



Postponing Federal Elections and the COVID-19 Pandemic: Legal Considerations

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On March 13, 2020, Louisiana’s Governor invoked emergency powers to [announce](#) that the state’s presidential primary election, previously scheduled for April 4, would be postponed for more than two months as part of the state’s response to the Coronavirus Disease 2019 (COVID-19) pandemic. [Other states](#) soon began exploring similar changes, prompting election officials, candidates, and voters to prepare for disruptions that could persist through November’s general election.

This Sidebar reviews the legal provisions that would constrain any efforts to delay or cancel federal elections during a public health crisis or other national emergency. The first part reviews laws pertaining to presidential elections, and the second part reviews laws relevant to congressional elections.

Presidential Elections

Presidential selection and succession is best understood as a three-step process, consisting of (1) the nomination of candidates by political parties; (2) the appointment of electors; and (3) balloting by electors (and, if necessary, the House of Representatives). Each step in this process is governed by a different constellation of state, federal, and constitutional rules, which allocate—or foreclose—discretion to alter the schedule to different actors.

Presidential Primaries

The Constitution makes no mention of the primary elections that the major parties have adopted in most states to select delegates to the national conventions where presidential candidates are formally nominated. Accordingly, it is [largely](#) the states’ prerogative, in coordination with the political parties, to set the schedule and method of these contests. Some states schedule presidential primaries according to parochial interests. [New Hampshire](#) law, for example, requires that state’s presidential primary to be held at least seven days in advance of any other state’s primary to preserve its first-in-the-nation status. Other states defer to the parties. In [South Carolina](#), state law provides that a political party may set the date and hours that polls will be open for a presidential preference primary election by providing written notice to the State Election Commission at least 90 days before the preferred date. In [other states](#), a party may choose to forgo holding primary elections altogether.

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If a party does choose to hold a presidential primary, state law may allocate the powers and procedures for modifying, postponing, or cancelling the election during an emergency. According to the [National Conference of State Legislatures](#), at least 45 states have laws that address Election Day emergencies. In [some states](#), the governor is explicitly granted the power by statute to delay or reschedule an election during an emergency. [Other states](#) vest special powers in the state's chief election official. Where state emergency laws are silent or ambiguous about the authority to postpone elections, courts may be asked to settle disputes. On the eve of Ohio's 2020 presidential primary, after the state's governor concluded he lacked emergency authority to postpone the election in response to COVID-19 concerns, a local state court [refused](#) to delay the election on its own authority. The state's Department of Health Director then [ordered](#) the closing of all polling locations under the authority of a law permitting her to "make special orders ... for preventing the spread of contagious or infectious diseases." In response, Ohio's Secretary of State rescheduled the primary for June 2, which has sparked a [new round](#) of litigation as plaintiffs argue that only the state's legislature can set an election date.

In some cases, states have adopted other mechanisms to protect the legitimacy of elections that may have been disrupted by a disaster. In [New York](#), for example, if an emergency causes less than 25 percent of registered voters to vote during an election, a second day of voting is to be held not more than 20 days after the original date. States also may act through the regular legislative process [during an emergency](#) to reschedule an election or enlarge the governor's powers.

Selection of Presidential Electors

Similar to its silence about presidential primary elections, the Constitution does not require a general election for President. While [Representatives](#) and [Senators](#) must be elected "by the People," the Constitution provides that the President is chosen by [electors](#) appointed at the direction of each state's legislature. Thus, while every state [currently](#) chooses its electors through popular election—where votes cast for presidential candidates are [counted](#) as votes for the electors pledged to those candidates—a state legislature could decide to select electors itself if it determined elections were infeasible. Indeed, it was [common](#) for legislatures to select electors without popular elections until the mid-1800s.

Whatever method a state chooses, the Constitution [empowers](#) Congress to set the date by which states must choose their electors. Since [1845](#), Congress has required states to appoint presidential electors on the Tuesday after the first Monday in November, which represents the date by which voters in every state must cast their ballot for President. However, the statute does contemplate that some states may not be able to comply with this deadline. By [law](#), "[w]henver any State has held an election for the purpose of choosing electors," but fails to "make a choice on the day prescribed by law," the state legislature may establish the manner for appointing electors on a subsequent date. It is not clear whether Congress intended the same flexibility to occur where a state was unable to hold its scheduled election.

Unlike the practice of some states that allow the Governor to postpone an election during emergencies, neither the Constitution nor Congress provides any similar power to the President or other federal officials to change this date outside of Congress's regular legislative process. Congress has enacted more than 100 [statutes](#) identifying special powers that the President may exercise during a national emergency, but none include the power to postpone or cancel any state's chosen method of appointing presidential Electors. During [previous episodes](#) of war, pandemic, or other deadly crises in American history, the presidential election date has never been changed in response to an emergency.

Selection of the President

The [Constitution](#) empowers Congress to determine the date the electors will cast their vote for President from their [home states](#). Consistent with that authority, Congress has [directed](#) electors to submit their votes on "the first Monday after the second Wednesday in December." Only Congress may change this date by

enacting a new statute. Anticipating that there may occasionally be delays, [federal law](#) instructs officials to send urgent requests to states that have not submitted their electors' votes by the fourth Wednesday in December.

Congress has [provided](#) that the electors' votes are to be tabulated on the sixth day of January, though occasionally it has chosen [other dates](#) in early January. To be elected President, a candidate must receive votes from a majority of the appointed electors. If no candidate receives this majority, whether because the vote is divided among multiple candidates or because a decisive number of electors were not able to submit their votes in time, the [Twelfth Amendment](#) requires the contest to be decided by the House of Representatives. Each state delegation casts one vote; members from at least two-thirds of the states must participate for there to be a quorum; and a winner must receive votes from a majority of all states.

The Constitution provides that each term for Members of Congress expires on the [third day of January](#). Thus, in the event of a catastrophic emergency that prevented a significant number of states from transmitting the votes of electors *and* from holding congressional elections, there could be no body on the prescribed day of January 6th to choose the new President. In such a scenario, the duty could fall to the Senate. As a "[continuing body](#)," two-thirds of the Senate's members remain in office even if elections do not occur in a given year. Under the [Twelfth Amendment](#), the Senate may choose the Vice President-elect. If the House of Representatives is not able to choose a President, then the Vice President-elect assumes that office.

Under the [Twentieth Amendment](#), the incumbent President's term ends at noon on January 20th. There are no provisions of law permitting a President to stay in office after this date, even in the event of a national emergency, short of the ratification of a new constitutional amendment. If none of the other avenues for selecting a new President have been successful, the vacancy would be filled according to the prescribed [rules of succession](#). If there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall act as President. If there is no Speaker, or if the Speaker otherwise fails to qualify as Acting President, then the President pro tempore of the Senate shall act as President.

Congressional Elections

The Constitution [empowers](#) state legislatures to schedule congressional elections in the first instance, though Congress can—and has chosen to—override states' preferences. By [statute](#), congressional elections are held on the Tuesday after the first Monday in November—the same day that states are to appoint presidential electors every four years. But recognizing that vacancies may arise due to the failure to elect a Member of Congress at the time prescribed by law, Congress has [deferred](#) to states to schedule elections to fill such vacancies according to their own laws.

As an alternative to postponing an election, in some circumstances a state might seek to avoid an anticipated disruption by moving elections earlier on the calendar. The Supreme Court, however, has [held](#) that while states may allow voters to cast ballots before Election Day during an early voting period, a federal election cannot be conclusively decided before Congress's scheduled date.

[Courts](#) have divided on their inherent authority to prolong or postpone voting hours in response to irregularities. The judiciary is more likely to intervene when the disruption is [so severe](#) that adhering to the regular election schedule would violate voters' constitutional rights to equal protection or due process.

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