



CONTINGENT ELECTIONS: QUANTIFYING A RISK POSED BY A CONSTITUTIONAL RELIC, THE 12th AMENDMENT

- The 2024 election is likely to be very close, which raises the spectre of a “contingent election.” That means the election would be thrown into the House (for President) and the Senate (for Vice President).
- A contingent election would occur if there were a 269-269 tie in the Electoral College, or if by reason of a third-party candidate or “faithless electors” no ticket otherwise gets to 270.
- In the House, each of the 50 states would get one vote (DC gets no vote), and the next president would need the support of 26 delegations. Each delegation would vote separately; if there were a tie, that state’s vote would not count (though 26 votes would still be required).
- Even though there is a good chance the Democrats will win the House (meaning it will have a majority of members), Republicans currently control 26 state delegations.
- There are no Federal laws governing these processes. The new Congress (seated on January 3) will likely set the rules for the votes that would take place “immediately” after January 6.
- All to say that Donald Trump could lose the popular vote and the Democrats could win the House, but if a contingent election is triggered, Trump could become the next President, and it will all be legal.

Donald Trump’s failed attempts to prevent the peaceful transfer of power triggered soul-searching among lawmakers, political scientists, constitutional law scholars and political commentators on how to improve the process by which US presidents are elected. Early on (and due to the multiple clumsy efforts to push the Vice President to do something that was well beyond his constitutional authority), that process identified the antiquated Electoral Count Act, the real reason the January 6th insurrection targeted the Capitol on that day, as ripe for revision and, in December 2022, the Electoral Count Act (“ECRA”) was included in the December 2022 omnibus appropriations bill as Title I and signed [into law](#).

While the ECRA brought much-needed clarity to the process for casting and counting the electoral votes cast in the Electoral College, Congress did not tackle one other critical feature of the presidential electoral process that could upend the 2024 election – the 12th Amendment’s equally antiquated provisions governing so-called “contingent elections.” By upend, I mean the potential for Congress to choose the next president and vice president, the popular vote and the Electoral College vote count notwithstanding.

In presidential elections, as we all know, winning the popular vote is not determinative, but neither is winning a plurality of electoral votes in the Electoral College; a ticket needs to win a majority of the electoral votes (270), per Article II, Section 1 of the Constitution and the 12th Amendment. If no presidential ticket gets to 270 electoral votes, then the president and the vice president are to be elected as provided under the 12th Amendment.

What happens if no ticket gets 270 electoral votes?

Under the 12th Amendment, the president would be selected by the House of Representatives from among the top three vote-getters in the Electoral College (or top two, if there is no third-party candidate with any electoral votes), and the vice president would be selected by the Senate. The vote would occur in a joint session of Congress “immediately” after the electoral votes are counted on January 6. As the new Congress is sworn in on January 3, the members



of the newly constituted House and Senate would vote in any contingent election. (*See generally*, [CRS Perspectives and Contemporary Analysis](#).)

Under the 12th Amendment:

- The vote for president would be conducted in the House by votes cast by each state delegation; each delegation has one vote (DC does not participate). The quorum would be two-thirds of the state delegations, and the vote would be by “majority” vote of state delegations, meaning a president would need the backing of at least 26 state delegations to win (and note a plurality, for example, if state delegations split, is not sufficient). To be clear, holding the overall majority in the House is not relevant for this purpose; Democrats could have a majority of members as of January 3, but Republicans could control a majority of the state delegations by reason of having more House members in more state delegations. And there is no weighting – California with 52 members (and currently 40 Democrats) has one (presumably Democratic) vote, as does South Dakota, which has one Republican member and one vote.
- In the Senate, the vote would be by individual Senator, with the vice president needing 51 votes to win.
- If the House were to fail to select a president by noon on January 20, the vice-president elect (elected by the Senate) would serve as president (based on the 20th Amendment) until the House reaches a decision.
- If both the presidency and vice presidency remain vacant at noon on January 20, 2025, under the [Presidential Succession Act](#), the speaker of the House is next in line to serve as acting president, followed by the president pro tempore of the Senate. To do so, however, the legislative officer must first resign his/her seat in the House or Senate, as the case may be. If both the speaker and president pro tempore were to decline to act, then the highest-ranking qualified cabinet member of the prior administration (starting with the Secretary of State) would act as president.¹

What rules would govern a contingent election?

There is no Federal law governing how contingent elections are to be held, and no one alive today has experienced one. The House and Senate would need to set their respective rules.

¹ Scott Anderson, in his piece in POLITICO (“[The Other Way Trump Could Steal the White House in 2024](#)”), raised the following scenario: Were Republicans to retain control of the House in 2024, on January 3, 2025 they could appoint Trump as speaker (the speaker need not be a member of Congress). Trump would assume the presidency at noon on January 20 (until the House were able to elect a president as described above). Unthinkable? No more so than the myriad efforts undertaken by Trump to overturn the results of the election and prevent the peaceful transfer of power. No more so than 139 members of Congress objecting to certification of Joe Biden’s electoral victories on the basis of unproven allegations of widespread electoral fraud affecting the presidential ballots (apparently their elections to the House were untainted by the fraud that affected the same ballots that they and Trump said were fraudulent). His proposed solution would be to amend the Presidential Succession Act.



As the 12th Amendment does not establish the required quorum for state delegation votes or whether votes are to be by plurality, majority or supermajority of members, or what happens if the required threshold is not met, the House (being the 119th Congress, seated on January 3, 2025) would likely have to set the rules for these fifty individual state votes, by traditional majority vote (not the per-delegation vote).

How might the 12th Amendment be triggered?

There are three ways the arcane provisions of the 12th Amendment could be triggered:

- The Democratic ticket and the Republican ticket each could get 269 electoral votes (there are 538 in total – 435 based on House seats, plus 100 based on Senate seats, plus three for DC).
- A third-party candidate could get two or more electoral votes – a few hundred thousand votes could suffice (although each state has a minimum of three electoral votes, two states are not winner-take-all: Maine, which has two congressional districts (one reliably Democrat and one reliably Republican), and Nebraska, which has three congressional districts (two quite Republican and one (NE-02) tends to be Democrat)).
- “Faithless” electors in sufficient numbers vote for a candidate other than the one to whom they are pledged, or they cast blank ballots, denying the candidate to whom they are pledged a majority.

How close might the election be?

Some *illustrative* scenarios:

- A winning path to just 270 for Harris-Walz means winning NH, NE-02, WI, MI and PA (without NV, GA, NC and AZ), not surprisingly with the highest odds of succeeding.
- Winning NV with that base case nets the ticket 276.
- Losing PA from that base case requires wins in NV and GA (netting 273 electoral votes).
- Losing PA and NV from that base case requires winning GA and NC (netting 283 electoral votes).
- Losing PA and GA, but winning NV and NC nets 273 electoral votes.
- Losing MI from the base case, but adding GA nets 271 electoral votes.
- Losing MI from the base case, but adding NC and WI also nets 271 electoral votes.

Have contingent elections occurred in the past?

Over the course of our history, contingent elections have occurred three times:

- in 1801, when the House chose Thomas Jefferson as president over Aaron Burr (although this preceded the 12th Amendment, which, in fact, was passed in response to the election of 1800);



- in 1825, when the House chose John Quincy Adams as president over Andrew Jackson (in that four-way 1824 race, Jackson had a plurality of the popular vote (41%) and a plurality in the Electoral College (38%), and Adams finished second); and
- in 1837, when the Senate chose Andrew Jackson as vice president.

Since then, the Electoral College process has produced majority outcomes, albeit some presidents won despite losing the popular vote (*see* [270 to Win](#)) and many won with extremely tight margins of victory.

Year	EV count	Popular vote D/R/3d P	States where margin was <5%
2020	306/272	81,268,867 - 74,216,747	79 EVs in 6 states (AZ, GA, MI, NV, PA, WI)
2016	304/227	65,853,514 - 62,984,828	102 EVs in 6 states (AZ, FL, MI, NC, PA, WI)
2012	332/206	65,915,795 - 60,933,504	82 EVs in 3 states (FL, OH, WV)
2008	365/173	69,498,516 - 59,948,323	74 EVs in 3 states (IN, FL, NC, OH)
2004	286/251	59,028,444 - 62,040,610	46 EVs in 4 states (CO, IA, NM, NV, OH)
2000	271/266	50,999,897 - 50,456,062	76 EVs in 5 states (NV, FL, MO, OH, TN)
1976	297/240	40,852,839 - 39,147,770	153 EVs in 6 states (MS, NY, OH, PA, TX, WI)
1968	301/191/46	30,898,055 - 31,170,470 - 9,906,473	There was a plausible path for Wallace to have prevented a majority ²
1948	303/189/39	24,105,695 - 21,969,170 - 1,157,328	Had 12,000 votes in CA and OH voted for Dewey, there would have been no majority ³

Why does RKF's name surface in discussions around contingent elections?

In a close election, a third-party candidate could be a spoiler. That would require a third-party candidate to gain one or more electoral votes, potentially in either Maine or Nebraska.

No Labels dropped out of the race and no longer is a factor. Kennedy suspended his campaign in August but has not fully pulled out of the race. He has said he is not running in battleground states, but he remains on the ballot in a number of states, including battleground states. In early August, his campaign manager did refer to acting as a spoiler to trigger a

² See "[Keep It Out of the House!](#)" (The Atlantic, September 1968).

³ Jeff Greenfield writing in POLITICO ("[A Southern Rebellion in 1948 Almost Threw American Democracy into Disarray](#)"), calculates that, in California, Harry Truman won by 18,000 votes out of close to 4 million votes cast, and, in Ohio, Truman won by 7,000 votes out of close to 3 million votes cast. If 12,000 had voted for Dewey rather than Truman, Truman would have ended up with 253 electoral votes, to Thomas Dewey's 239 and Strom Thurmond's 39 (so, no majority). In the House, Democrats controlled 25 out of the 48 state delegations (at the time), but four of those states were Southern states that had voted for Thurmond (AL, LA, MS, SC). Had any one of the four voted for Thurmond there would have been no majority in the House vote. As the POLITICO article noted, it was unclear by what process each state delegation should vote, and queried, what would happen if a state delegation voted by a plurality but not a majority; would the vote be by secret ballot or be public, who would determine the rules (the outgoing GOP-controlled Congress, or the incoming Democratic-controlled Congress)? Would a standing committee or new committee propose those rules?

The article also noted that a contingent election was not hypothetical; the Southern segregationists had intended all along to force the election into the House where they could deliver a defeat for Truman, all designed to halt the use of federal power against state-directed discrimination. The article's conclusion was a stark warning: 12,000 votes saved the country from a constitutional crisis and a crisis in confidence in our electoral system.



contingent election, and following suspension of his race Kennedy [said](#): “I encourage you to vote for me, and if enough of you do vote for me – and neither of the major party candidates wins 270 electoral votes ... I could conceivably still end up in the White House in a contingent election.”

How real is the risk of one or more faithless electors?

Americans do not vote directly for president. Instead, they vote for electors in their respective states.

Article II, Section 1 of the Constitution leaves it to each state to determine how its electors are to be chosen. There is no provision in the Constitution or other Federal law that requires electors to vote in accordance with the results of the popular vote in their state, and there is no consistency among the states as to whether electors must remain true to such results. Some states require electors to cast their electoral votes consistent with the popular vote, and in some states, electors are bound by pledges made to their political parties.

There have only been a few instances over time where electors failed to cast their electoral votes as they should have (according to the [National Constitution Center](#), over 58 elections, there were 157 faithless electors, but 71 were unable to pick their candidate because they had died between the election and the Electoral College vote). This is not surprising as electors typically are chosen by their respective state political parties, and they tend to hold senior positions in those political parties.

According to NPR legal correspondent Nina Totenberg [reporting](#) in 2020, 32 states have some form of “faithless elector” law, but only 15 states (AZ, CA, CO, IN, MI, MN, MT, NE, NV, NM, NC, OK, SC, UT and WA) remove, penalize or cancel the votes of errant electors. The ME Secretary of State has indicated a faithless elector could be removed. That leaves 17 states that have no such laws. In 2020, the Supreme Court [ruled](#) that “faithless elector” laws are constitutional, but did not rule that states must adopt them.

Note that “faithless electors” should not be confused with the slates of “fake electors” who presented themselves in 2020 as part of an effort to overturn the 2020 election, or “contingent electors,” being fake electors in 2020 whose defense was that they could only be seated if state courts found the election to have been fraudulent.

How might a contingent election unfold in the House?

The determination of which party controls a state delegation would be based on the members seated on January 3, 2025. Currently, Republicans control 26 state delegations and Democrats control 22 state delegations; two delegations (Minnesota (divided 4/4) and North Carolina (divided 7/7)) are split. If a state is split, it would not be able to cast a vote.

In 2023, the UVA Center for Politics (“[Republicans Retain Edge in Electoral College Tie](#)”) believed that 22 state delegations were comfortably Republican and 13 were comfortably Democratic – that left 15 states potentially up for grabs. In 2024, the Center updated its breakdown (“[Trump's Contingent-cy Plan](#)”), as follows:

Safe R	23	Toss up	5	Leans D	2
Likely R	2	Leans tie	1	Likely D	3
Leans R	1			Safe D	13



The last time Democrats controlled a majority of state delegations in the House was 2008 (when they had 257 seats). That said, “[t]here are circumstances where they could deny Republicans a majority by winning or forcing ties in almost all of the competitive states.” Much could be up for grabs.

Note that House members are not bound to vote within their delegations one way or the other. A state with a majority of Republican member in which the Harris-Walz ticket wins the popular vote would not be bound to cast its votes for Harris.

What other risks might present themselves?

A report prepared last October by Beau Tremiere and Aisha Woodward of Protect Democracy (“[Danger in Plain Sight: The Risk of Triggering a Contingent Election in 2024](#)”) cited a number of potential considerations associated with contingent elections:

- A single House seat in a contingent election scenario might determine the next president. There would be two different majorities to watch – first, which party has a majority of House members will be important for purposes of electing a speaker, but also potentially important for determining the House rules governing any contingent election. Second, as noted above, which party controls a majority of the state delegations would determine who is elected president in a contingent election. That one seat could determine control of the House in a razor-thin election for the 119th Congress, and that one seat could determine whether a state delegation supports one candidate or another.

Narrow margins of victory could lead to challenges under the [Federal Contested Elections Act](#), under which elections of House members can be challenged by other members, particularly if doing so would determine the make-up of the House overall or of a state delegation.

- If one of the presidential candidates were to die after the Electoral College meets in December, there is no way to provide a substitute in a contingent election (*see* “[Of Death and Deadlocks: Section 4 of the 20th Amendment](#)”). The 20th Amendment authorized Congress to pass a law to address this; however, Congress has not acted to fix the problem (*see* “[The Electoral Count Act is fixed: Presidential transition remains in jeopardy](#)”).
- The Senate may fail to elect a vice president due to its filibuster rules. Absent unanimous consent, the Senate’s [standing rules](#) would apply, which means that 60 senators would need to agree to cut off debate before voting on a vice president. A majority of senators could invoke the so-called “nuclear option” to allow a simple majority to cut off debate on the motion (*see* “[What is the Senate filibuster, and what would it take to eliminate it](#)”). It is an open question as to whether the sitting vice president, acting in her capacity as president of the Senate, could cast a tie-breaking vote (*see* [Senate Election of the Vice President and House of Representatives Election of the President](#)”).
- The contingent election process could produce a president and vice president from opposing parties.



To what extent was the Electoral College process reformed?

As noted above, the ECRA brought much needed clarity to the Electoral College process, in effect circumscribing the power of Congress to alter state-level outcomes (except as noted above). Recall that that goal of the January 6th insurrection and Trump's entreaties that Vice President Pence exercise authority he did not have to decline to certify the electoral votes was intended to deprive the country of a president-elect on January 6th, throwing the election into the House, and a certain Trump victory.

Among other things (*see also*, "[Protect Democracy FAQ](#)"),

- The ECRA clarifies that the role of the vice president on January 6 is "solely ministerial"; the vice president has no authority to reject electoral votes as certified by the states. This was the message conveyed to Mike Pence via [tweet](#) from former Judge J. Michael Luttig on January 5, 2021.
- The ECRA sets out a judicial process for disputes over electoral votes to be resolved before they are communicated to Congress.
- Under the ECRA, state officials and lawmakers are precluded from changing election rules after Election Day and from directly appointing alternate slates of electors after Election Date.
- Objections or other questioning of the certification process by members of Congress now require one-fifth of each chamber of Congress. The grounds for objections have been narrowed – either that electors were not lawfully certified under the recognized procedure for "ascertainment of appointment" or the vote of one or more electors was not "regularly given."

What vulnerabilities remain post the ECRA?

The changes made under the ECRA notwithstanding, as Edward B. Foley, election law professor and expert on the Electoral College, noted (*see* "[One year out: how a free and fair 2024 presidential election could be under threat](#)"), there is plenty of room for mischief, namely through an avalanche of legal challenges that so overwhelm the courts that the key safe harbor date (December 11) is missed. Foley also has [cited](#) the risk that the House, were it still in Republican hands, might refuse to perform its statutory obligations in a contingent election scenario, as a consequence of which there would be no president and vice president on Inauguration Day. Were Mike Johnson still speaker, he would be next in line to serve as acting president. Far-fetched, Foley said, but then so were the events of January 6th, of course until they actually came to pass.

In the same vein, David Becker, Executive Director of the Center for Election Innovation and Research, [warns](#) that a more concerted and coordinated effort on the part of the 2024 version of election deniers could slow the process down sufficiently that statutory deadlines are missed – "instead of having [the election denial effort] focused on just one place at one time – the Capitol on January 6th – we could see it focused on the counting process, the certification process, on the meeting of the Electoral College, at various points in time in various places. ... That kind of chaos could bog things down enough that the election's statutory deadlines – the safe harbor deadline, the meeting of the Electoral College six days



later, and the Jan. 6 certification by Congress – come into play and force a halt to the process.”

The potential for mischief is heightened by the fact that the current speaker of the House, Mike Johnson, played a key role in December 2020 to overturn election results in four battleground states (note the [amicus brief](#) filed in the case brought by the Texas Attorney General challenging the results in Pennsylvania, Georgia, Michigan and Wisconsin lists Johnson “and 125 Other Members” of the House). Johnson is, as Newsweek editor-at-large Tom Rogers noted in his Newsweek opinion piece (“[Whether U.S. Democracy Is a House of Cards Is Up to the House](#)”), “not only an election denier, but a ringleader of [the effort to overturn the election]. He has never renounced his claim and has the support of the majority of his caucus in claiming the last presidential election was illegitimate.” Recall, he and 199 of his House Republican colleagues voted [against](#) the ECRA, and he and 138 of his House Republican colleagues, immediately following the attack on the Capitol, refused to certify the 2020 presidential election.⁴

Even if Democrats were on a trajectory to take back the House in 2024, what of the period between Election Day and January 3rd (when the new House is seated). In their article in the Washington Spectator (“[Dancing in the Dark: Steps to Avoid a Constitutional Coup in the 2024 election](#)”), Mark Medish and Joel McCleary warn that Republican House members in the current (118th) Congress might seek to weaponize the Federal Contested Elections Act to preserve their majority in the 119th Congress and re-elect a speaker (this, the authors note, would largely be beyond the purview of the Federal courts). That speaker, in turn, with enough votes under the new ECRA thresholds could refuse to certify the election, and even if the Senate did not play along, the refusal could trigger the contingent election procedure.

Medish and McLeary also posit that since the House (unlike the Senate) is not a continuous body, its rules in effect need to be adopted anew by each incoming House, which in 2025 could imperil the adoption of rules to implement the ECRA. They tie various scenarios to the logical endgame that there is no president to take the oath of office at noon on January 20th. We could then be forced to fall back on the Presidential Succession Act, and imagine if keeping Donald Trump off the ballot under Section 3 of the 14th Amendment is viewed as anti-democratic, how the nation would react to being led by an unelected acting president.

Concluding Thoughts

As noted [above](#), very few were aware then, or now are aware, how close the country came in 1948 to a contingent election that would have “rocked American democracy, shaking the public’s confidence in our electoral system while giving Southern segregationists a chance to

⁴ Rachel Bade, writing this week in POLITICO (“[The other Jan. 6 Democrats are worried about](#)”), cites concerns among Democrats that if the Republicans were to win the House, Speaker Johnson (assuming he is elected speaker) might: try to rewrite the rules that govern the vote-count on January 6, muster a sufficient number of Republican House members to object to certain contested slates of electors to deprive Harris of 270 electoral votes, delay the vote-count beyond January 6, or challenge the ECRA in court in the hope of defaulting to the 12th Amendment process. An equally problematic outcome would be the failure of a House Republican majority to elect a speaker by January 6.



extort the country.” What saved the country then was a mere 12,000 votes in two states. Again, in 1968, a third-party candidate with a similar agenda of extortion, raised alarm bells that the country could face its first contingent election since 1825, and a constitutional crisis.

We enter the final leg of the 2024 election cycle, a fundamentally polarized society with deep levels of distrust in the electoral system and in the political class. Were a contingent election to be triggered, it would follow a razor-thin (or no) margin in the Electoral College and, if past is prologue, a significant margin of victory for Democrats in the popular vote. A House vote based on state delegations would likely be contrary to the outcome of the popular vote as well as the will of voters in states representing 268 or 269 electoral votes.

For election watchers, it will come down to the inflection point that tips one or the other over 270. If you have heard references to Nebraska-02 it is because in the closest margin possible that avoids a contingent election, it would be 270-268, with NE-02, which Biden won in 2020, providing the edge.

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September 19, 2025 (update of briefing note initially published February 9, 2024)