

# The Electoral Count Act and Presidential Elections

December 19, 2022

Every four years in November, citizens vote for presidential and vice presidential electors—known collectively as the electoral college—who meet in their respective states in December to vote for the U.S. President and Vice President. On the following January 6, a joint session of Congress convenes to count and announce the electors’ votes. (For more information, see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.) The U.S. Constitution, the Electoral Count Act of 1887 (ECA), codified at 3 U.S.C. §§ 5-6, 15-18, and other federal statutes set forth key procedures for this process. This Insight discusses the presidential election process established in the ECA and in related constitutional and federal statutory provisions and recent congressional action.

## Process Prior to Convening Joint Session of Congress to Count Electoral Votes

### Election Day: Appointment of Electors

The Electors Clause of the Constitution ([Article II, Section 1, clause 2](#)) provides that “[e]ach state shall appoint” presidential and vice presidential electors in the manner “as the Legislature thereof may direct.” [Article II, Section 1, clause 4](#), further provides Congress with power to determine *when* the states choose their electors or “the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” Accordingly, Congress enacted a [federal statute](#) establishing Election Day for presidential and vice presidential electors as the first Tuesday after the first Monday in November every four years. [Federal law](#) further provides that whenever a state holds an election for presidential electors “and has failed to make a choice on the day prescribed by law,” electors can be appointed on a later date “in such a manner as the legislature of such State may direct.”

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## Certificate of Ascertainment of Appointed Electors Sent to Archivist

The [ECA](#) requires that “the executive of each State” send to the Archivist of the United States (Archivist), by registered mail and under state seal, “a certificate of such ascertainment of the electors appointed,” including the name of, and number of votes cast for, each elector. Further, the ECA commands that such certificates of ascertainment be sent “as soon as practicable” after the “final ascertainment” of the appointment of the electors or “as soon as practicable” after the “final determination of any [election] controversy or contest” that was resolved under the state’s statutory procedure for election contests.

## Duplicate Certificates of Ascertainment Sent to Electors and to Congress

On or before the electors meet to cast their votes, the [ECA](#) directs “the executive of each State” to deliver to the electors of the state, under state seal, “six duplicate-originals of the same certificate” of ascertainment that were sent to the Archivist. At the first meeting of Congress following the appointment of the presidential electors, the ECA requires the Archivist to transmit “copies in full of each and every” certificate of ascertainment to the two houses of Congress.

## States’ Determination of Election Contests: “Safe Harbor” Provision

The [ECA](#) specifies that if a state, under laws enacted before Election Day and “by judicial or other methods,” has made a “final determination of any controversy or contest” regarding the appointment of electors in the state, and if that determination is made at least six days prior to the day that the electors are to meet to cast their votes, such determination “shall be conclusive, and shall govern in the counting of the electoral votes.” Known as the “safe harbor” provision, this clause seeks to “assure finality of the State’s determination” in resolving a presidential election contest (*Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring)).

## Electors Meet to Cast Their Votes

The [Twelfth Amendment](#) requires the electors to meet to cast their votes “by ballot” for President and Vice President “in their respective states.” [Federal law](#) specifies that the electors meet and cast their votes “on the first Monday after the second Wednesday in December” following election day at a location “in each State as the legislature of such State shall direct.”

## Certificates of Votes Sent to President of Senate, Secretary of State, Archivist, and Federal Judge

After the electors meet to cast their votes, the [Twelfth Amendment](#) requires the electors to create “lists” containing the number of votes cast by the electors for each presidential and vice presidential candidate, “sign and certify” the lists, and send to the President of the Senate (the Vice President of the United States). Accordingly, [federal law](#) specifies that after the electors vote, they “make and sign six certificates” of their votes, which contain two separate lists of the votes cast for President and Vice President. It further provides that the electors [attach](#) a certificate of ascertainment to each certificate of the vote; [seal and certify](#) them; and [send](#) one set to the President of the Senate, two sets to the state’s secretary of state, two sets to the Archivist, and one set to the federal judge in the district where the electors voted.

# Procedures for Joint Session of Congress to Count Electoral Votes

## Date of Joint Session to Count Electoral Votes

The [ECA](#) requires Congress to count the electoral votes on January 6 at 1:00 p.m. following each presidential election unless the date is changed by law.

## Opening and Reading of Electoral Votes

The [Twelfth Amendment](#) instructs that “[t]he 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 [ECA](#) provides that the electoral votes be counted at a joint session of the Senate and the House of Representatives, meeting in the House chamber, with the President of the Senate serving as the presiding officer. The [ECA](#) further specifies that the President of the Senate open and present the certificates of the electoral votes in alphabetical order.

## Counting Electoral Votes and Announcing Result

The [ECA](#) requires the appointment of “tellers” who read, record, and count the votes of each state and the District of Columbia. The law directs the President of the Senate to announce whether any candidates have received the required majority, “which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President.”

## Majority of Electoral Votes Required for Election

The [Twelfth Amendment](#) requires the winning candidate to receive “a majority of the whole number of Electors appointed” and anticipates that, if no candidate receives a majority of the electoral votes, the House of Representatives shall elect the President and the Senate shall elect the Vice President in a contingent election. For additional discussion, see CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

## Objections to Counting One or More Electoral Votes

The [ECA](#) provides that as the tellers read each certificate, the President of the Senate shall call for any objections. It specifies that each objection be made in writing, stating “clearly and concisely, and without argument, the ground thereof,” and be signed by at least one Senator and one Member of the House. When such an objection is received, the [ECA](#) directs that “the Senate shall thereupon withdraw” from the House chamber, the two houses [debate the question](#) in their respective chambers for a maximum of two hours, and each body vote separately to accept or reject the objection. The [ECA](#) specifies that both houses of Congress must agree to an objection for a state’s electoral vote to be excluded from the vote count, providing that “the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors.” Following the votes, the [ECA](#) instructs that the joint session “immediately again meet, and the presiding officer shall then announce the decision of the questions submitted.” In addition, the [ECA](#) sets forth a process to address the receipt of multiple certificates from the same state.

For additional discussion, see CRS Report RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress*, coordinated by Elizabeth Rybicki and L. Paige Whitaker.

## Recent Congressional Action

During the 117<sup>th</sup> Congress, the process described above has been the subject of committee examinations as well as legislation. Actions taken in the 117<sup>th</sup> Congress, with links to electronic resources providing more information concerning those actions, are described below in chronological order.

In January 2022, the Committee on House Administration released a [staff report prepared for the chair](#) with a detailed explanation of the ECA and a discussion of proposals for reform. The House Select Committee to Investigate the January 6<sup>th</sup> Attack on the Capitol has held [multiple hearings concerning the events](#) that occurred during the 2021 joint session to count the electoral votes, including six in June 2022. On July 20, 2022, a bipartisan group of Senators announced that they had reached agreement on legislation to reform the ECA (S. 4573). They shared a [summary of the proposal](#) and spoke about it on the Senate floor (see the [Congressional Record, July 20 and July 21](#)). On August 3, 2022, the Senate Rules and Administration Committee held a [hearing, “The Electoral Count Act: The Need for Reform,”](#) in which sponsors of the measure and legal scholars testified about the proposed legislation. Companion measures, identical to the Senate-introduced bill, were introduced in the House on September 14, 2022 (H.R. 8824), and September 15, 2022 (H.R. 8846).

On September 19, 2022, the chair of the House Administration Committee introduced a bill, H.R. 8873, that addressed the subject in a different way. The bill was referred to the House Administration Committee, and a [one-page summary of the bill](#) has been posted on the committee’s website. On September 20, the House Rules Committee held a [hearing concerning procedures](#) for bringing the legislation before the full House, receiving testimony from Members both in favor of and against the legislation. The House [debated and approved the procedures](#) for considering the bill and then [debated and passed the bill](#) on September 21, 2022. The [vote on final passage of the bill was 229-203](#).

On September 27, 2022, the Senate Committee on Rules and Administration [held a markup of S. 4573](#). After debating and voting on several amendments, the committee voted, 14-1, to advance the bill with a full-text substitute amendment. (See the [CQ markup report](#); link requires a paid subscription.) The bill was reported with the amendment on October 18, 2022. A written committee report has not been filed. The full Senate has not taken up S. 4573. Senate sponsors have indicated that they are pursuing inclusion of the text in appropriations legislation expected to be considered before the end of the 117<sup>th</sup> Congress. (See [news coverage in Roll Call](#) and [remarks of the Senate majority leader on the floor December 13, 2022](#).)

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