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Commentary

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2020 Election Sidebar: No Winner in a State? What Then?



By [Jerry H. Goldfeder](#)

[This is the latest in his series on salient legal issues concerning the presidential election. For a comprehensive narrative of constitutional and statutory procedures involved in the presidential election, readers should go to the New York State Bar Association Report on the subject, [here](#).]

It is hard to believe that the 2020 presidential election is actually upon us. During the last six months, this Sidebar column has addressed [whether the election could be postponed](#), if a [state legislature can step in and appoint its own slate of electors](#), and my continuing concern with [terrorist attacks and natural disasters impacting](#) the election. Here I address several “nightmare” scenarios that might occur if a state fails to determine a winner of its popular vote in time for presidential electors to meet.

Unless there is a [blue tsunami](#), voters can probably expect weeks of counting mail ballots, aggressive litigation, and a steady stream of vituperative rhetoric. There is a ton of mail, and each ballot needs to be scrutinized to see whether it was mailed and received timely; if the secrecy/oath envelope has the voter’s signature and matches her registration document; and, if required, a witness also signed the ballot envelope. No doubt there will also be an [avalanche of litigation](#) challenging whether these and other legal requirements have been met.

Let's look at Pennsylvania, for example, which may be ground zero this year. It has no early in-person voting, and vote-by-mail efforts have been very robust and already subject to aggressive litigation, including at the [U.S. Supreme Court](#). If, as expected, additional lawsuits are brought after election day, the vote in the Keystone State may still be up for grabs by the middle of December.

This year [presidential electors from around the country meet on Dec. 14](#). If there is no clear winner in Pennsylvania by then, what happens? Consider three scenarios:

Scenario One: The Pennsylvania Legislature, controlled by Republicans, decides that because a winner cannot be determined, they will invoke a [federal statute](#) to remedy this problem by [directly appointing a slate of electors](#) pledged to Trump. The Democratic governor vetoes the bill, and the GOP protests, pointing out that the [U.S. Constitution says that the "legislature" decides](#) how electors are chosen and they do not need the governor's approval. Not to be out-manuevered, the governor sends Congress a slate of Biden electors. Ultimately, when [Congress meets](#) to tally the votes on Jan. 6, 2021, it will decide between the two slates. In the meantime, both sides rush into federal court, and ultimately the Supreme Court may decide if a legislature can choose electors after the people have voted and whether this legislative act requires gubernatorial consent.

Scenario Two: Again, with no winner in sight, the Pennsylvania electors have not been chosen. Electors from the rest of the states meet and vote on Dec. 14. Without Pennsylvania's 20 electors, neither candidate has 270 electoral college votes, a majority of electors from all 50 states and Washington, D.C. Trump has 260 electoral college votes, and Biden 258. Trump declares victory nevertheless, announcing that the [Twelfth Amendment](#) to the Constitution says that all he needs is a majority of those electors chosen—and without Pennsylvania's votes, there are only 518 electors, a majority of which is 260. Not so fast, says Biden, and he goes to federal court, asking for a ruling on the meaning of "majority of electors." The Republicans demand Biden concede, adding that if Biden prevails in court—that 270 votes are needed even without Pennsylvania's 20—the [House of Representatives should choose the president](#).

Scenario Three: With no clear winner in the electoral college, the House is set to choose the president—with each state having one vote. Currently, Republicans [control 26 delegations](#), the magic number to win. Even assuming Democrats maintain a majority of House members after November, it is likely that Republicans will continue to control a majority of state delegations. So the Democrats pass a rule requiring that a state can vote only if 75% of its members are in accord—and Republicans have such supermajorities in only 21 states. The Republicans go into federal court, arguing the new rule undermines their ability to choose a president. The Democrats move to dismiss the case on the ground that the court has no jurisdiction over House rules. The issue as to how the House votes for president goes to the Supreme Court. Meanwhile, the House is deadlocked, and no president is chosen.

Any of these scenarios caused by a huge number of mail-in ballots would lead to a constitutional crisis unlike any we have had in our history. It is too late to urge people to forgo mail-in voting for early or election day voting. So, probably, the only recourse is to recite the [election administrator's favorite prayer: "no matter who wins, please let there be a landslide."](#)

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