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

"I have no hesitation in saying that I have ever considered the constitutional mode of election, ultimately by the legislature voting by states, as the most dangerous blot in our constitution, and one which some unlucky chance will some day hit, and give us a pope and antipope."

Thomas Jefferson
August 17, 1823 [referring to the proposed 12th Amendment]

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 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. In the event that 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.

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:

- For the vote itself, it does not matter which party controls the House. 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.
- 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 neither a president nor a vice president were elected via the contingent election process, the next person in the presidential line of succession (the newly appointed speaker of the House, assuming there is one in time, failing which the president pro tempore of the Senate) would serve as president (based on the Presidential Succession Act) until the House and the Senate reach a decision.

Currently, Republicans control 26 state delegations and Democrats control 22 state delegations; two delegations (Wisconsin and North Carolina) are split. The UVA Center for Politics ("Republicans Retain Edge in Electoral College Tie") believes that 22 state delegations are comfortably Republican and 13 are comfortably Democratic – that leaves 15 states potentially up for grabs. It projects that Iowa and North Carolina are likely to be Republican controlled in 2024 and favors the Republicans holding their majorities in Arizona and Montana. Republicans might also flip Michigan and Pennsylvania. The Center further posits that it would be difficult for Democrats to get to 26 in the midst of an otherwise competitive national election. 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."

The (Limited) History of Contingent Elections

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[1]

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

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[2]

Why This Is Not Merely Hypothetical

How might the arcane provisions of the 12th Amendment get 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) or a third-party candidate could get two or more electoral votes (although each state has a minimum of three electoral votes, two states are not winner-take-all: Maine, which has two congressional districts, and Nebraska, which has three congressional districts – a few hundred thousand votes could suffice). The third possibility is that "faithless" electors in sufficient numbers vote for a candidate other than to whom they are pledged, or they cast blank ballots, denying the candidate to whom they are pledged a majority.

United to Protect Democracy, in its September report ("The Risk of a Contingent Election: Hidden Dangers in the 2024 Race for the White House"), posits that a No Labels ticket makes it a realistic possibility that no presidential candidate reaches 270 electoral votes. As of September 2023, No Labels has secured ballot access in eleven states: Alaska, Arizona, Arkansas, Colorado, Florida, Maine, Nevada, North Carolina, Oregon, South Dakota, and Utah. Efforts are ongoing in Michigan, Wisconsin, and other states. While the likelihood of a third-party ticket reaching 270 electoral votes is highly unlikely, the risk of a third-party ticket throwing the election into the House and Senate is far more plausible. United to Protect Democracy's report sets out various illustrative scenarios whereby a third-party ticket triggers a contingent election:

- the third party wins Alaska and Utah (D: 266; R: 263; TP: 9);
- the third party wins Maine statewide and Nebraska CD-2 (D: 269; R: 266; TP: 3); and
- the third party wins Maine CD-2 and Nebraska CD-2 (D: 269; R: 267; TP: 2).

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[2] 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.

Potential Adjacent Risks

A report prepared last October by Beau Tremitiere and Aisha Woodward of Protect Democracy ("Danger in Plain Sight: The Risk of Triggering a Contingent Election in 2024") cited a number of potential risks associated with contingent elections:

- Electors, even in states with "faithless electors" laws[3], may decide to vote for another candidate, likely triggering court challenges and objections when Congress meets on January 6 to count the electoral votes.
- 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 the contingent election. Second, 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.
- 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 would likely have to set the rules for these fifty individual state votes.
- 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").

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[3] According to NPR reporting on the 2020 Supreme Court case that found faithless elector laws (that remove or punish errant electors) to be constitutional, 32 states have some form of such laws, 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.

- The contingent election process could produce a president and vice president from opposing parties.
- 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 would act as president. It is an open question as to whether the sitting vice president, acting in his/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").[4]

The ECRA

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). 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."

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[4] 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.

Gaps Post-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). He 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 election.

Democrats, you say, are on a trajectory to take back the House in 2024. Yes, but what of the period between Election Day and January 3rd (when the new House is seated). In their recent 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 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.

Voter disenchantment with both Democratic and Republican tickets could propel No Labels or other third-party efforts forward, which when combined with expected narrow margins in battleground states, could presage a constitutional crisis that the country has managed to avoid (in a few cases, narrowly) since 1824. Remote one might argue, but far less so if there is a determined effort to trigger a contingent election, and it could all be legal.

The midterms handed high-profile election deniers defeats across key states where the races were competitive, which meant, however, that most of the House Republicans election deniers returned to Congress. Nonetheless, the midterms were viewed as a repudiation of election denial. That repudiation seems quaint, and perhaps a historical anomaly, as we watch the election denier-in-chief steamroll across the GOP primary landscape. I have to believe though that, in November 2022, the broad-based advocacy in support of democracy and of the right of every citizen who votes to have his/her vote counted made a difference. In the days ahead, sustained and comprehensive nonpartisan messaging in support of democracy will be imperative.

If the political rollercoaster we have been on as a nation since 2016 has confirmed anything, it is that even the remotest of scenarios – the unthinkable – could come to pass. We should be clear-eyed regarding not only the stakes but the dangers of fraying coalitions.

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