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# Wisconsin Legislative Council



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Director

TO: REPRESENTATIVE PAUL TITTL

FROM: Peggy Hurley, Staff Attorney

RE: Appointment of Electors in a Presidential Election

DATE: November 6, 2020

This memorandum responds to several questions from your office relating to the appointment of electors in a presidential election. Specifically, you asked: (1) for an explanation of the history, legality, and circumstances surrounding the appointment of electors; (2) whether the President of the United States or the Wisconsin Legislature has legal authority to appoint a slate of electors; (3) the process under which such appointment may be possible; and (4) what statutes, rules, or processes govern the appointment of presidential electors. This memorandum describes the requirements under federal and state law for appointing presidential electors, and discusses whether it is possible for the Wisconsin Legislature<sup>1</sup> to appoint electors after an election is held.

## **ELECTION PROCEDURES AND APPOINTMENT OF PRESIDENTIAL ELECTORS**

### **Constitutional Mandate and the Electoral Count Act**

After much deliberation as to how to elect a president and vice president, the framers of the U.S. Constitution eschewed direct election by popular vote and election by Congress in favor of a system under which states select a slate of presidential electors, who in turn cast their votes for president and vice president. As originally instituted, electors voted for two persons, without differentiating between the positions; the person who received the highest number of electoral votes was elected president, and the person who received the next highest number of electoral votes was elected vice president. After a tie vote in the 1800 Presidential Election, the Twelfth Amendment to the U.S. Constitution was ratified, under which electors cast separate ballots for president and vice president.<sup>2</sup>

U.S. Constitution, Article II, Section 1, states:

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

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<sup>1</sup> While questions have been raised regarding the ability of the President to direct legislatures to appoint electors, there is no constitutional or statutory authority for him to do so. If political pressure is brought to bear upon legislators to act, they must still do so on their own initiative, according to the U.S. Constitution and applicable federal and state laws.

<sup>2</sup> For more information on the history of the Electoral College, see [Electoral College and Indecisive Elections](#).

representatives to which the state may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Wisconsin has two senators and eight representatives in Congress; therefore, Wisconsin is entitled to appoint a slate of 10 electors for the presidential election in the manner chosen by the Legislature.

The Electoral Count Act, established in 1887, sets forth when, and how, Congress counts the electoral votes submitted by each state. The act requires the governor of each state to submit to the federal government, under state seal, the slate of electors chosen according to state law. [3 U.S.C. s. 6.]

While the Electoral Count Act allows Congress to resolve certain disputes as to the submitted electoral votes, it is generally understood to guarantee that Congress will accept votes from electors whose names were submitted by each state's governor to Congress at least six days before electors meet to cast votes. [3 U.S.C. s. 5.] This "safe harbor" provision does not require states to submit their slates of electors by that date, but it ensures that votes from a state will be honored if the electors are designated by the safe harbor date.

## **Wisconsin Procedure**

### **Appointment of Electors by Political Parties**

The Wisconsin Legislature has established a system for the appointment of electors by the Republican and Democratic parties in the state.<sup>3</sup> On the first Tuesday in October of each presidential election year,<sup>4</sup> the candidates for the Senate and Assembly nominated by each political party at the primary, the state officers, and the holdover state senators of each political party meet in the State Capitol to nominate a slate of 10 electors for each party. The names of the nominated electors from each party are certified by the chairperson of the state committee of each party to the chairperson of the Wisconsin Elections Commission (Commission). [s. 8.20, Stats.]

### **Election and Post-Election Proceedings**

At the general election, held on the first day following the first Monday in November of a presidential election year,<sup>5</sup> voters choose which slate of presidential electors will cast their ballots for president and vice president of the United States. Beginning after polls close on Election Day, all votes cast are counted (canvassed) and, within 14 days after the general election,<sup>6</sup> each county clerk must deliver a certified statement of the election results for that county to the chairperson of the Commission. The chairperson of the Commission must, by December 1 in each year a general election is held, examine the submitted statements of canvass and make a determination as to the votes cast for each candidate. The Commission prepares a certificate showing the determination of the results of the canvass and the names of the persons selected by the voters to be presidential electors, which it sends to the Governor. [ss. 7.60 (5) (a), 7.70 (3) (a), and 8.25 (1), Stats.]

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<sup>3</sup> Wisconsin law also provides for minor parties and independent candidates to select a slate of electors. However, because the political discourse surrounding this topic is focused on a potential conflict between the major political parties, this memorandum will focus on the electors chosen by the Republican and Democratic parties in Wisconsin.

<sup>4</sup> For this year, that date is October 6, 2020. For a list of all dates relevant to the 2020 Presidential Election, see the Wisconsin Election Commission's [2020 Calendar of Election Events](#).

<sup>5</sup> For this year, that date is November 3, 2020.

<sup>6</sup> For this year, that date is November 17, 2020.

The Governor, by the first Monday after the second Wednesday in December,<sup>7</sup> must then sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. Administrator of General Services. In order to comply with the federal “safe harbor” deadline, which guarantees that Congress will accept the votes by the electors identified in the Governor’s certification, this must be done at least six days<sup>8</sup> before the slate of electors meets to cast their votes. [3 U.S.C. ss. 5 to 7.]

The Governor must also prepare six duplicate originals of such certificate and deliver them to one of the presidential electors on or before the first Monday after the second Wednesday in December in anticipation of the electors meeting to cast their votes. [s. 7.70, Stats.]

### **Electoral Vote and Congressional Endorsement of Election Results**

On the first Monday after the second Wednesday in December, the slate of electors that was chosen by the voters, as certified by the chairperson of the Commission, must meet in the Capitol to cast votes for president and vice president of the United States. In Wisconsin, as in every other state except Maine and Nebraska, all of the electoral votes are assigned to the candidate that won a plurality of votes for the state. Additionally, Wisconsin law requires each elector to vote for the candidate of the party that nominated him or her as an elector. As a result, on December 14, 2020, state law requires that all 10 Wisconsin electoral votes be cast for either the Democratic or the Republican nominees for president and vice president. After the electors sign and certify the form forwarded to them by the Governor, the certificates are sent to federal officials, including the President of the U.S. Senate. [3. U.S.C. s. 11; ss. 5.10 and 7.75 (2), Stats.]

On January 6 of the year following a presidential election, the U.S. House of Representatives and the U.S. Senate convene to open the certifications submitted by each state’s electors and count the electoral votes. Upon determining that one candidate for each office has received a majority of the electoral votes, the President of the U.S. Senate must declare those persons the President and Vice President of the United States. [3 U.S.C. s. 15.]

## **THE ROLE OF THE LEGISLATURE**

### **Wisconsin’s Selection of Electors**

The U.S. Constitution authorizes state legislatures to determine how electors are nominated in their own states. The Wisconsin Legislature has opted to allow state political parties to nominate their own electors. These nominations are submitted to the Commission, which is administered by nonpartisan staff and a bi-partisan board of commissioners. [ss. 5.05 (4) and 15.61, Stats.] The Legislature has likewise chosen to allow voters to choose the electoral slate by popular vote at the presidential election. After the presidential election, the chairperson of the Commission certifies the post-election canvassing, which determines which party’s slate of electors is named by the Governor to cast its votes for president and vice president.

The Legislature has imposed additional deadlines to ensure that our state’s slate of electors is certified by December 8, 2020, and given due consideration by Congress. The statutes provide deadlines for canvassing, allowing for challenges to, or a recount of, ballots cast, and certification by the Commission and the Governor.

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<sup>7</sup> For this year, that date is December 14, 2020.

<sup>8</sup> For this year, that date is December 8, 2020.

Wisconsin law allows an elections inspector or a voter to challenge, for cause, whether a voter is casting a legitimate ballot. The Legislature has imposed deadlines for making and resolving these challenges and determining which body is responsible for resolving challenges. [ss. 6.92 to 6.97, Stats.]

Additionally, Wisconsin law allows for a candidate who is an “aggrieved party” to petition for a recount. In the case of a presidential election, an aggrieved party is a candidate who trails the leading candidate by no more than one percent of the total votes cast for that office and, under state law, he or she must petition for a recount no later than 5:00 p.m. on the first business day after the Commission receives the last statement from a county board of canvassers. For this presidential election, the last day for a county board of canvassers to submit its statement to the Commission is November 17, 2020. If the Commission orders a recount, canvassers must transmit the returns no later than 13 days from the date of the order. [ss. 7.60 (5) (a) and 9.01 (1) (ar) 3., Stats.]

Thus, the Wisconsin Legislature has exercised its authority by enacting elections statutes that direct how presidential electors are chosen, establish deadlines for doing so, and determine which officials are responsible for determining the slate of electors certified to vote in a presidential election.

## **Contested or Competing Electors**

### **Constitutional, Federal, and State Law Background**

There has been some reporting in the national media that federal law may allow for a legislature to install its own slate of electors, mainly centered on two premises. First, the U.S. Supreme Court has acknowledged that, although the legislatures in every state have determined that presidential electors are selected by the popular vote in each state, a legislature may, at any time, choose to select its electors itself, or choose another way of appointing electors. [*Bush v. Gore*, 531 U.S. 98, 104 (2000).]

Second, the Electoral Vote Act provides that: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” [3 U.S.C. s. 2.]

For this presidential election, the Legislature has established the procedure by which electors are chosen, certified, and submitted to Congress. While a state legislature may change how its presidential electors are selected, absent a statutory change before the election scheduled for November 3, 2020, the Legislature’s approved procedure is to allow the selection of electors by popular vote, and to enjoy the protections of the federal safe harbor law. It does not appear that current Wisconsin law allows the Legislature to submit its own slate of electors; even in the case of challenged ballots and a recount, the Legislature has designated the chairperson of the Commission, not the Legislature, as the official in charge of determining which slate of electors has been chosen by the voters. The legislative-established deadlines appear to have been intended to ensure that this determination will be made, and forwarded for Congressional consideration, by the safe harbor date.

If, for unforeseen reasons, the ballot count is delayed past the safe harbor date, Wisconsin law still does not contemplate a role for the Legislature to determine its slate of electors. The chairperson of the Commission determines which slate has been elected, and the Governor forwards that slate’s electoral votes to Congress. While the safe harbor deadline may have passed, and Congress may decide how to resolve any remaining “controversy or contest” surrounding the submitted slate of electors, if there is only one slate of electors submitted it is unlikely that those votes would be dismissed.

On the other hand, Congress has determined that, in the extreme circumstance of a state failing to select its electors on Election Day, the Legislature may choose to select electors. However, in order for

the Legislature to do so under Wisconsin law, it would need to determine that the chairperson of the Commission is unable to ascertain the winner of the popular vote and that it should select its own slate of electors. This would only occur if the Commission fails to certify the results, or a court order prevents the Commission from certifying the election results.

The Legislature has established a series of safeguards and deadlines to ensure that this does not happen, but it is possible to imagine a scenario in which allegations are made, or a court determines, that the popular vote is so rife with fraud, error, or other inaccuracies that the true winner of the vote is impossible to ascertain. It is possible that one or more courts could issue a finding that an accurate count is impossible, or order a particular slate of electors to be appointed, allowed to vote, and that their votes be sent to Congress.

In any of those scenarios, two (or more) slates of electoral votes could conceivably be forwarded to Congress. If the Legislature disagrees with the determination of the chairperson of the Commission as to the true winner of the popular vote in Wisconsin, the Legislature could, theoretically, opt to select its own slate of electors and submit that slate's votes to Congress. The Legislature, the Governor, or the chairperson of the Commission could conceivably be ordered by a court to nominate a particular slate of electors and forward its votes to Congress. Congress would need to determine, when it meets on January 6, 2021, which slate's votes to consider or whether not to count the state's electoral votes at all.

There is some question as to how Congress would resolve a dispute of this nature. The Twelfth Amendment to the U.S. Constitution states that "The President of the Senate shall, in the presence of the Senate and the House of Representatives, open the certificates and the votes shall then be counted." This has been interpreted to suggest that the President of the Senate, who is the current Vice President, decides which certificates to open and which votes to count. On the other hand, the Electoral Count Act sets forth, in a lengthy statutory section, the procedures for settling disputes surrounding the electors' votes that are submitted by the states. [3 U.S.C. s. 15.]

Unfortunately, there is no consensus on how those provisions must be interpreted or applied. One reading suggests that, if competing slates of electors are submitted after the safe harbor deadline, the slate proffered by the governor of a state shall prevail. Another reading suggests that the state's electors should not be counted at all, and that the presidency will be won by whomever earns the majority of the remaining electoral votes. Other interpretations vary depending on whether one party controls both houses of Congress or whether the houses are split.<sup>9</sup>

Wisconsin's laws, however, are intended to ensure that election results are counted in a timely and accurate manner and that any challenges or controversies are resolved promptly. The Legislature has authorized the chairperson of the Commission to certify election results and it has enacted deadlines to ensure that Wisconsin's submission of its slate of electors meets the safe harbor provisions of federal law. The Legislature has enacted no authority for itself to nominate a slate of electors.

## CONCLUSION

While federal law authorizes a legislature to appoint its own electors after an election has been held, a legislature may only do so if voters fail to make their choice by casting their votes on Election Day. It is

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<sup>9</sup> For discussions on the Electoral Counting Act, scenarios under which an electoral vote may be challenged, and competing interpretations for resolution of those challenges, see Edward B. Foley, [Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management](#), 51 Loy. U. Chi. L. J. 309 (2020), and the Congressional Research Service, [Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress](#) (2016).

theoretically possible that the Legislature could determine that a lack of an accepted or certified election result is a failure by the voters to make their choice. The legislatively enacted safeguards in the Wisconsin statutes make that prospect unlikely, but not impossible.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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