

## Six Questions on COVID-19, the Presidential Elections, and Potentially Incapacitated Candidates

*The circumstances of the 2020 election—in particular, the COVID-19 pandemic—have raised complicated and important questions about what the law mandates in extraordinary circumstances. The following answers respond to some of the most commonly asked questions about the election, the presidential line of succession, and potentially incapacitated candidates.*

### COULD THE ELECTION BE DELAYED OR CANCELLED BECAUSE A CANDIDATE HAS CONTRACTED COVID-19?

- Only Congress can change the date of the general election.
- Under no circumstances can any president's term be extended past noon on January 20th without amending the Constitution

No, unlike the primaries, which are governed by state law and take place on different dates across the country, federal law—which only Congress can change—sets November 3rd as the date of the general election. The president and other actors have no authority to change this date because a candidate has contracted COVID-19. The Constitution also significantly limits the ability of Congress to delay choosing the next president, even if it wants to—as under no circumstance can any president's term be extended past noon on January 20th without amending the Constitution. Read our legal guidance explaining this [here](#).

### IN THE EVENT A CANDIDATE BECOMES INCAPACITATED OR DIES, CAN THEY BE REPLACED ON THE BALLOT?

- Both parties have rules in place to replace a nominee after the convention.
- State law differs on whether political parties may nominate replacement candidates, but from a practical perspective in the ongoing 2020 election, such replacement would be difficult.
- Because a vote for a presidential candidate is a vote for a slate of presidential electors, not a candidate, votes associated with a replaced candidate are likely still valid.

The national political parties, specifically the Democratic National Committee (“DNC”) and Republican National Committee (“RNC”), nominated their candidates at their respective conventions. Both parties have rules in place to replace a nominee after the convention.

The DNC has a clear [rule](#) for this situation. The 447 members of the DNC, as the entity that formally hosted the convention, would choose the new nominee. The DNC chair, currently Tom Perez, is required to consult with the

Democratic leadership in Congress and with the Democratic Governors Association. After the consultation, the chair provides a report to the DNC members, who then make the choice.

According to [Rule 9\(a\)](#) of the Rules of the Republican Party, the RNC is allowed to replace the Republican nominee for President when a vacancy arises due to death, declination, “or otherwise.” The RNC may select a replacement nominee by either re-convening the national convention, or selecting the new nominee itself. According to [Rule 1](#) of the Rules of the Republican Party, the RNC consists of 168 members — three from each state, plus three from six U.S. territories. In selecting a replacement nominee, each jurisdiction’s RNC members get to cast the same number of votes as the jurisdiction’s delegates would have been able to cast in a national convention. For example, the three RNC members from Alaska would be able to cast a total of 28 votes, since Alaska would have been entitled to send 28 delegates to a national convention. According to [Rule 9\(b\)](#) of the Rules of the Republican Party, if a jurisdiction’s RNC members disagree among themselves on which nominee to support, that jurisdiction’s votes are allocated proportionately among them. Those members may instead vote to reconvene the delegates for a new convention instead of directly filling the vacancy.

State law differs on whether political parties may nominate replacement candidates, and whether those candidates appear on ballots (either absentee or in-person ballots), when a candidate dies or is otherwise replaced late in the nomination process.

However, from a practical perspective in the ongoing 2020 election, [millions of votes](#) have already been cast. At this point in the election cycle, it will be difficult for jurisdictions to print new ballots or reprogram voting machines and go through a process of re-certifying those ballots (as required in most jurisdictions).

A vote for a presidential candidate is not counted as a vote for that particular candidate, but rather as a vote for a slate of presidential electors. If a candidate dies or is replaced, votes for the slate of electors associated with that candidate are likely still valid.

## **IF THE PARTIES DON'T REPLACE AN INCAPACITATED OR DECEASED CANDIDATE ON THE BALLOT, WHAT HAPPENS?**

- The president is chosen by the Electoral College, which is composed of electors from each state.
- Once a slate of electors is appointed, state law governs whether and how they are bound to cast their electoral votes for a specific presidential candidate.
- States vary in how these “faithless elector” laws are designed and enforced.

The president is chosen by the Electoral College, which is composed of electors from each state. Article II of the Constitution provides that each state “shall appoint” its electors for president “in such Manner as the Legislature thereof may direct.” All states have chosen to appoint their elections based on the results of popular elections.

Once a slate of electors is appointed, state law governs whether and how they are bound to cast their electoral votes for a specific presidential candidate. On July 6, 2020, the Supreme Court ruled unanimously in *Chiafalo v. Washington* that the Constitution permits states to adopt and enforce “faithless elector” laws requiring electors to cast their electoral votes for the presidential candidates to whom they are pledged.

[Thirty-three states](#) have faithless elector laws. Indiana, Minnesota, Montana, Nebraska, Nevada, Washington, Michigan, Maine, North Carolina, Iowa, Utah, Oklahoma, Colorado, and Arizona have laws that specify that, when an elector votes for a candidate other than the one to whom they are pledged, the vote is invalid and constitutes an automatic resignation from the office of elector who is then replaced. Utah has an exception to deal with the case of deceased candidates. California, New Mexico and South Carolina create a penalty for faithless electors, but votes are still counted. In the other states with faithless elector laws, there is no enforcement mechanism to ensure electors cast their electoral votes for the presidential candidates to whom they are pledged.

## **WHAT IF THERE IS A DISPUTE OVER STATE ELECTORAL COLLEGE VOTES IN CONGRESS? WHAT HAPPENS IF A CANDIDATE DIES OR BECOMES INCAPACITATED BETWEEN DEC. 14 AND JAN. 6, AFTER THE VOTES HAVE BEEN CAST BUT BEFORE CONGRESS HAS COUNTED THEM?**

- Electoral College votes are counted by a special joint session of Congress, a process directed by the Electoral Count Act (ECA).
- If disputes arise—such as competing slates of electoral votes—the two chambers vote separately on the issue, with different potential resolutions depending on the details.
- If a deceased candidate receives a majority of votes for President in the Electoral College, then at the beginning of the next term the Vice President-elect will be sworn in as President instead.

On Wednesday, January 6, 2021, at 1:00 p.m., the two chambers of Congress will meet in a special joint session to count electoral votes as directed by the Electoral Count Act (“ECA”). During this joint session, electoral vote certificates are opened and votes are officially counted in the presence of both chambers. When objections are raised to a certificate, the ECA requires the chambers to separate and vote separately on the issue. After the two chambers consider such disputes, they reconvene in the joint session to resume counting.

Ultimately, through this process, the ECA requires that:

- If there is only one submission of electoral votes from a state, Congress must count those votes unless both chambers agree to reject them for reasons specified in the statute.
- If there is more than one submission of electoral votes from a state, the question ultimately is whether the chambers agree on which slate to accept. If the chambers agree to accept a particular slate on the statutorily specified grounds, those electoral votes count. If the chambers agree to reject a particular slate, then those electoral votes do not count. If the chambers disagree as to which slate to accept, then the votes certified by “the executive of the State” are counted. This provision operates as a “fail-safe to prevent state disenfranchisement.”
- The same process applies if a candidate is incapacitated or deceased.

If a deceased candidate receives a majority of votes for President in the Electoral College, then a vacancy will exist in the Presidency at the beginning of the next term, and the Twentieth Amendment requires that the Vice President-elect be sworn in as President, instead.

There is no mechanism through which Congress may count electoral votes cast for a Vice Presidential candidate as votes for the office of President, instead.

For more details on the procedures that govern in the joint session and the rules that apply when the two chambers meet separately to consider objections, see pages 5-8 of [The Electoral Count Act & The Process of Electing a President](#).

## **WHAT HAPPENS IF A CANDIDATE DIES OR BECOMES INCAPACITATED BETWEEN JANUARY 6TH AND JAN. 20, AFTER THE JOINT SESSION OF CONGRESS WHERE A NEW PRESIDENT HAS BEEN DECLARED AND BEFORE INAGURATION?**

If the presumptive President-elect dies, the Vice President-elect gets sworn in as President, instead, under U.S. Const. amend. XX, sec. 3.

## **WHAT HAPPENS TO THE VICE PRESIDENCY AFTER A VICE PRESIDENT-ELECT IS SWORN IN AS PRESIDENT?**

Whenever a vacancy exists in the office of Vice President for any reason, the President may nominate a new Vice President, who must be confirmed by a majority in both chambers of Congress. U.S. Const. amend. XXV, sec. 2.