its establishment in 1787. Constitutional amendments have improved the Electoral College, and over time States have altered the ways they have implemented it. But the fundamentals of the system remain mostly intact. While the Electoral College is not a flawless system, it has passed many difficult tests during the 56 Presidential elections in which it has been used.

This United States Election Assistance Commission white paper explains the origins of the Electoral College, and the ways in which it has changed since its introduction more than 200 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 in spite of its apparent imperfections, the Electoral College has continued to endure.

## Creating the Electoral College

To understand the origins of the Electoral College, one should look at life and politics in the United States in 1787.

- The country had only 13 States, which until 1776 had been separate colonies. The founders believed that State loyalties could trump the best interests of a national government and that it would be difficult to elect a candidate with national prestige. If a candidate was required to win States instead of just popular votes, however, it would be more likely that he would have wide-ranging support outside his home State. This was a concern for smaller States that feared the domination of the presidency by States with larger populations.
- Support for popular elections was not universal. While some delegates to the Constitutional Convention argued for the popular election of the president, others believed that the public should have a much smaller role.
- The logistics of a national popular election in 1787 would have been daunting, even for a country of only four million people.

Today’s Electoral College looks surprisingly similar to the one used in George Washington’s first election to the presidency. The only time the structure of the Electoral College was modified by amendment was in 1804. All other modifications to the original version of the Electoral College

as outlined in the Constitution were accomplished through Federal and State statutes. Additionally, the 23<sup>rd</sup> Amendment, enacted in 1961, provides the District of Columbia with three electors.

## **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.

### *Popular Vote*

If the people were allowed to vote directly for president, many delegates feared that there would be numerous candidates receiving votes. This concern stems from the idea 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 likely be chosen with a very small plurality of votes from a State with a large population.

While delegates agreed in principle that the public should have a voice in the process, they 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 that the president should be subservient to the Congress and, as such, dependent on it for his election and reelection. Others believed that the Congress would be the most informed electorate about the potential presidential candidates.

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.”<sup>2</sup> 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.”<sup>3</sup> 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.

## *Electoral College*

If the president was not chosen by the national legislature and not directly by the people, then the delegates were left with few options. One was a process by which the governor of each State would cast one vote for president. This proposal was quickly rejected. The public was no more represented by having the State governors elect the president than they were by the appointment of the president by the national legislature.

Another option was to create 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 on the basis of congressional representation. The public would be included in the presidential election through State legislators, who were elected by popular vote.

However, State legislatures were sitting political bodies just like the national legislature, and the delegates worried these would be subject to the same intrigue and cabal about which Morris warned. Instead of mandating that the State legislatures appoint the electors to the separate institution, the delegates allowed the States to decide how to select their electors. In essence, each State would choose for itself whether or not it preferred a popular election for the electors or would rather have the State legislature appoint them without public input.

The group of electors would meet only once in each respective State to vote for president and vice president. It was thought that by keeping the groups' 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 his 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 of the delegates' concerns.

## **The Constitutional Electoral College**

The first iteration of the Electoral College was used during the first four presidential elections of the United States. The system is outlined in Article II, Section 1 of the Constitution. From it we learn the structure and function of the Electoral College, and which aspects of it were governed by the Federal government or by individual States.

### *Elements of Electoral College governed by the Federal government:*

- **The fundamental structure of the Electoral College system.** The framers decided that the number of electors allotted to each State must equal the number of its congressional delegation. This method of allotting 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 "intrigue or cabal" 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 his 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 his respective State. By aggregating the group of electors’ second choices, one candidate would be more likely to win a majority of the electoral votes.

*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. The framers’ were concerned about a standing political body’s potential for corruption in the election of the president. Later, the 14<sup>th</sup> Amendment would ban anyone from being an elector who “engaged in insurrection or rebellion” against the United States during the Civil War.
- **How to appoint electors.** State legislatures were given the power to decide how to appoint their electors. Their options include popular election or appointment by the State legislature.

The Constitution also specified how the process operated after the electors were appointed by the States. The States made a list of all of 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) who presided over a joint session of Congress to count the electoral votes of all of the States. After the votes were read to Congress, the candidate who received an absolute majority of all of the electoral votes was declared the president. The candidate who won the second highest number of electoral votes became the vice president.<sup>4</sup>

If there was a tie in the Electoral College, the House of Representatives chose the president from those two 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.<sup>5</sup> 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 two candidates who were tied.

## **The Electoral College after Constitutional Amendment**

The system crafted in 1787 was not perfect, however, which led to parts of it being amended. The major impetus to amend the Constitutional provisions of the Electoral College came after the election of 1800. The Electoral College reached a tie, which meant the House of Representatives was charged with deciding who the next president would be according to the Constitution. After 36 rounds of voting, the process finally came to a conclusion, but not without some “intrigue and cabal” between members of the Congress and the future president. This was exactly what the framers were trying to avoid in creating the Electoral College. So the 12<sup>th</sup> Amendment was drafted.

The 12<sup>th</sup> Amendment gives each elector two votes in the Electoral College, but specifies that one vote is for president and the other for vice president instead of two votes for president with

the runner-up becoming the 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. In the event that no candidate receives a majority of the electoral votes, the selection process in the House of Representatives remains relatively 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. Congress passed the 12<sup>th</sup> Amendment and the States ratified it to be in effect for the election of 1804.

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. An absolute majority of senators is necessary to elect the vice president and a quorum of two-thirds of all senators is required to conduct the vote.

## How Has the Electoral College Evolved?

The Electoral College has changed in other ways since its inception more than 200 years ago. The areas where that is most notable is in 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....”<sup>6</sup> This clause leaves to the States the choice of appointment of electors by the State legislature or through popular elections. 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. However, there have been different ways of choosing electors over the past 56 presidential elections.

There are no recorded popular vote totals for the first few presidential elections because all of the State legislatures appointed their electors without the direct input of the public. By 1832, all electors except those from South Carolina were chosen by popular vote.

There have been a few instances in which there was disputed popular election in a given State and the State legislature chose to appoint electors. 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.<sup>7</sup>

The State legislatures also decide how to allocate the electoral votes within their States. While it is common practice today for States to award all of their electoral votes to one candidate on a winner-take-all basis, they are not required to do so. In Nebraska and Maine, the electoral votes are not awarded entirely on a winner-take-all basis. In those States, the winner of the statewide popular vote is automatically awarded two electoral votes. The remaining electoral votes are earned by winning the popular vote in each of the States’ congressional districts. It is therefore possible for more than one candidate to win votes in the Electoral College in Nebraska and Maine.<sup>8</sup>

Divided electoral votes within a State were the norm for the early presidential elections. For the first four elections, the electors were required to vote for two candidates for president, so it was inevitable that electoral votes would be awarded to more than one candidate by each State. However, there are instances of divided State Electoral College votes even after the ratification

of the 12<sup>th</sup> Amendment. For example, during the controversial election of 1824, five States divided their electoral votes among more than one candidate for president.

There have been recent efforts to change the way electoral votes are allocated by individual States. 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 effort to create an interstate compact between the legislatures of as many States as required to achieve a majority of electoral votes. 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. Thus, the winner of the popular vote would never again lose the Electoral College vote, as happened in 1876, 1888, and 2000

## 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.”<sup>9</sup> 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.<sup>10</sup>

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 became clear that there could be a distinct benefit to a State voting later in the process. For example, South Carolina's legislature chose a date very late in the process for the appointment of electors, which it did without any popular vote. In essence, the legislature of South Carolina had given itself a very large role in picking the president in the event of a close election among the States voting earlier in the 34-day 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.”<sup>11</sup> In 2012, the presidential Election Day is November 6.

## 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 1800** was revolutionary on several counts. It was the first election not won by the Federalist Party. The election was won by a sitting vice president defeating a sitting president. Perhaps most importantly, though, the election of 1800 resulted in the first real test of the Electoral College.

This election was conducted under the original design of the Electoral College as outlined in the Constitution. Electors each had two votes for president, one of which was required to be cast for a candidate of a State other than the elector's. It was understood that the Democratic-Republican candidate for president was Thomas Jefferson. Aaron Burr was the intended

candidate for vice president. In order to avoid a tie vote, one Democratic-Republican elector was to have abstained from choosing Aaron Burr. However, no electors abstained and both Democratic-Republican candidates received 77 electoral votes.

As outlined by the Constitution, the tie vote resulted in the election being decided by the House of Representatives. Voting by State delegations, the House needed to choose between the two candidates. Each of the 16 States was given one vote, and nine votes were required to win the presidency. Jefferson won eight States and Burr won six States with two State delegations divided after 35 rounds of voting. Finally, on the 36<sup>th</sup> ballot, Thomas Jefferson was elected the third president of the United States.

**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 strong support in different parts of the country, and the Electoral College vote splintered among the four of them. Interestingly, John C. Calhoun received enough electoral votes to be elected vice president. He received votes for vice president as a running mate to all four presidential candidates.

In 1824, 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 12<sup>th</sup> 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 electoral votes than Andrew Jackson.

Some people consider Andrew Jackson the winner of the popular vote as well. However, at that time the electors from six States were chosen by their State legislatures and not by popular vote. The largest State, New York, was among those six States and was one of Adams' strongest bases of support.

**The election of 1836** is unique in that one party, the newly-formed Whig Party, attempted to intentionally split the Electoral College vote so that the election would be decided by the House of Representatives. Instead of running one candidate against the Democratic-Republican candidate, Martin Van Buren, the Whigs ran four separate tickets that had support in different regions of the country. The Whigs believed that their candidates, William Henry Harrison, Hugh Lawson White, Daniel Webster, and Willie Person Mangum, would defeat Van Buren in their respective geographic regions and that the House would have to choose the president from the top three candidates, which they expected to be Whigs. Instead, Martin Van Buren won an outright majority of electoral votes and was elected president. This strategy has not been attempted since by any party.

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 vice presidency. While 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 12<sup>th</sup> Amendment required the Senate to pick the vice president from the two candidates receiving the most electoral votes. Whig candidate Francis P. Granger received the second most votes. However, on the first ballot, Johnson was easily elected to the vice presidency.

**The election of 1872** was relatively mundane. President Ulysses S. Grant won more than 80 percent of the Electoral College votes and handily won the popular vote over Liberal Republican candidate, Horace Greeley. But the election was interesting because Horace Greeley died after Election Day and before the voting of electors. Greeley had won 66 pledged electoral votes on Election Day, but when the Electoral College met in the various States, the electors were unsure about what to do. The electors split their votes among four different candidates for president and eight different candidates for vice president. Three electors from Georgia still chose to vote for Greeley posthumously, but those votes were disallowed by Congress.

No candidate who appeared to have won the Electoral College vote on Election Day has ever died before the electors met in the States to make the vote official. However, one can see the confusion that could have ensued had the vote been reversed in 1872 and Horace Greeley died after winning the pledged vote of the Electoral College but before the Electoral College officially met.

**The election of 1876** was indisputably an instance in which the winner of the popular vote did not also win the vote in 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 oddities at play in this election.

There were several disputed slates of electors. Officials in Florida, Louisiana, and South Carolina certified opposing slates of electors and sent them to Congress. Additionally, an elector for Hayes in Oregon was disqualified because he was “person holding an office of trust or profit under the United States” and had to be replaced. 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 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. From the Congress, there were five Democrats and five Republicans. Of the Supreme Court Justices, two were associated with each party. The final member of the commission was to be Justice David Davis, an Independent. However, the Democrats in the State legislature of Illinois selected Justice Davis to be a Democratic senator for the State.<sup>12</sup> They may have expected him to stay on the commission until the president was selected, but he immediately resigned to take his post in the Senate. There were only Republicans left on the Supreme Court to replace him; though the one thought most independent, Justice Joseph Bradley, was selected to take his place, all of the commission’s votes split along partisan lines 8-7 in favor of the Republicans. Hayes won the Electoral College by a one-vote margin, 185-184.

Many historians call this deal the Compromise of 1877. While the Republican Rutherford B. Hayes was elected president, there was an informal understanding that he would remove all Federal troops from the South. This action effectively ended Reconstruction. The election resulted in the Electoral Count Act of 1887, creating the safe harbor deadline for States. Today, each State is guaranteed that Congress will accept its election results if the State meets the safe harbor deadline to decide any intrastate election disputes.

**The election of 1888** also resulted in a split in the popular vote and the Electoral College. President Grover Cleveland won the popular vote by fewer than 100,000 votes, but the Republican candidate, Benjamin Harrison, easily won the Electoral College vote, 233-168. Cleveland won the popular vote by huge margins in several States. For example, he won by more than 30 per-

cent over Harrison in Alabama, Georgia, Louisiana, Mississippi, South Carolina and Texas. Harrison only won by that large margin in one of the smallest States, Vermont. Still, had Grover Cleveland managed to win his home State of New York, which he lost by a mere 1 percent of the popular vote, he would have won the Electoral College.

**The election of 2000** was the most recent test to the Electoral College. Vice President Al Gore won the popular vote over George W. Bush, but lost in the vote of the Electoral College 271-266.<sup>13</sup> The election most closely resembles the election of 1888 in that there were two major party candidates receiving votes in Electoral College. In 2000, third parties won about 3.74 percent of the popular vote. Third parties received an almost identical 3.58 percent of the vote in 1888. Gore won the popular vote by 0.49 percent over Bush; in 1888, Cleveland won the popular vote by 0.83 percent over Harrison.

The election in Florida was contested until December 12, in part due to the impending safe harbor deadline. 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.

This legitimacy was evident when Vice President Gore presided over the counting of the Electoral College votes in Congress on January 6, 2001. While about twenty United States Representatives contested the vote of the Electoral College, Gore ruled each motion out of order and certified the election of George W. Bush for president.

## The Electoral College of 2012

On November 6, 2012, the country will likely "know" who wins the presidency. But 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, 2013. 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 will have its slate of electors comprise the Electoral College of that State. For example, Virginia has two senators and eleven representatives for 13 Electoral College votes. All political parties that qualify on the ballot will submit a list of 13 names to the Commonwealth of Virginia before Election Day. The names on the list of the victorious party will become the Electoral College voters in Virginia.

Shortly after the popular election, the governor of each State will transmit to the archivist of the United States the certified election results with the names of the chosen electors.<sup>14</sup> The electors from one State will not meet with the electors of another State while they are part of the Electoral College. In fact, the electors in each State will only meet as a group once during the entire process.

The next important date in the process applies only to States that have disputed election results. Recent experience shows that it is possible that there will be challenges or recounts in some States. If a State has a contested outcome, it must meet the "safe harbor" deadline<sup>15</sup> of December 11, 2012, or risk having its disputed electoral votes decided by Congress. Meeting the safe harbor deadline guarantees to States that Congress will accept their election results. If an election dispute is not resolved by the State before the safe harbor deadline, Congress has discretion over the disposition over the State's electoral votes.

The Electoral College will meet in 51 separate State locations on December 17, 2012.<sup>16</sup> Each elector will cast one vote for president and one vote for vice president.<sup>17</sup> The assembled electors in each State will then create 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.<sup>18</sup> After creating the certificates, each State's group of electors will send identical copies of their certificate to the president of the Senate (the vice president of the United States), the secretary of State of their State, the archivist of the United States, and the judge of the district in which the electors are assembled.<sup>19</sup>

On January 6, 2013, at 1:00 p.m.,<sup>20</sup> the vice president of the United States will preside over a joint session of Congress. The certificates from the electors of each State will be opened in alphabetical order by State and read aloud to the recently convened 113<sup>th</sup> Congress. After the votes are counted, the vice president will announce the results and will call for any objections. All objections must be made in writing and include the signature of at least one representative and one senator. 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 will finally be official.<sup>21</sup>

## The Electoral College by State, 2012

State	Votes	State	Votes
Alabama	9	Montana	3
Alaska	3	Nebraska	5
Arizona	11	Nevada	6
Arkansas	6	New Hampshire	4
California	55	New Jersey	14
Colorado	9	New Mexico	5
Connecticut	7	New York	29
Delaware	3	North Carolina	15
District of Columbia	3	North Dakota	3
Florida	29	Ohio	18
Georgia	16	Oklahoma	7
Hawaii	4	Oregon	7
Idaho	4	Pennsylvania	20
Illinois	20	Rhode Island	4
Indiana	11	South Carolina	9
Iowa	6	South Dakota	3
Kansas	6	Tennessee	11
Kentucky	8	Texas	38
Louisiana	8	Utah	6
Maine	4	Vermont	3
Maryland	10	Virginia	13
Massachusetts	11	Washington	12
Michigan	16	West Virginia	5
Minnesota	10	Wisconsin	10
Mississippi	6	Wyoming	3
Missouri	10		

## Weaknesses of the Electoral College

The Electoral College has some potential problems 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. These 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, but they are worrisome in this time of close electoral margins. The other weakness of the Electoral College system is the amount of time it takes to complete the process and the death or resignation of a president-elect.

### Faithless Electors

The 20th century saw eight instances of an elector not voting for the candidate to whom he or she was pledged. It happened in 1948, 1956, 1960, 1968, 1972, 1976, 1988, and 2000.<sup>22</sup> These votes never affected the outcome of the election.

Many Constitutional scholars believe that electors are free to vote for any candidate they wish once they are appointed. However, faithless electors are unlikely because the political parties submit the names of their own electors, and those coveted spots are reserved for party loyalists who are unlikely to defect.

The ability of electors to be independent agents is not without dispute. In 1952, Justice Robert H. Jackson wrote that “[e]lectors, although often personally eminent, independent and respectable, officially become voluntary party lackeys and intellectual nonentities....”<sup>23</sup> Still, faithless electors are nothing new. The first instance was in 1796 when a Federalist elector voted for Thomas Jefferson instead of for John Adams.<sup>24</sup> Even in the extremely close election of 2000, when one elector from the District of Columbia cast a blank ballot for president instead of for Al Gore, there was little public notice. It is unlikely, however, that the elector would have voted that way had her ballot been the deciding vote in the Electoral College.

As of 2000, twenty-six 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.<sup>25</sup>

### 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.<sup>26</sup> 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. 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 Democratic Candidate 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 of the votes as received from the States. In our example, Democratic Candidate 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 of 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.

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 Democratic Candidate was 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 worked well for 56 elections with the exception of a few historical anomalies. 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 significant influence in the outcome and much more than in parliamentary systems in which the executive is chosen by the ruling political party.

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 their president.

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- <sup>1</sup> *The Federalist No. 68* (Alexander Hamilton).
- <sup>2</sup> Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Volume 2. New Haven: Yale University Press, 1911. Pg. 109.
- <sup>3</sup> Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Volume 2. New Haven: Yale University Press, 1911. Pg. 29.
- <sup>4</sup> This provision, U.S. Const. art. II, § 1, cl. 3, was amended by the 12<sup>th</sup> Amendment
- <sup>5</sup> This provision, U.S. Const. art. II, § 1, cl. 3, was amended by the 12<sup>th</sup> Amendment
- <sup>6</sup> U.S. Const. art. II, § 1, cl. 2.
- <sup>7</sup> Fortier, John C. ed. *After the People Vote: A Guide to the Electoral College*. Third Edition. Washington, DC: AEI Press, 2004. Pg. 4.
- <sup>8</sup> In 2008, President Barack Obama won the popular in the Second Congressional District in Nebraska, earning its one electoral vote, even though he lost the statewide popular vote to Sen. John McCain.
- <sup>9</sup> U.S. Const. art. II, § 1, cl. 4.
- <sup>10</sup> 2 Cong. Ch. 8, March 1, 1792, 1 Stat. 239.
- <sup>11</sup> 3 U.S.C. § 1
- <sup>12</sup> At the time, senators were selected by State legislatures, not through popular vote.
- <sup>13</sup> There was one abstention in the Electoral College by an elector from Washington, DC.
- <sup>14</sup> 3 U.S.C. § 6
- <sup>15</sup> The safe harbor deadline was created by the Electoral Count Act of 1887 following the disputed Hayes-Tilden election of 1876. It is codified in law as 3 U.S.C. § 5
- <sup>16</sup> 3 U.S.C. § 7
- <sup>17</sup> 3 U.S.C. § 8
- <sup>18</sup> 3 U.S.C. § 9
- <sup>19</sup> 3 U.S.C. § 11
- <sup>20</sup> 3 U.S.C. § 15
- <sup>21</sup> 3 U.S.C. § 15
- <sup>22</sup> Neale, Thomas H. (CRS). "The Electoral College: How it Works in Contemporary Presidential Elections." Washington, DC: Congressional Research Service, January 17, 2001. Pg. 4.
- <sup>23</sup> Longley, Lawrence D. and Neal R. Peirce. *The Electoral College Primer 2000*. New Haven: Yale University Press, 1999. Pg. 110.
- <sup>24</sup> Fortier, John C. ed. *After the People Vote: A Guide to the Electoral College*. Third Edition. Washington, DC: AEI Press, 2004. Pg. 90
- <sup>25</sup> U.S. National Archives and Records Administration. 9 Sept. 2008 <<http://www.archives.gov/federal-register/electoral-college/laws.html>>.
- <sup>26</sup> Charter and Bylaws of the Democratic Party, Article III, Section 1 and Rule 9 of the Republican Party, Filling Vacancies in Nominations.