



# 2020 Presidential Election: Where Do We Stand?

*Last Updated: November 9, 2020*

**W**hile much of the media is acting like Democrat Presidential Candidate Joe Biden has already won the election and is starting with that assumption in every piece now being written, that's a faulty assumption. Candidate Biden has not yet been elected president. There are a number of steps—under the Constitution, federal, and state law—that still need to occur in the presidential election process. Here are the facts:

## **Has the presidential election been finalized?**

No. The media “calling” the race are only giving their projection and best estimate of the results. At this point, states still need to finalize their vote counts, and certify their results by certain deadlines.

## **What could affect the final vote counts and certification of state results?**

As of right now, there is ongoing litigation in multiple states over voting procedures and election results. This litigation could affect the final vote counts in key states like Pennsylvania, Nevada, Georgia, and Michigan. Meanwhile, states like North Carolina and Arizona are still counting ballots

and tallying their results. In other close states, like Wisconsin, recounts are being conducted. It is possible that none of these efforts will change the final results in these states, but the final vote counts are not determined until all of this is finished. Only then can state election results be certified.

## **What happens after results are certified?**

If selected, electoral delegations will meet in their respective states and vote for president and vice president on December 14. While electors typically are sent based on the popular vote in the state, ultimate authority to choose electors rests with a state's legislature. This is a constitutional reality that we were last reminded of during the dispute over Florida in the 2000 Presidential Election.<sup>1</sup>

## **What happens if results are not certified before the relevant deadline?**

Election-related disputes in states have to be resolved by December 8; if the dispute is not resolved by that date, the choice of electors for the Electoral College could be challenged by Congress.<sup>2</sup>

Clearly, if a dispute is not resolved by December 14 when the state delegations meet to vote, and a state has not selected electors, then it is possible that neither candidate will reach the 270 votes necessary to prevail.

## **What happens if neither candidate receives 270 votes in the Electoral College?**

The House of Representatives meets on January 6, 2021 to count the votes cast on December 14. If the Electoral College does not produce a winner because no candidate has 270 votes when those votes are counted in the House, the election will immediately move to what is known as a "contingent election."<sup>3</sup>

## **What happens in a contingent election?**

As provided by the 12th Amendment to the Constitution, in a contingent election "the House votes

‘immediately, by ballot’ for President . . . , choosing from among the three candidates who received the most electoral votes.”<sup>4</sup> Each state delegation has one vote for the election of the President, and a majority of all state delegations is needed to win. It is very likely (but not yet finalized) that Republicans will hold a majority of state delegations when the new congress convenes in January 2021.

In the Senate, “[i]f no candidate for Vice President receives a majority of electoral votes, then the Senate elects, choosing between the two candidates receiving the most electoral votes . . . each Senator casts a single vote.”<sup>5</sup> A majority of all Senators is needed to win. Though we won’t know until January 2021, it is likely that the Republicans will control the Senate, and thus be able to select the Vice President in a contingent election.

## What happens beyond a contingent election?

The 20th Amendment to the Constitution requires that the terms of the President and Vice President end at noon on January 20, 2021. If the House is unable to elect a President by January 20, the Vice President-elect serves as Acting President until the impasse is resolved. If the Senate is unable to elect a Vice President by January 20, then the Speaker of the House serves as Acting President.”<sup>6</sup>

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<sup>1</sup> Raju Chebium, “Florida Legislature would pick electors if votes not certified by deadline,” CNN, November 22, 2000, accessed November 9, 2020, <https://www.cnn.com/2000/LAW/11/22/legislature.electors.pol/index.html>.

<sup>2</sup> “[I]f a state, under its established statutory procedure, has made a *final determination* of any controversy or contest’ relative to the presidential election” before December 8, “such determination is to be considered ‘conclusive’ as to which electors were appointed on election day (3 U.S.C. §5).” CRS Report, “Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress,” RL32717, pp. 1-2 (italics added) (Washington, D.C.: Congressional Research Service, updated Nov. 15, 2016), <https://crsreports.congress.gov/product/pdf/RL/RL32717/12>.

<sup>3</sup> For a more detailed overview of this process, see: CRS Report, “Electoral College: How It Works in Contemporary Presidential Elections,” RL 32611 (Washington, D.C.: Congressional Research Service, updated May 15, 2017), <https://crsreports.congress.gov/product/pdf/RL/RL32611>.

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<sup>4</sup> CRS Report, “Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress,” RL32695 (Washington, D.C.: Congressional Research Service, updated Dec. 14, 2004), <https://www.everycrsreport.com/reports/RL32695.html>.

<sup>5</sup> CRS Report, RL32695.

<sup>6</sup> CRS Report, RL32695.