
Wisconsin Legislative Council



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Director

TO: SENATOR KATHY BERNIER

FROM: Katie Bender-Olson, Senior Staff Attorney, and Peggy Hurley, Staff Attorney

RE: Legislative Authority to Decertify a Presidential Election

DATE: November 1, 2021

You asked for an analysis of the Wisconsin Legislature’s current authority to “decertify” the presidential election or “pull back” the electoral votes cast by the state presidential electors. There is no mechanism in state or federal law for the Legislature to reverse certified votes cast by the Electoral College and counted by Congress. Instead, except in the case of presidential incapacity, impeachment is the only mechanism for removing a sitting U.S. President.

WISCONSIN STATE LAW PROCESS FOR SELECTING PRESIDENTIAL ELECTORS AND CASTING ELECTORAL VOTES

The U.S. Constitution authorizes state legislatures to “direct” how presidential electors are appointed, which the Wisconsin Legislature has done by specifying an appointment procedure in state law. Specifically, Article II, section 1 of the U.S. Constitution, provides that “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....”

The Wisconsin Legislature enacted statutes establishing the process for selecting and appointing presidential electors, which involves the political parties each nominating a slate of electors, and the results of the popular vote for president in Wisconsin determining which slate will be appointed. The Legislature could change this process, but it would require amending state law. There is no procedure under Wisconsin law for “decertifying” or “pulling back” a slate of presidential electors who have been appointed pursuant to state statutes.

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. On the first Tuesday in October of each presidential election year, 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 in November, 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, 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 then examine the submitted statements of canvass and make a determination as to the votes cast for each candidate by December 1. 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, and sends the certificate to the Governor. [ss. 7.60 (5) (a), 7.70 (3) (a), and 8.25 (1), Stats.]

The Governor 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 by the first Monday after the second Wednesday in December. 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 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 the 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.]

The slate of electors chosen by the voters, as certified by the chairperson of the Commission, must meet in the State Capitol on the first Monday after the second Wednesday in December to cast votes for President and Vice President. 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. This means that that all 10 Wisconsin electoral votes must be cast for either the Democratic or the Republican nominees for President and Vice President.¹ 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.]

FEDERAL LAW PROCESS FOR COUNTING ELECTORAL VOTES

Congress enacted the Electoral Count Act in 1887 to establish the process for how and when Congress counts the electoral votes submitted by each state. There is no procedure under either the U.S. Constitution or federal law for “decertifying” or “pulling back” electoral votes after Congress has accepted and counted them.

Under the Electoral Count Act, the governor of each state submits 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

¹ In recent presidential elections, a small number Electoral College electors have cast votes for candidates other than the candidate of the party that nominated the elector. The U.S. Supreme Court has held that states may penalize so-called “faithless electors.” [See *Chafalo v. Washington*, 591 US _ (2020).] In Wisconsin, state law requires the presidential electors to vote for the candidate of the political party which nominated the electors. [s. 7.75 (2), Stats.] There is no specific statutory penalty for faithless electors; however, a general criminal provision, s. 939.61 (1), Stats., provides a catch-all statutory penalty that could arguably apply to a “faithless elector” in some circumstances.

“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.

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. The Electoral Count Act creates a process for members of Congress to object to the counting of electoral votes from a particular state. When the certificate from each state or the District of Columbia is read, “the President of the Senate shall call for objections, if any.” An objection must be signed by at least one senator and one representative and must be presented in writing. If an objection is received, then the houses meet separately to consider and vote on the objection. The electoral votes at issue are counted unless each house votes to sustain the objection. The President of the U.S. Senate (the Vice President) must then declare the candidate who has received a majority of electoral votes as President of the United States. [3 U.S.C. s. 15.] The Electoral Count Act does not provide for any procedure to reverse electoral votes after they have been counted by Congress and the Vice President has declared a winner.

REMOVAL OF A SITTING PRESIDENT

Impeachment is the only mechanism for the involuntary removal of a U.S. President who is capable of performing the duties of office.² There is no procedure for reversal of an Electoral College vote and no mechanism for “undoing” a congressional declaration of the winning presidential candidate. The Twentieth Amendment to the U.S. Constitution provides that the U.S. President takes office on January 20, after swearing an oath of office contained in U.S. Const. art. II, s. 1, cl. 8. Once that has occurred, Congress must conduct an impeachment before the President may be removed from office.

The U.S. President may be removed from office after an impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. [U.S. Const., art. II, s. 4.] In an impeachment proceeding, the House of Representatives must first issue articles of impeachment outlining the alleged misconduct. Next, the Senate conducts a trial of the impeachment with a team of “managers” from the House of Representatives acting in the role of prosecutors. The trial is presided over by the Chief Justice of the U.S. Supreme Court. If two-thirds of the members of the Senate vote for conviction, the President is removed from office, with no opportunity for appeal, and is replaced by the Vice President. Impeachment is the procedure specifically established by the U.S. Constitution for removing a sitting president.

DISCUSSION

As discussed, the U.S. Constitution empowers states to determine the manner in which presidential electors are chosen. The U.S. Constitution does not provide any similar role for states after presidential election results have been certified. Thus, although the Legislature could pass legislation to prospectively modify the process under state law for choosing presidential electors, options for challenging already certified election results are likely limited to challenging such results in court.

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² The Twenty-fifth Amendment to the U.S. Constitution creates a method for removing a President who is “unable to discharge the powers and duties of his office.” However, even if a President is removed under the Twenty-fifth Amendment procedure, the Vice President takes over as acting President and there is no reversal or redetermination of the original election results.