

No Clear Winner. Now What?

Breaking Down the Election In Action



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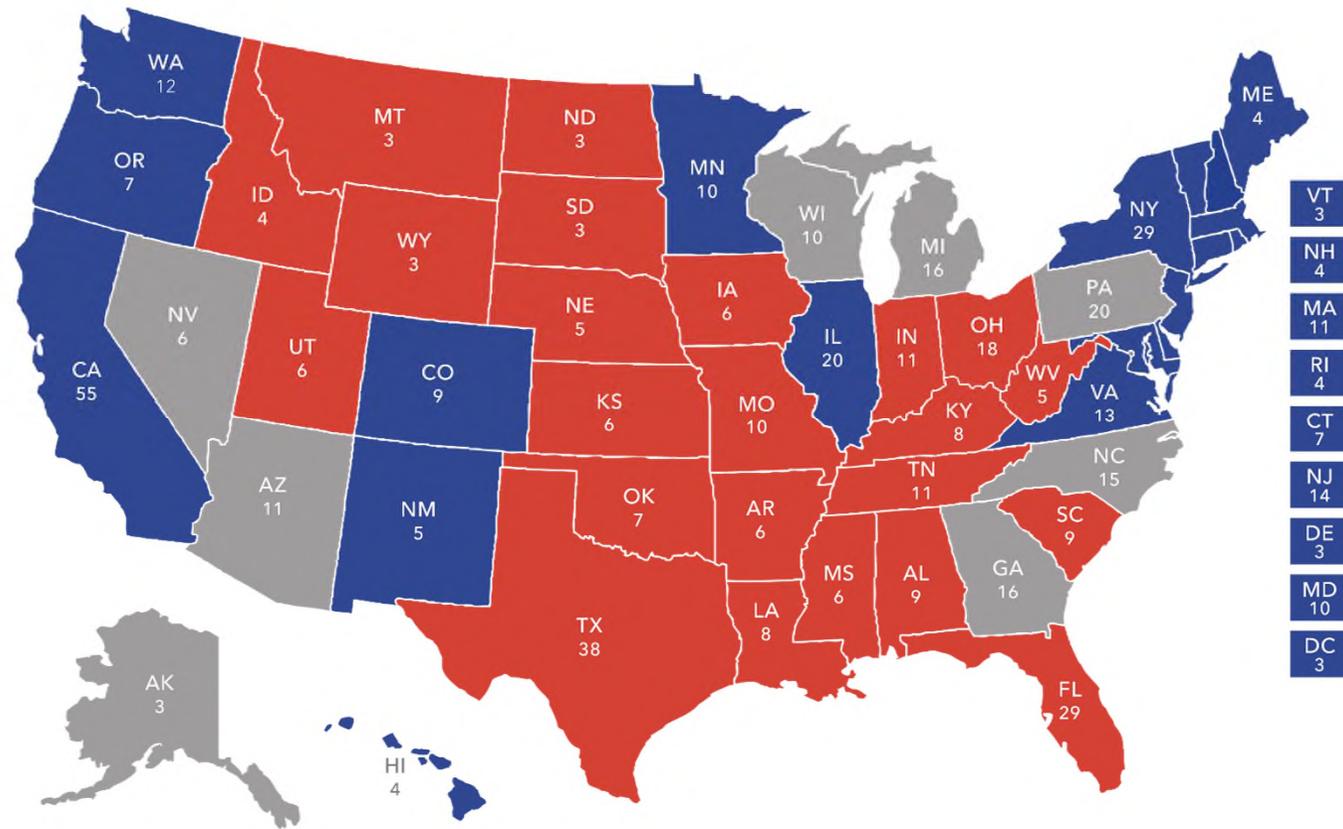
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Where the Race Stands



The Process of Electing a President





Timeline

Dates	Steps
November 3 Election Day	<ul style="list-style-type: none">• Voters cast votes.• Counting begins.
November 4 – December 14	<ul style="list-style-type: none">• Vote counting, canvassing, recounts, and contests conducted and completed.
December 8 Safe Harbor Date	<ul style="list-style-type: none">• 3 U.S.C. § 5: Sets Conclusive Date for results in a contested election.• Prior to Election Day states must have enacted procedures to settle controversies or contests over electors and electoral votes.• State must have followed these procedures and determined result six days before the electors' meetings.• Results are considered to be conclusive and will apply in the counting of the electoral votes.• In this situation, the governor is required to send a certificate describing the form and manner of the determination to the Archivist of the United States as soon as practicable.
No later than December 14 Certificates of Ascertainment	<ul style="list-style-type: none">• Certificates of Ascertainment of the vote, which include:<ul style="list-style-type: none">◦ Names of the electors chosen by the voters and the number of votes received in the popular election results.◦ Names of all other candidates for elector, and the number of votes they received.◦ Seal of the state.◦ Often signed by state governors (not required).• One copy sent to the Archivist of the United States.• Six duplicate copies provided to the Electoral College delegation.



Voting

In-Person Ballots

- In-person voting seemed to go relatively smoothly around the country.
- In-person early voting numbers were record-breaking in most places.

Mail-In Ballots

- There are still many ballots outstanding in key states.
- Counting mail-in ballots will present the biggest challenge.
- Timing is critical: states have different rules for accepting ballots and counting ballots.
- When will ballots arrive?
- Where in the state are they from?
- What is the partisan nature of the ballots outstanding?



Counting Mail-In Ballots

State	Rules
AZ	Ballots must arrive by election day.
GA	Ballots must arrive by election day.
MI	Ballots must arrive by election day.
NV	Ballots must be postmarked by election day, and arrive by November 10.
NC	Ballots must be postmarked by election day, and arrive by November 12.
PA	Ballots must be postmarked by election day, and arrive by November 6.
WI	Ballots must arrive by election day.



Counting/Certifying Processes

Counting Ballots

- Delays because of absentee ballots.
- Concerns over legitimacy of absentee ballots.
- Concerns about multiple votes from absentee and in-person.
- Fewer issues with determining voter intent (hanging chads) with modern voting equipment.
- Concerns about electronic voting equipment—security, accuracy, reporting.

Determining Results

- **Canvass:** Official results as reported from local elections officials up to state.
- **Recount:** Request for officials to recount the votes. Some states have mandatory recounts when vote is within certain threshold.
- **Contest:** Challenge of results in court. Most states have special provisions for how conducted. Limited to specific issues.
- **Litigation:** Outside of the contest procedures, attempts at injunctions or other relief against process.



Electoral College Process

- Electors meet in person in each state at location set by legislature.
- Vote by paper, one vote for President, one for Vice President.
- Electors count ballots.
- Complete six “Certificates of Vote” which contain:
 - Two lists, one including votes for the President, the other votes for the Vice President.
 - Includes the names of persons receiving votes and the number of votes cast for them.
- Electors pair Certificates of Votes with Certificates of Ascertainment (provided by the state governors) and sign, seal, and certify them (3 U.S.C. §§8-10).



Delivering Electoral Votes

- The six certificates sent by registered mail to the following officials listed below:
 - One certificate to the President of the U.S. Senate (the Vice President);
 - Two certificates to the secretary of state of the state or equivalent state officer of the jurisdiction in which the electors met;
 - Two certificates to the Archivist of the U.S.; and
 - One certificate to the judge of the U.S. district court of the district in which the electors met (3 U.S.C. §11).
- Must be transmitted by December 23.
- If the President of the Senate does not have votes from a state, he must request them from the secretary of state of the missing state and one copy is sent by registered mail.
 - The district court is to send its certificate by hand delivery to the Senate in that case.



Electoral Vote Issues

- Generally this is a very simple process.
- There could be competing slates of electors—Florida was preparing two sets prior to decision in *Bush v. Gore*.
 - No history of this happening before.
- Electors in some states are bound by state law to vote for the candidate they pledged to vote for and have punishment or removal for electors who do not (“faithless electors”).
 - Supreme Court upheld these laws.
 - Not clear what would happen if they are faithless.
 - Could be issue if candidate has died.

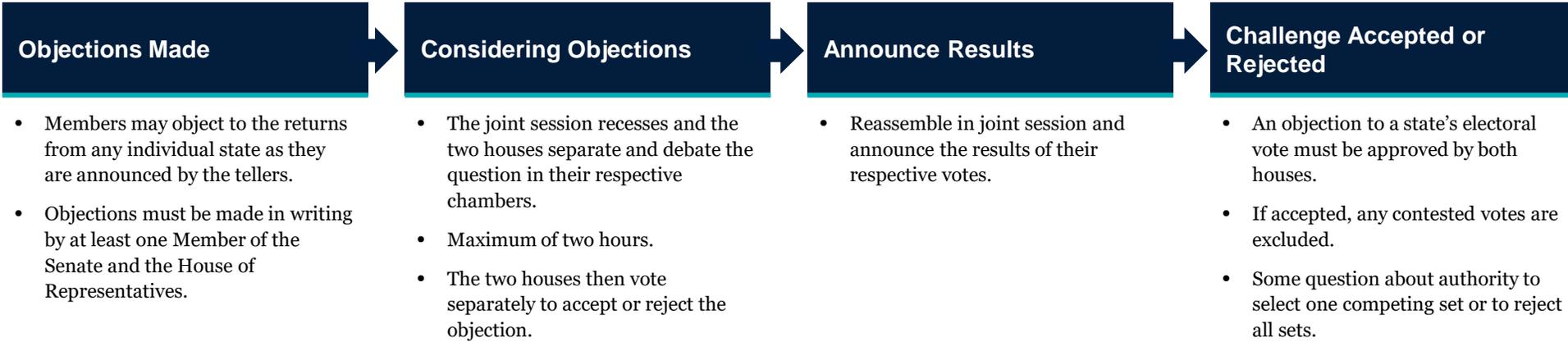


Process for Counting Electoral Votes

- 1:00 p.m. January 6, Joint Session of Congress in the House Chamber
- The Vice President presides as President of the Senate.
- The Vice President opens the certificates and presents them to four tellers, two from each chamber.
- The tellers read and make a list of the returns.
- When the votes have been ascertained and counted, the tellers transmit them to the Vice President.
- If one of the tickets has received a majority of 270 or more electoral votes, the Vice President announces the results, which “shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President.”



Process for Challenging Electoral Votes





Challenges to Votes

- Concern about competing slates at state level.
- Votes by faithless electors.
- Votes for dead candidates.
- Votes for replacement candidates (e.g., candidate died at some point in the process).
- This only happened in the post-Civil War era and only once recently (in Hawaii, 1960, there was a change in outcome after electors voted).
- If enough challenges are made and there are not 270 votes for a winner, then a Contingent Election occurs.
- Contingent Election can occur if there is a tie vote or if there are otherwise not a majority of votes (tie is more likely reason for this if all electoral votes are counted with no viable third-party candidates to get electoral votes).



Contingent Election

- Three times there have been Contingent Elections—two after the 12th Amendment Changed the Process.
- House selects the President, Senate selects the Vice President.
- House must vote immediately after contingency is declared, and no other business may be considered.

House

- Top three vote getters only
- One vote per state
- Delegation votes to determine vote
- Currently 26 R majority delegations, 23 D majority delegations, 1 tied
- Majority vote—could have a tie



Senate

- Majority vote
- Each Senator votes—no state-by-state voting
- Vice President would cast tie vote





State Delegations

State	D	R	State	D	R	State	D	R	State	D	R
Alaska	0	1	Illinois	13	5	North Carolina (1 vacant)	3	9	South Carolina	2	5
Alabama	1	6	Indiana	2	7	North Dakota	0	1	South Dakota	0	1
Arkansas	0	4	Kansas	1	3	Nebraska	0	3	Tennessee	2	7
Arizona	5	4	Kentucky	1	5	New Hampshire	2	0	Texas (1 Vacant)	13	22
California (1 Vacant)	45	7	Louisiana	1	5	New Jersey	10	2	Utah	1	3
Colorado	4	3	Massachusetts	9	0	New Mexico	3	0	Virginia	7	4
Connecticut	5	0	Maryland	7	1	Nevada	3	1	Vermont	1	0
Delaware	1	0	Maine	2	0	New York	21	6	Washington	7	3
Florida	13	14	Michigan (1 Ind.)	7	6	Ohio	4	12	Wisconsin	3	5
Georgia (1 Vacant)	4	9	Minnesota	5	3	Oklahoma	1	4	West Virginia	0	3
Hawaii	2	0	Missouri	2	6	Oregon	4	1	Wyoming	0	1
Iowa	3	1	Mississippi	1	3	Pennsylvania	9	9			
Idaho	0	2	Montana	0	1	Rhode Island	2	0			

26 R | 23 D | 1 Tied 7 states with just one rep. | 4 states with one rep. difference



No President?

- If House cannot select a President by Inauguration Day, then the new Vice President (either by majority vote of the Electoral College or by majority vote of the Senate if there is a contingent election) becomes Acting President on January 20 under the Twentieth Amendment until a President is chosen.
- If there is no new Vice President, then the Presidential Succession Act of 1947 provides for the Speaker of the House to serve as Acting President until a President or Vice President is chosen.
- If the Speaker does not wish to serve, then the President Pro Tempore of the Senate becomes Acting President (currently Chuck Grassley of Iowa).
- If either the Speaker or the President Pro Tempore becomes President, they must **resign their seat** in Congress immediately before being sworn in as Acting President.
 - Serious issues with Senate majority given current breakdown.
 - Would not just regain their seats once President is chosen.

Death of a Candidate



Before Election Day

- Parties name replacement.
- Ballots cannot be changed after they have been finalized, so voters do not see new names.
- If the deceased candidate wins, question if electors would or could cast votes for party-named replacements.
- Issue of whether House would accept electors voting for replacement.
- No history of this happening.
- Voters would know that a vote for the deceased candidate is potentially a vote for replacement candidate.



Before Votes Are Certified

- Situation arises only if the candidate who won dies.
- No process specified in this scenario.
- Political party may try to use process to name new candidate, but voters would have had no say in who this person is and would have voted for someone else.
- Even if incumbent wins, no specific provision to say Vice President becomes President.



Before the Electoral College Votes

- No process specified.
- Votes from states would have been certified for someone who was still alive at that time.
- Supreme Court upheld state laws removing or punishing “faithless” Electoral College delegates.
- The Court acknowledged the possible chaos death or incapacity of a candidate could create but declined to provide guidance.
- Note the faithless elector issue arises in all three of these scenarios if the winner dies before Congress has accepted votes.



Before Congress Counts Electoral College Votes

- At this point electors would have cast their ballots for a living candidate who then dies.
- No process specified.
- Congress would likely have to choose the next President.
- House selects President, Senate selects Vice President.
- If the House cannot select a President, the new Vice President selected by the Senate becomes President until the House decides.



Before Inauguration Day

- The House and Senate have counted and accepted the electoral votes and named the President and Vice President Elect, and then the President-Elect dies.
- Twentieth Amendment is clear that the Vice President Elect, who would have received votes on Election Day, and majority vote of Electoral College, and those votes would have been accepted by Congress, becomes the new President on Inauguration Day

Additional Information and Sources

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Ron Jacobs focuses his practice on political law, nonprofit organizations, and crisis management, including congressional investigations, class actions, and regulatory investigations. Ron founded and co-chairs the firm's nationally recognized Political Law practice. He advises clients on all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, pay-to-play laws, and tax implications of political activities.

Ron's clients – which include large and small companies, trade associations, charities, campaigns, super PACs, ideological groups, individuals, and political vendors – recognize his ability to help them achieve their political objectives and navigate the minefield of the often contradictory rules that apply. He has developed political compliance programs for Fortune 500 companies, leading trade associations, and other clients that lobby and make political contributions nationwide.

Ron serves as outside general counsel to a number of nonprofit organizations and trade associations, and guides them on tax exemption, corporate governance, international operations, and other complex issues. He helps clients create new entities, deal with leadership changes, merge with other organizations, and negotiate major contracts, and oversees litigation.

Ron also assists clients that are facing crisis events. His work includes responding to government investigations and enforcement actions, congressional investigations, media relations, class action lawsuits, and other high-profile problems that involve potentially damaging legal and public relations matters. His clients appreciate his steady hand, ability to devise a plan, and candor in helping the client maintain a focus on solving the problem at hand. He uses his institutional knowledge of the firm and its practitioners to bring together the right team of litigators, lobbyists, and other attorneys to handle a problem. Whether a difficult situation involves political or nonprofit law, Ron offers practical advice that considers not only legal requirements, but also reputational risk. Ron's clients appreciate his responsiveness and ability to provide candid advice to achieve their business objectives.

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Janice Ryan is an experienced general counsel to tax-exempt organizations, specializing in lobbying and political activities compliance. Janice counsels advocacy groups, charities, associations, political organizations, and businesses on the full spectrum of legal issues related to their efforts to influence public policy and elections. She is adept at delivering creative solutions to complex problems and providing pragmatic day-to-day general counseling tailored to her clients' specific needs and goals. Janice's clients appreciate her accessibility and responsiveness, and her ability to bring together and manage the right team of attorneys within the firm to solve the problem at hand, providing her clients with seamless, full-service legal support.

Janice serves as outside general counsel and political counsel to several prominent 501(c)(4) social welfare organizations engaged in high-profile nationwide issue advocacy campaigns and efforts to influence elections. She also advises federal and state super PACs, candidates, and corporate and association PACs.

Questions?

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Roundtable Discussion



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