

## The President Cannot Cancel or Postpone the General Election

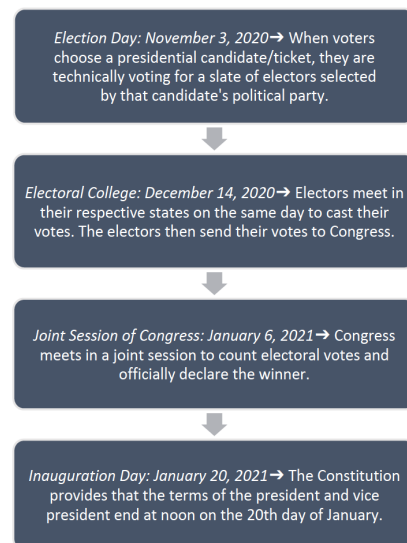
Unlike the primaries, which are governed by state law and take place on different dates across the country, federal law—which only Congress can change—sets November 3rd as the date of the general election. The president has no authority to change this date. The Constitution also significantly limits 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.

### THE U.S. CONSTITUTION AND FEDERAL LAW REQUIRE THAT THE ELECTION BE COMPLETED BY EARLY JANUARY

Presidential elections in the United States are governed by a combination of the U.S. Constitution and federal, state, and local laws. The overall timing of the general presidential election is governed primarily by federal law, but also constrained by the Constitution.<sup>1</sup> The actual mechanics of conducting the election are governed primarily by state and local law.

The president is technically chosen by the Electoral College, which is composed of electors from each state.<sup>2</sup> The Constitution provides that each state “shall appoint” its electors for president “in such Manner as the Legislature thereof may direct.” U.S. Const. art. II, § 1, cl. 2. That means that the fifty states and the District of Columbia have the ability, through their legislatures, to decide how to choose the electors who will participate in the Electoral College. All states have chosen to do so based on the popular vote—in other words, whichever candidate wins the most votes in the state on Election Day generally also wins the state’s electors.<sup>3</sup>

The Constitution gives Congress the power to “determine the Time of chusing the Electors.” U.S. Const. art. II, § 1, cl. 4. As set forth in the Electoral Count Act, Congress requires that all states appoint their electors on the Tuesday after the first Monday in November. See 3 U.S.C. § 1. Thus, federal law requires that the general presidential election be held this year on November 3, 2020.<sup>4</sup>



<sup>1</sup> See the Appendix for a more detailed timeline.

<sup>2</sup> The number of electors for each state is determined by adding the number of Senators and Representatives that the state has in Congress. See U.S. Const. art. II, § 1, cl. 2.

<sup>3</sup> See Thomas H. Neale, *The Electoral College: How It Works in Contemporary Presidential Elections*, Congressional Research Service (May 15, 2017). All but two states use a winner-take-all method of apportioning electoral votes. Nebraska and Maine appoint electors by congressional district (the winner of the popular vote in each district gets that district’s electoral vote), with the remaining two electoral votes (one for each Senator) going to the winner of the statewide vote.

<sup>4</sup> That does not mean that states cannot allow for early voting, for example, as many do, or that states cannot continue to count votes after November 3rd. Rather, it means that, pursuant to the Electoral Count Act, the election must be held (and the casting of votes generally must be completed) on November 3rd. Note, however, that the statute also provides: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” 3 U.S.C. § 2 (emphasis added). This provision has rarely been invoked, but it does suggest congressional approval for some

The Electoral Count Act also requires that the electors meet in their respective states on the Monday after the second Wednesday in December (in this case, December 14, 2020) to officially cast their votes. See 3 U.S.C. § 7; see also U.S. Const. art. II, § 1, cl. 4 (requiring that all electors vote on the same day chosen by Congress). Those votes are then sent to Congress, which is required by law to meet in a joint session of the Senate and the House of Representatives on January 6th to officially count them.<sup>5</sup> See 3 U.S.C. § 15.

Although, in theory, Congress could change some of these dates, the Constitution limits the president's term to four years and requires that the term end "at noon on 20th day of January." See U.S. Const. art. II, § 1, cl. 1 & amend. XX, § 1. Accordingly, all steps in the election—including voting, recounts, legal contests, and importantly, the meeting of the Electoral College—must be concluded in time for the newly elected or re-elected president to be sworn into office on January 20, 2021.<sup>6</sup>

## THE PRESIDENT OF THE UNITED STATES CANNOT CANCEL OR POSTPONE THE ELECTION

The general election is governed by a combination of the U.S. Constitution, federal law, and state and local laws. None of these gives the president any authority to change the date of the election or to extend the current presidential term past January 20th.

Under our constitutional system, the president has only the powers set forth in the Constitution or delegated to him by Congress. Neither the Constitution nor any statute passed by Congress gives the president the authority to cancel or postpone an election, even in an emergency. The powers that Congress has delegated to the president and various executive agencies to respond to emergencies,<sup>7</sup> including public health crises, are limited. The president has no "plenary" or absolute power either generally or during the emergencies covered by these laws.<sup>8</sup>

Nor does the president have any form of *unwritten* authority to order an election canceled or postponed.<sup>9</sup> The general power to order or enact measures to protect the health, safety, and welfare of the people is vested

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form of remedy (chosen by state legislatures) should a state fail to conclude its voting on November 3rd. The narrow circumstances in which this provision might become relevant are beyond the scope of this paper.

<sup>5</sup> The Congress that meets in joint session on January 6th is the newly elected Congress that takes office on January 3rd. See U.S. Const. amend. XX, § 1.

<sup>6</sup> If the election somehow remains incomplete and there is no president-elect (or vice-president-elect) decided by noon on January 20th, federal law provides that the vacancy shall be filled by an "acting president" (with the Speaker of the House first in line, followed by the president pro tempore of the Senate). See 3 U.S.C. § 19; U.S. Const. amend. XX, § 3. An incomplete election does not mean that the previous president stays in office.

<sup>7</sup> See generally Brennan Center for Justice, *A Guide to Emergency Powers and Their Use* (Sept. 4, 2019) (enumerating presidential powers set forth in emergency statutes). We do not address in this paper the ways in which a president might exercise emergency powers—lawfully or not—to implement measures that could have the effect of disrupting or interfering with the manner in which the general election is conducted in one or more states.

<sup>8</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("The President's authority to act, as with the exercise of any governmental power, must stem either from an act of Congress or from the Constitution itself.") (internal quotation marks omitted).

<sup>9</sup> The president's powers regarding foreign affairs and to command the military, during wartime or otherwise, do not include the power to cancel, suspend, or otherwise delay elections. It is well-settled that the president generally does not command domestic affairs even during war. See *Youngstown*, 343 U.S. at 643-44, 650 (Jackson, J., concurring) (the president is Commander in Chief of the military but not "of the country, its industries and its inhabitants," and other than suspending habeas corpus, the Constitution includes "no express provision for exercise of extraordinary [presidential] authority because of a crisis."). Nor is there any precedent in this country for suspending presidential elections. In fact, this country held

primarily in state governments.<sup>10</sup> See U.S. Const. amend. X.<sup>11</sup> Congress also has authority where interstate commerce is concerned. See U.S. Const. art. I, § 8. The president, on the other hand, generally lacks this kind of power—often referred to as general “police” powers. The president therefore generally does not have the power to manage the conduct of private or public business, the movement of people, or other affairs within a state.

Accordingly, the president has neither express nor inherent power that would allow him to order that an election be canceled or postponed.

### **About the National Task Force on Election Crises**

*The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The mission of the nonpartisan National Task Force on Election Crises is to ensure a free and fair 2020 presidential election by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except an election that is free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member’s point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>.*

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presidential elections during the War of 1812, the Civil War (1864), World War II (1944), the Vietnam War (1964, 1968, 1972), and the wars in Iraq and Afghanistan (2004, 2008, 2012, 2016).

<sup>10</sup> See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (“Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, . . . matter[s] of local concern . . . the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons . . .”) (internal citations and quotation marks omitted).

<sup>11</sup> The full text of the Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

## APPENDIX: PRESIDENTIAL ELECTION TIMELINE

