



MEMORANDUM

TO: Speaker Robin Vos
FROM: Michael Gallagher, senior coordinating attorney
DATE: November 16, 2020
SUBJECT: The electoral college process in Wisconsin

You requested an overview of the electoral college process in Wisconsin. As this memorandum outlines, the U.S. Constitution vests the Wisconsin Legislature with the power to direct how the state's presidential electors are appointed. The legislature has exercised that power by passing laws that govern the appointment of presidential electors, and the legislature has also passed laws that pertain to the convening and voting of presidential electors, although the Twelfth Amendment to the U.S. Constitution dictates the procedures these electors must follow when they convene and vote.

Background

The electoral college was fashioned at the Constitutional Convention of 1787 as a compromise on the question James Wilson, a Pennsylvania delegate to the convention, said was actually the most difficult one the convention faced—how to choose a president. Article II, section 1, clause 2 of the U.S. Constitution gives the states the power to appoint presidential electors and requires state legislatures to determine the manner of appointment:

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 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.¹

The U.S. Supreme Court has repeatedly held that this clause gives “plenary power to the state legislatures in the matter of the appointment of electors.”² While for a number of years after the Constitution was ratified several state legislatures reserved to themselves the choosing of the

¹ [U.S. Const. art. II, §1, cl. 2.](#)

² [McPherson v. Blacker, 146 U.S. 1, 35 \(1892\); Bush v. Gore, 531 U.S. 98, 104 \(2000\).](#)

states' presidential electors, today every state, including Wisconsin, allows the citizens of the state to elect presidential electors.

The electoral college process in Wisconsin

Based on its plenary power under U.S. Const. art. II, §1, cl. 2, the Wisconsin Legislature has directed by statute that the manner of appointment of the state's presidential electors shall be by a vote of the people of the state at the presidential election. Wisconsin has 10 electoral college votes—equal to the number of senators and representatives to which the state is entitled in the Congress, as required under U.S. Const. art. II, §1, cl. 2. Wisconsin, like most states, is “winner-take-all” based on the November presidential election.³

Nomination of the electors

However, the process for choosing presidential electors in Wisconsin begins a month earlier on the first Tuesday of October in each presidential election year, when representatives of each political party appearing on the ballot meet in the Wisconsin Capitol to nominate their party's presidential electors.⁴ One presidential elector is nominated from each congressional district and two presidential electors are nominated to represent the state at large.⁵ Each party's nominees for presidential elector are then certified to the chairperson of the Wisconsin Elections Commission.⁶

Election of the electors

On election day, the people of the state cast their ballots for candidates for the offices of president and vice president, but voters are actually voting for the slate of presidential electors nominated by those candidates' parties. Under [Wis. Stat. § 5.10](#), “Although the names of the electors do not appear on the ballot and no reference is made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast.”⁷

After the election, the Wisconsin Elections Commission prepares a certificate that certifies the results of the presidential election, which the governor then signs, seals with the great seal of the state, and transmits to the U.S. General Services Administration.⁸ The governor also prepares six duplicate originals of the certificate and delivers them to one of the presidential electors on or

³ [Wis. Stat. § 7.75 \(2\)](#). All but two states currently use a winner-take-all popular election for selecting their presidential electors. Maine and Nebraska split their electoral college votes based on which candidates win the overall popular vote in the state, as well as which candidates win the vote in each congressional district.

⁴ [Wis. Stat. § 8.18 \(1\)](#). The party representatives convening at the state capitol consist of candidates for the state senate and assembly nominated by each political party at the primary, the state officers, i.e. members of the political party holding a constitutional office, such as the governor, and the holdover state senators of each political party. *Id.* Independent candidates' electors are nominated under a process set forth in [Wis. Stat. § 8.20](#), and write-in candidates' electors are nominated under a process established in [Wis. Stat. § 8.185](#).

⁵ [Wis. Stat. § 8.18 \(2\)](#).

⁶ *Id.*

⁷ See also [Wis. Stat. § 5.64 \(1\) \(em\)](#) (“The names of the presidential electors for the candidates supplied under ss. 8.18 (2) and 8.20 (2) (d) are not listed on the ballot but a vote for the candidates for president and vice president is a vote for them through their named presidential electors.”).

⁸ [Wis. Stat. 7.70 \(5\) \(b\)](#).

before the date the presidential electors convene to cast their votes for president and vice president.⁹

Convening of the electors

The winning presidential and vice presidential candidates' slate of electors convenes at the state capitol "at 12:00 noon the first Monday after the 2nd Wednesday in December," or December 14, 2020, in the current election cycle.¹⁰ Should there be a vacancy in the office of presidential elector when the electors convene, "due to death, refusal to act, failure to attend or other cause," the electors themselves must "immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy."¹¹ The electors are then required to vote for their party's candidates for president and vice president.¹² A presidential elector is not required to vote for a candidate who is deceased at the time of convening, but the statutes do not provide any further guidance with respect to how an elector should vote in that situation.¹³

The Twelfth Amendment to the U.S. Constitution governs the process after the electors have convened. The electors are required to cast separate ballots for president and vice president.¹⁴ The electors then must make separate lists of the persons voted for as president and the persons voted for as vice president and the number of electoral votes cast for each.¹⁵ Once the lists are completed, the electors are required to sign and certify the lists and "transmit [the lists] sealed to the seat of the government of the United States, directed to the President of the Senate," who opens and reads the electoral college votes of each state before a joint session of Congress.¹⁶

Conclusion

The appointment of Wisconsin's presidential electors, as well as the process by which the electors convene and vote, is governed by the Wisconsin Statutes and the U.S. Constitution. Political parties nominate electors to represent their party; the people of the state appoint the electors by voting for candidates for president and vice president at the presidential election; the electors so appointed are required by law to convene and vote for the candidates of the party that nominated them; and once those votes are tallied, the electors must transmit the results of the vote to the president of the U.S. Senate to be opened and read before a joint session of Congress.

I hope this information is helpful. Please let me know if the LRB can provide any additional assistance.

⁹ *Id.*

¹⁰ [Wis. Stat. § 7.75 \(1\)](#).

¹¹ *Id.*

¹² [Wis. Stat. § 7.75 \(2\)](#).

¹³ *Id.*

¹⁴ [U.S. Const. amend. XII](#).

¹⁵ *Id.*

¹⁶ *Id.* The vice president is the president of the U.S. Senate.