

Post-Election Day Scenarios

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Abstract: Confronted with likely delays in counting an unprecedented number of mail-in ballots, close vote counts in key battleground states, the prospect of allegations of election fraud, and an intensely polarized political climate, the United States faces the possibility of highly contested election results on and after November 3. This paper explores some unlikely but conceivable scenarios that could emerge, such as a state legislature's appointment of a slate of electors before the state's popular vote is fully counted, a Congress faced with two conflicting slates of electors from the same state, and the death of a presidential candidate. These [Google Slides](#) correspond to the content of this memo and might be useful for a presentation covering the material.

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Table of Contents

Table of Contents	1
Introduction	2
November 4 - December 13: Post-Election Day Scenarios	2
Scenario 1: State Legislature Appoints Electors Before Popular Vote is Certified	2
December 14 - January 6: Reporting Votes to Congress	4
Scenario 2: State Misses Deadline to Send Its Slate to Electoral College	4
Scenario 3: Faithless Electors Defect and Change Election Outcome	5
January 6 -19: Congressional Counting of Electoral Votes	5
Scenario 4: Congress Faces Two Conflicting Electoral Slates from a State	6
Scenario 5: No Candidate Receives a Majority of Electoral Votes	9
January 20: Inauguration Day	10
Scenario 6: No Clear Winner on Inauguration Day	10
Scenario 7: Judicial Intervention Determines Election Outcome	10
A Presidential Candidate Dies	11
Scenario 8: A Presidential Candidate Dies Before or After Election Day	11

Introduction

The 2020 presidential election has already emerged as one of the most hotly contested in American history. Both campaigns speak in existential terms in describing the stakes. Voters seem to agree, as considerably higher turnout is expected as compared to four years ago, even in the face of a worsening pandemic. Because of the pandemic, record numbers of voters (roughly half of overall turnout) will be casting mail ballots, requiring additional time to process and reach a final count. Polling in the final week of the election indicates close races in several key battleground states. If late-counting states prove determinative in producing a winner of the Electoral College, litigation may perhaps follow. This paper explores some of the unlikely but conceivable scenarios that could develop from a close and highly contested election and examines the guidance available to resolve these dilemmas under the primary legal authorities of the Electoral Count Act and the U.S. Constitution.

November 4 - December 13: Post-Election Day Scenarios

Scenario 1: State Legislature Appoints Electors Before Popular Vote is Certified

For presidential elections, many voters understand that the winner of the popular vote in each state will be awarded the state's electoral votes, and that the electoral votes from all states ultimately decide who becomes president. What fewer voters understand, however, is that there is some wiggle room under federal law for a state legislature to send to the Electoral College a slate of electors to support a candidate who has *not* won the state's popular vote.

The process of choosing a president through the vote of "a number of Electors" was established by [Article II of the U.S. Constitution](#) and is further governed by the [12th Amendment](#) and certain federal laws, most importantly, the Electoral Count Act of 1887, codified as [Title 3 U.S. Code Chapter 1](#). Article II 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." Thus, the U.S. Constitution grants state legislatures the power to appoint electors. Although most states have adopted state constitutions or statutes that require the state to appoint electors consistent with the popular vote in the state, which is typically certified by the state's governor, it is unclear the extent to which such state law provisions are binding or enforceable under federal law if a state legislature submits a slate of electors under a process that is arguably inconsistent with state law.

However, there are circumstances under which a state legislature may be motivated to send a slate of electors before there is an opportunity for state to determine the results of the popular vote count. An important [provision](#) of the ECA, known as the “safe harbor,” provides that if, at least six days before the Electoral College voting date, a state has resolved “any controversy” concerning the selection of its electors and has also, by then, chosen its electors, that slate of electors shall be accepted by Congress as “conclusive” and shall “govern in the counting of electoral votes....” This is the ECA text ([3 U.S.C. Section 5](#)):

§5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Thus, submitting a slate of electors by the safe harbor deadline in compliance with the associated requirements affords a state meaningful protection against the possibility that congress will reassess the validity of the slate it submits.

The [Electoral Count Act](#) (ECA) instructs the electors from each state and the District of Columbia to meet in their respective states and cast their votes for president on the first Monday after the second Wednesday in December. This year, the meeting of the Electoral College falls on December 14, 2020.

That means that for 2020, the “safe harbor” deadline is December 8. If the state has resolved “any controversy or contest” concerning the appointment of its electors and appointed a slate by December 8, that slate “shall govern.” This can be a particularly helpful advantage in the event a state submits another slate after the safe harbor deadline. To ensure safe harbor protections, however, the slate must be submitted under the state law in existence on November 3.

One possible scenario is that a state legislature appoints a slate of electors before the result of the popular vote is known. This becomes more likely in the event the vote count process drags on and approaches the December 14 meeting of the electors. It is possible that one or more states may need weeks after Election Day to determine who won the popular vote in their state, due to the time needed

to count an unprecedented number of mail votes and, potentially, to resolve legal challenges surrounding that process. If a state misses the December 8 Safe Harbor, and the December 14 meeting of the Electoral College is approaching without a conclusive vote tally, it is possible to imagine that before the legislators know for whom the people have voted, the state legislature might vote to appoint a slate of electors to meet the December 14th deadline. And if a legislature takes such a route, it is reasonable to expect it will choose electors to support the presidential candidate who is from the same political party as the state legislature's majority. In an interview with [The Atlantic magazine](#), the Pennsylvania Republican Party chairman acknowledged discussing that option with the Trump national campaign. Such a scenario would likely undermine the perceived legitimacy of the election results and could weaken faith in our nation's democracy.

December 14 - January 6: Reporting Votes to Congress

Scenario 2: State Misses Deadline to Send Its Slate to Electoral College

If a state fails to put forth a slate of electors by the December 8 deadline to claim the safe harbor, the slate will lose protection which would make it more likely to be validated by Congress. But if no slates have been submitted by the safe harbor date, the state would still have until December 14 — the date of the meeting of the Electoral College — to put forth its slate. In some of the key battleground states, this additional time may be sufficient to finish counting the popular vote and to resolve any legal disputes.

But if it is not enough time, and a state fails to meet the December 14 deadline, the consequences could be more significant. According to Ohio State University Moritz College of Law Professor Edward “Ned” Foley, Congress is likely to ignore any electoral vote activities that happen in the states after December 14. This is because both the [Constitution](#) and the ECA require that the Electors of every state meet on December 14 to cast their votes. The ECA ([3 USC §12](#)) does, however, contemplate the possibility that a state might not have submitted a certificate to the federal government by that date, and instructs Congress, on the fourth Wednesday of December (which this year is December 23), to “request, by the most expeditious method available,” that any delinquent state’s secretary of state send to Congress the certificate and list of electors by registered mail “immediately.”

[The ECA](#) directs Congress to convene in a Joint Session on January 6 and count the electoral votes. If a state has failed to submit its slate by a date Congress is willing to accept, Congress will have to agree on how to satisfy the Constitution’s requirement that the winning presidential candidate

receive a “majority of the whole number of Electors appointed.” (U. S. Const. art. II, § 1). With 538 electoral votes, a majority is 270. But if fewer than 538 electors have been validated, the law is not clear as to whether a winner still needs 270 votes or just a majority of the reduced total number of electors.

Scenario 3: Faithless Electors Defect and Change Election Outcome

Another potential complication for the Electoral College is the possibility of “faithless electors”—electors who cast their votes for a candidate other than the one to whom they are pledged. Imagine, for example, that one presidential candidate has won the popular vote and the other candidate appears poised to win the Electoral College vote. But when the Electoral College meets on December 14, some number of electors pledged to the candidate poised to win the electoral vote cast their votes instead for the candidate who won the popular vote.

Such Electoral College “defections” are not unprecedented, though in most elections they have involved only one elector at a time. In 1808, there were six so-called “faithless electors,” and in 2016, there was a record number of seven. In none of these elections did the defections change the outcome of the election. [Reasons](#) given for the 2016 defections included support for party candidates that did not make it to the general election (such as Bernie Sanders and John Kasich) and an attempt to block the election of Donald Trump.

A July 2020 U.S. Supreme Court [decision](#) affirmed that states have the power to pass laws that require their electors to vote for the candidate they promised to support when they were nominated as an elector. Some [states](#) have exercised the power to control their electors by passing laws imposing penalties on faithless electors. In [North Carolina](#), defection is punishable by a [\\$500-1000](#) penalty, cancelation of the elector’s vote, and replacement of the elector. In [Michigan](#), there is no penalty, but the vote cast by the faithless elector is cancelled and the elector is replaced. Other swing states, such as Wisconsin, Florida, and [Pennsylvania](#), have no punishment for faithless electors and count their votes as cast.

January 6 -19: Congressional Counting of Electoral Votes

Typically, after the popular vote in a state has been counted and the winner of the presidential race in that state determined, the slate of electors pledged to that candidate meets on December 14 and casts its votes. [Section 6 of the ECA](#) calls for the governor to send a certificate to the Archivist indicating who the state’s electors are and to provide certificates to the electors for conveying their votes to Congress. The electors indicate their votes on these certificates and deliver them to the

President of the Senate. On January 6, at 1 pm, Congress opens those certificates and counts those votes. But what happens if a state sends more than one certificate of votes?

Scenario 4: Congress Faces Two Conflicting Electoral Slates from a State

There are numerous ways in which Congress may find itself facing conflicting slates of electors for its January 6 meeting. The most widely discussed of these possibilities is that the governor of a state certifies one electoral slate and the state legislature certifies another. For example, if a state has not counted its popular vote by the safe harbor deadline of December 8, the legislature might decide to certify a slate of electors in order to meet the safe harbor deadline. The governor, in reaction, might submit a certificate for an alternate slate which he or she believes will reflect the actual popular vote count. Of the six battleground states for the 2020 election, all have Republican-controlled legislatures, and four have Democratic governors (Michigan, North Carolina, Pennsylvania, and Wisconsin). Any of these governors could use their power to certify a different, conflicting slate of electors from the slate certified by the state legislature. In this scenario, the state would put forth two different slates of electors—one from the Democratic governor and one from the Republican legislature.

There is also the possibility that a state’s governor could certify two different slates at different times, or that the governor could certify one slate and the state Secretary of State validate another. The sources of these conflicting slates are relevant to how Congress determines which to validate. [Section 15 of the Electoral Count Act](#) requires the President of the Senate to open “all the certificates and papers purporting to be certificates of the electoral votes.” But Section 15 of the ECA also states that if the House and Senate cannot agree on which slate to accept, “the votes of the electors whose appointment shall have been certified by the executive of the state, under the seal thereof, shall be counted.”

Legal Authority and Context

In accordance with Section 15 of the Electoral Count Act, after the electors have delivered their certificates of vote to the President of the Senate, Congress meets in a joint session on January 6 at 1:00 pm to count them. The event takes place in the House chamber and, as President of the Senate, the Vice President of the United States serves as the Presiding Officer. The ECA specifies that each state’s electoral certificate is “opened by the President of the Senate” and handed to four tellers—two elected by the House and two elected by the Senate. The certificates are taken one state at a time, in alphabetical order. The President of the Senate then announces the certificates and “call for objections, if any.”

Scholars have different interpretations of the role the ECA gives to the President of the Senate. Many scholars, including Foley, view the President of the Senate's role to be merely ceremonial, particularly in light of the overall intention of the ECA to weaken Congressional power in selecting electors. But some scholars who support a kind of textualist theory of interpretation, similar to that advocated by Justice Scalia, contend that the President of the Senate has the authority to announce which of two conflicting submissions has Safe Harbor status in his judgment, forcing *both* chambers, voting separately, to overrule his determination.

If there is an objection, [Section 15 of the ECA](#) requires that one member from the House and one from the Senate submit that objection in writing and that the opening of the electoral certificates is suspended while the House and Senate retreat to their separate chambers to discuss and decide which slate should be counted. [Section 15 of the ECA](#) prohibits Congress from proceeding to the next state until "objections previously made" have been "finally disposed of." If both chambers agree on which slate to verify, the agreed upon slate will be verified and counted.

But if the chambers disagree, matters get complicated, and if the two chambers are led by different parties, the likelihood of disagreement increases. For 2021, a new Congress will be seated on January 3, and there is always the possibility that both chambers will be controlled by the same party. However, in the event that Republicans continue to hold the majority in the Senate and Democrats in the House, the potential conflicts over how the Electoral Count Act applies here could be difficult to resolve. This makes the ability of a state to submit its electoral slate before the December 8 safe harbor deadline especially important.

If there is a dispute over a slate appointed by the safe harbor deadline, or if more than one slate is appointed by the deadline, and if the House and Senate "disagree" over which slate to count, [Section 15 of the ECA](#) states, "the votes of the electors whose appointment shall have been certified by the executive of the state, under the seal thereof, shall be counted." This section gives preference to the slate signed by the state's governor.

But, Section 15 of the ECA *also* states that, if only one of two or more conflicting slates meets the safe harbor deadline, that slate will govern. A difficult scenario arises where the slate submitted by the safe harbor deadline is *not* the one certified by the governor, and the slate submitted *after* the safe harbor *is* certified by the governor and based on the result of the popular vote count. Given the intensity of this election and its potential for a close outcome and a delay in counting mail-in votes, many would likely argue that the electoral slate submitted *after* the safe harbor deadline is the more accurate reflection of the popular vote in that state, and therefore the one that should count. But the ECA suggests preference in this case goes to the slate submitted before the safe harbor deadline.

And what if both slates were submitted by the safe harbor deadline? One [prominent legal interpretation](#), supported by Professor Foley and other legal scholars, relies on Section 15 of the ECA that states, if a state submits multiple electoral slates and both meet the safe harbor deadline, the slate submitted by the governor, the chief officer of the state, should prevail. This will almost certainly be the argument put forward by the party whose presidential candidate is favored by the governor's slate. But some scholars have posited alternative interpretations of how the ECA directs Congress to select among competing slates. One such [alternative interpretation](#) contends that a governor's signature does not render one slate of electors as superior to any other. Under this interpretation, if two or more slates are submitted, then all of them must be thrown out. In this scenario, Congress would again face the question of what is the denominator when determining how many electors constitute "a majority"—is it 270? Or is it a majority of 538 minus the number of electors from any state that has not submitted a slate or has had their slate invalidated? And still another scholar, John Fortier, director of governmental studies at the Bipartisan Policy Center, has suggested that Congress might choose to prioritize the electoral slate submitted first or the one submitted by an authority which Congress deems most "official."

An allegation by Congress that a slate resulted from fraud presents yet another scenario that would be difficult to navigate. The ECA provides Congress with only brief and vague authority to reject a slate of electors if it believes that the slate is the result of fraudulent activities. Section 15 states that "the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified." An accusation that an elector's vote was not "regularly given" implies the possibility that the vote was given for reasons of bribery, fraud, or corruption.

According to Foley, this provision is generally understood as pertaining to fraud in the vote of the electors themselves, as a consequence of bribery, for example, and is analytically different from fraud in the casting or counting of the popular vote, which determines the appointment of the electors. However, allegations of fraud could nonetheless come into play during the 2020 election. President Trump has repeatedly stated publicly that he believes the election is "rigged" and that the use of mail-in ballots is a "scam." If members of Congress were to attempt to disqualify electoral slates as fraudulent because the slates were chosen based on a vote count that included mail-in ballots, then the language of Section 15 of ECA would be the only guidance Congress has to refer to in seeking to address the claim.

Professor Foley [outlines](#) a potential scenario where the Senate and House fail to agree on whether to verify a slate, due to fraud or any other cause of disagreement. In such scenario, the presiding officer of the joint session of Congress attempts to settle the impasse by unilaterally deciding the resolution of the dispute. The Speaker of the House, led by the opposing political party, moves to

block the presiding officer by expelling all Senators from the House chamber. In response, the presiding officer would likely attempt to reconvene the joint session in the Senate chambers. In that case, however, Democrats would likely refuse to participate, including their elected House tellers. The presiding officer would likely claim the disputed slate had been resolved by the participating congressmen (Republicans, in this scenario) so the counting could lawfully continue. The opposing party would likely claim that the disputed slate had not been properly resolved and that any claim of a final count is illegitimate because the ECA requires that each state's electoral certificate, after being opened by the President of the Senate, be handed to the four tellers—two elected by the House and two elected by the Senate, to tally the vote. The Democrats would argue that the absence of the house tellers invalidated the vote in the Senate.

Other developments could also induce chaos. It is possible, for example, that after extensive negotiations regarding two conflicting slates, the two chambers agree to throw out both slates. Congress would again face the dilemma of how to establish when a candidate has achieved “a majority of the electors,” as outlined in the 12th Amendment. Are the electoral votes of the state whose slate has been thrown out subtracted from the 538 total, and whoever has the majority of that *smaller* number wins the presidency? Or must one candidate still win 270 votes in order to secure a winning majority? Without clear guidance in the ECA or the constitution, Congress may find there is no clear authority on how to proceed—leading to what will likely be an intensely partisan clash and a clamor for resolution outside Congress, such as in the courts.

Scenario 5: No Candidate Receives a Majority of Electoral Votes

Another contentious scenario that could develop on January 6 or in the lead up to Inauguration Day is if no candidate has secured a majority of electoral votes. The 12th Amendment explicitly requires the winning candidate for president receive a majority of “Electors appointed.” But a close election could produce a tie in electoral votes, or a third party candidate could divide the votes such that no candidate can reach a majority. Or, a state's electors could be rejected and Congress concludes that the winning candidate must still secure a majority of 538 electoral votes.

The 12th Amendment provides that, “if no person shall have a majority,” the U.S. House of Representatives is responsible for choosing the President through a special procedure in which each state delegation is given one vote. This procedure is sometimes referred to as the “contingent election procedure.” The District of Columbia is not included as a state in this process. It is possible that the party with the majority of House *members* does not control the majority of *state delegations*. This is possible because large states, such as California with its 53 members, most of them Democrats, would have just one vote, the same as less populous states, such as Montana, with one member (a Republican). In the current House, for instance, Republicans control 26 state delegations and

Democrats control 23, with Pennsylvania's split 9-9. If this continues to be the case after the new Congress is seated on January 3, the Republicans would have the majority of votes in the House contingent election.

Additionally, under the contingent election procedure, the U.S. Senate is responsible for electing a Vice President, using the standard Senate vote process.

Special House Vote Results in Tie

One potential outcome of the contingent election procedures in the House is a 25 - 25 tie. In this situation, and assuming the Senate has successfully nominated a Vice President, *that* person, under the laws of succession, would become *acting* President until the House breaks its tie to determine a president. In such a scenario, however, one could imagine the minority party in the Senate refusing to show up in order to deny the required quorum to elect a Vice President. If that move was successful, the laws of succession would again call for the Speaker of the House to be certified to serve as the interim president. In this event the Speaker would need to resign both the Speakership and House membership.

January 20: Inauguration Day

Scenario 6: No Clear Winner on Inauguration Day

If the Electoral College has not confirmed an undisputed winner by inauguration day, the 20th Amendment to the Constitution and a 1947 [law](#) governing succession [call](#) for an acting president. In this instance, [3 U.S. Code §19](#) gives the Speaker of the House the opportunity to resign as Speaker and assume the role of acting president.

A more difficult scenario ensues if each chamber of Congress declares a different candidate as the winner and both are poised for inauguration on January 20. Who gets sworn in and who does the military respond to as commander-in-chief? According to Foley, a judicial decree is [more likely](#) in this case, as the practical urgency to determine the winner is obvious. A court determination would help the military decide who gets access to the nuclear codes and other institutions decide who to acknowledge as the chief executive officer of the nation.

Scenario 7: Judicial Intervention Determines Election Outcome

Both Democrats and Republicans are already staffing up for the possibility of protracted legal battles, as the prospect of judicial intervention in determining the victor of the presidential election appears increasingly likely. In late September, President Trump [stated](#) he thinks the election “will end up in the Supreme Court.” The U.S. Supreme Court has intervened before, in the deeply contested 2000 presidential election, and it came under [considerable criticism](#) for its perceived partisanship. And yet, it could play a decisive role once again.

The recent passing of Justice Ruth Bader Ginsburg and subsequent nomination by President Trump of Judge Amy Coney Barrett to the U.S. Supreme Court have intensified concern that the judiciary will become the decisive battleground between the two parties. In a recent U.S. Senate Judiciary Committee questionnaire, and during her confirmation hearing, Judge Barrett [refused](#) to pledge to recuse herself from any deliberation over the 2020 election that might come before the Supreme Court.

As Foley [argues](#), if legal and constitutional uncertainty create a question about who the winner is that remains unresolved on inauguration day, January 20, a ruling from the U.S. Supreme Court may be essential. But this is a double edged sword. On one other hand, if two candidates assert the right to be inaugurated on January 20, the country might look to the Court to settle the matter peacefully. The court could weigh in on a variety of matters regarding Congress's role in verifying the electoral count. For example, there is the initial question of whether the Electoral Count Act is constitutional. Assuming it is, the court might also clarify some of the ambiguous provisions of the ECA.

Court intervention could result in a wide-scale perception that the judiciary has “stolen” the election or, if the Court’s decision contravenes the popular vote, Americans’ faith in our democratic system could be irrevocably harmed. But what is the alternative? The Court could balk at intervening, citing the [Political Question Doctrine](#) which requires courts to refrain from settling political disputes. Such lack of guidance could equally result in chaos, violence, and/or military control, and also undermine Americans’ faith in our democracy.

A Presidential Candidate Dies

Scenario 8: A Presidential Candidate Dies Before or After Election Day

Before Election Day

Now, add to all this the possibility that a presidential candidate dies before taking office. The ages of both candidates for president this year put them at a higher risk of mortality, especially as the deadly COVID-19 pandemic continues to spread. Both candidates' age groups have roughly an [11% mortality rate](#) from COVID-19. These factors force the country to contemplate a scenario where a presidential candidate or a president-elect, whether it be Trump or Biden, could die before taking office.

The major political parties each have rules for what happens when their candidate dies before Election Day. [Rule 9](#) of the the 2016 Rules of the Republican Party states that, if a Republican candidate for president or vice president leaves the race due to “death, declination, or otherwise” after the national convention, the Republican National Committee (RNC) has the authority to fill a vacancy by a majority vote of its 168 members or by reconvening the national convention. For the Democrats, the [procedure](#) calls for the Democratic National Committee (DNC) chair to consult with Democratic leadership in Congress before reporting to the 447 members of the DNC who choose the new nominee.

As a result, the [best-case scenario](#) for either party is that the party is able to unify around a single replacement candidate. This might be difficult given that the rules allow splits even within states, if electors are not able to agree on a single candidate. Regardless, all the [state deadlines](#) to put a candidate's name on the ballot have already passed, so it is unlikely that a replacement candidate's name could appear on any ballots. The RNC or DNC might try to [take this battle to court](#) to ensure that their chosen replacement candidate gets on the ballot. But even if they succeeded, it is surely too close to the election to allow states time to print revised ballots, especially given the influx of mail-in voting. Thus, no matter who the committees choose, it is most likely that the deceased candidate's name would remain on the ballot. Effectively, then, a vote for the candidate whose name is on the ballot would be a vote for that party's slate of electors to make the final decision.

Another difficult dilemma could develop if this slate of electors is not able to agree on a candidate, whether on a state or national level. The result could be that none of the top presidential candidates is able to get a majority of the electoral votes. This becomes even more likely if some state laws force electors to cast their votes for an incapacitated candidate. In this event, pursuant to the [12th Amendment](#), the House would then have the power to choose a president following the contingent election procedure.

After Election Day

And what if a candidate dies after Election Day but before Inauguration Day? One scenario is that the candidate dies sometime between Election Day and the December 14th meeting of the

electors. Twenty nine states and the District of Columbia require, by [state law](#), that electors vote for the candidate who wins the popular vote in the state. It is likely that, in this situation, electors would choose to vote for the new candidate that their committee has selected. However, it is unclear whether that move would be legal. The U.S. Supreme Court addressed this in its [Chiafalo et al v. Washington](#) decision earlier this year, ruling that states can legally bind electors to support the winner of the state's popular vote. As Justice Elena Kagan pointed out in her majority opinion, however, the court failed to address whether electors were still legally bound to vote for the incapacitated candidate. Most likely, electors would vote for the substitute candidate chosen by the party and endure any sanctions that might result from such a decision.

If a candidate dies between December 14 and January 6, the matter gets resolved by Congress when it meets, as per the [Electoral Count Act](#), in a special joint session to count the electoral votes.

Finally, if a candidate is declared the winner on January 6 but dies between January 6 and Inauguration Day, the Vice President-elect would be sworn in as president, under Section 3 of the [20th Amendment](#) of the Constitution. He or she would then need to nominate a new Vice President to be confirmed by a majority of both chambers of Congress, under Section 2 of the [25th Amendment](#).