

Yet another unforeseen event in 2020. Can a Democrat-controlled Congress elect the next Republican President? Maybe.

The news that President Trump and First Lady Melania Trump have tested positive for Covid-19 has immediately raised questions concerning the course of the election and what it means for the peaceful transition of power in the United States. The most obvious questions that come to mind involve a number of different scenarios that depend on President Trump's (and for that matter candidate Biden's) health and ability in assuming the powers and duties as President of the United States before, during and (if Trump wins) after the election.

Ordinary Succession of the US President

First, the simplest case before the election. If President Trump becomes debilitated and unable to function as President, Article II §1 and the 25th Amendment of the United States Constitution provide that the powers and duties shall be assumed by the Vice President. In the remote possibility that the Vice President is also unable to hold the office, the order of succession would be: Speaker of the House (Rep. Pelosi, D. CA), President Pro Tempore of the Senate (Sen. Grassley, R. IA), Secretary of State (Pompeo), Secretary of the Treasury (Mnuchin), Secretary of Defense (Esper), and so on going down the line of cabinet officers in the order in which their agencies were created. Query whether an unconfirmed Acting Cabinet Secretary (which has not been an infrequent situation during the Trump administration) would qualify, although practically speaking, that's more of an academic question given the extremely remote possibility.

The Electoral College (again)

As the world learned in 2016 the US Presidential candidate with the most popular votes does not necessarily win the office. Conversely, the less popular Presidential candidate (in absolute votes) can indeed win the presidency.

When Americans vote for president, they are not voting directly for the candidate of their choice. Rather, they are actually voting for people whose names they often do not know. These are members of that peculiar American institution called the Electoral College.

Article II §1 of the US Constitution instructs that, "Each state shall appoint, in a 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 Twelfth Amendment to the US Constitution further sets forth the electors' voting procedures, which among other things provides that in the absence of a candidate with a majority vote in the Electoral College, the House of Representatives from among the three candidates with the most votes shall choose by ballot, the next President. But in choosing the President, the state representative delegations shall have only one vote, meaning a majority of 26 state delegations in the House are needed to win.

Members of the Electoral College are selected by each state based on the popular vote. Each state has its own mechanism to ensure that the electors bindingly vote for the presidential candidate that has won the popular vote in that state. The Electoral College currently comprises 538 members. The District of Columbia is also allocated three electors. There are currently 435 members of the U.S. House of Representatives. Adding up the 100 senators from the 50 states brings the total of electors to 538.

Other than the most straight-forward case of ordinary succession, the formalities of electing the President of the United States must involve the Electoral College and the intersection of federal and state law governing that process.

Removal of the President due to death or resignation – not without its own complications

While most attention will be focused on the electoral process and the role of the Electoral College, even the above scenario is not without potential complications. The 25th Amendment of the US Constitution provides that in "case of the removal of the President from office or of his death or resignation, the Vice President shall become President." Absent removal, death, or resignation, however, Section 3 of the 25th Amendment further provides that the President himself must transmit a written declaration that he is unable to discharge the powers and duties of his office. The written declaration must be transmitted to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. If the President is alive but severely debilitated, the question is whether he will voluntarily admit to such a debility and hand the reigns of the office to the Vice President.

In the alternative, if the President is unable or unwilling to transmit such a written declaration, then the 25th Amendment under Section 4 provides that the Vice President and a majority of the cabinet heads may transmit to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, at which time the Vice President shall immediately assume the powers and duties of the office of Acting President. It would be an extraordinary event to say the least if this were to happen, but one can envisage a scenario where at least this might be debated or become the subject of intense media speculation if the President's health deteriorates enough to put this issue on the table.

Impact of either candidate's health on the electoral process: possible scenarios

Again, the above scenarios are remote at this time. Perhaps more relevant and the question on most minds is, what impact will the President's or for that matter candidate Biden's health have on the electoral process?

To answer those questions, today's Washington Post updated a 2-part series, initially printed this past summer, that features an interview with Professor Richard Pildes, a law professor at NYU School of Law and an expert on elections and U.S. government. See <https://www.washingtonpost.com/politics/2020/10/02/were-final-stages-presidential-election-what-happens-if-candidate-withdraws-or-dies/>. The following summary is based largely on that reporting.

Scenario 1. Trump wins and either dies or withdraws after Congress has counted the electoral college's votes in January 2021 before assuming office.

As indicated above, the 25th Amendment applies and the vice-president elect becomes President. If candidate Biden wins and dies before the electoral college's votes in January, that is another and different scenario, see below.

Scenario 2. Trump or Biden win but between election day and January 6, 2021, when Congress counts the votes from the Electoral College, the winner becomes disabled or dies.

Professor Pildes writes: "If Congress has not yet received and counted the votes of the electors [of the Electoral College], it is not clear we have someone who could legally be considered president-elect." *There are legal uncertainties concerning Congressional power in that situation.* (emphasis added). Professor Pildes further writes, "But assuming Congress does have this power, then until it counts the votes we would not have a president-elect." If Congress is unable or unwilling to count electoral votes for a dead candidate and no other candidate has a majority vote in the Electoral College, the Professor opines in that case, "the choice of president would then devolve to the House, where each state's delegation gets one vote."

It is conceivable however unlikely that the foregoing circumstance could occur if in a close election President Trump wins but becomes disabled or dies, and Congressional deadlock or other reason prevents a count of the elector's votes. The choice of president would then, as Professor Pildes opines, devolve to the House, which likely will still be controlled by the Democrats, although as provided by the Twelfth Amendment the vote is by state delegations to the House each with only one vote. In that calculus Republican states currently edge out Democratic states (26-23 with 1 independent) but that could change after the votes are counted for below ticket candidates and the new Congress is sworn in on January 3, 2021. An incredible event to say the least.

The Professor further explains that, although the electors vote on December 14, Congress does not officially count the votes until January 6, 2021. This is to allow the newly elected Congress, which is sworn in on January 3, 2021 to resolve any disputes about the validity of a candidate's election.

Scenario 3. The winner of the November election dies or withdraws before the electoral college meets to vote in December.

In this situation as in the case of Scenario 4 below, the complexities and permutation of scenarios (and corresponding uncertainty) multiply because the resolution depends on both state and federal laws. The state laws set forth how electors of the Electoral College are to vote, and most states provide that the electors vote in accordance with the popular vote of their state and not exercise their own discretion. The notion that states may enforce an elector's pledge to support the state voters' choice for President was recently affirmed by the United States Supreme Court in the case of *Chiafalo et al. v. Washington* (No. 19-465, decided July 6, 2020). State laws were not written to account for the possibility that the candidate has died after election day but before the electors have cast their vote, and given the short time horizon, there likely will not be enough time for all the states to amend their laws to provide for what to do in that event. Query whether electors would have no choice but follow the current literal text and vote for a dead candidate or be permitted by law or intervening court action to vote for another candidate.

As an historical aside, the democratic candidate in the 1872 election, Horace Greeley, died the after election day, but the vote was so overwhelming in favor of Republican candidate Ulysses Grant, that the death did not become an issue.

In any case, as Professor Pildes writes, as a practical matter, "Even if the electors are formally bound by state law to vote for the dead candidate, [Professor Pildes] would expect them to cast their presidential vote for the vice-presidential nominee of that party." That presumably would be followed by an elevation to President by operation of the Constitution.

Because the laws (especially the state laws governing electoral college votes) are not written to address these scenarios and because of the unprecedented nature of such circumstances on the body politic, it would not take much imagination to envisage extremely partisan obstructing and maneuvering, including lawsuits by either party in jockeying for advantage or clarity in anything other than the most straight-forward scenarios.

As a reminder, the constitutional formality of the process is a two step process. First the electoral college must vote in December (that they must vote is set forth in the Constitution, but how they vote and whether their pledges to vote the popular choice is binding or not is dictated by state laws). The second step involves Congress actually accepting and counting the electoral college votes. Without that formality the president-elect cannot be determined. In this regard, Professor Pildes opines: "Moreover, since Congress ultimately decides which electors' votes to count, Congress might become a central player and decide what counts as a valid electoral vote in the various circumstances this scenario might unleash."

Taking this a step further, it would be extraordinary indeed if the election results in a Democratic controlled Congress but a Republican victory for the White House. That would appear to suggest that the Democrats could possibly be in a position to elect a Republican president!

Scenario 4. One of the Presidential candidates dies, withdraws or becomes disabled before election day.

Professor Pildes believes that, “This puts the ball in the hands of the ‘national political parties,’ which for this purpose means the legal entities known as the Democratic and Republican national committees.” According to Professor Pildes, the Democratic National Party (“DNC”) would choose a new nominee. The Republican National Committee (“RNC”) rules are similar. Because of the short time horizon, there would likely not be enough time to replace the deceased candidate’s name on the ballot with the new nominee. Professor Pildes expects that “courts would probably have to be brought in.” While the Professor did not address in detail how long this would take and which court or courts would have to be involved, the Professor did remark in the article that, “It’s hard to imagine courts refusing to permit one of the two major parties to replace a deceased candidate’s name with that of a validly chosen replacement.” It should be noted, however, that this is merely an opinion albeit highly respected but nevertheless not grounded on actual fact or settled law. Put another way, while we can speculate on the most likely, practical, and common-sense way this scenario should be resolved, no one can rightly predict how and what will transpire if one of the candidates dies or withdraws in the next 32 days.

Adding to the potential mayhem in this scenario is the issue of mail-in ballots, many of which have already started to trickle in. Because of the extremely short timeline it would be highly unlikely if not impossible to change the votes on mail-in ballots in time to account for any change in candidate. Extrapolating from Professor’s Pildes’ comments, perhaps the mail-in ballots could be counted for the vice presidential candidate or for the replacement candidate consistent with the deceased candidate’s party.

Conclusion

All except the most straight forward process of passing on the powers and duties of the President in accordance with the established line of succession set forth by the US Constitution will be fraught with uncertainty because of the intersection of federal and state laws that impinge on the selection and voting obligations of members of the Electoral College; all of which would have to occur in an extremely compressed timeframe. State laws, written at a time that did not contemplate the scenarios involving the possibility of the death or disability of a sitting President or a Presidential candidate so near to election day, would have to be revised, amended or waived in order for electors to have the flexibility to vote in a situation where conceivably the only Presidential candidate on the ballot is a deceased one. One alternative as suggested by Professor Pildes is that the Electoral College will vote for the winning party’s vice presidential candidate, who will assume office and by operation of the 25th Amendment assume the powers and duties of the Presidency. But that is such an unprecedented occurrence it is difficult to imagine that process would not be challenged in court by the losing party. Alternatively, the DNC or the RNC as the case may be might have to conduct a last-minute re-do to come up with a ticket to replace the former candidate, and equally likely the courts would be involved at the state and federal levels (and probably the US Supreme Court).

In summary, fact and opinion may be difficult to distinguish here because only in the most straight forward scenario of succession under the Constitution appears to be grounded on indisputable facts and settled law. Other scenarios discussed herein are so unprecedented and not specifically addressed by current state and federal law that only conjecture— albeit expert and respected but still conjecture— can fill the unanswered questions at this time. As even Professor Pildes concedes, that there are legal uncertainties concerning Congressional power in a number of the possible scenarios, which would undoubtedly complicate or at best extend the time needed for a definitive resolution.

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