

The Breakfast Club

Constitutional Minute for 2 November 2024

The Contingent Election

With various media outlets portraying a [razor-thin election](#) victory for either candidate on Tuesday, there is a very real possibility of a tie in the Electoral College vote (269-269), or, if there are even 1-2 [faithless electors](#), neither candidate might achieve a majority in the Electoral College vote. What happens then?

In the original Constitution, Article 2, Section 1, Clause 3 discusses a contingent election whereby in the event of the foregoing, the House elects the President and the Senate the Vice-President. A contingent election has been held three times in our history: once because of a tie in the electoral count (1801) and twice for lack of a majority (1825, 1837, see Wikipedia).

After the debacle of the 1801 election, where a tie in the electoral vote for President resulted in the outgoing, Federalist-controlled House of Representatives refusing to give Democratic-Republican candidate Thomas Jefferson the necessary votes to become President (they eventually gave in after 36 ballots), the 12th Amendment changed the process by which presidential electors cast their ballots, and modified slightly how the contingent election is conducted. The operable language from the 12th Amendment reads:

“The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.-- The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.”¹ (emphasis added)

Notice that in the House contingent election the state delegations vote, one vote per state, not individual Representatives. This provides further evidence that the Framers intended to give the responsibility of electing the President to the states, not the people!

If the contingent election was to be conducted by the outgoing Congress, as Thomas Jefferson faced, then Donald Trump would become President (with 26 votes) and Tim Walz the Vice President (with 51 votes, Senators voting individually). But In 1933, the 20th Amendment moved the start of the new congressional term from March 4 to January 3 and the presidential term from March 4 to January 20. Thus, it is the incoming Congress that now conducts the contingent election immediately after the electoral votes are counted on January 6th.

Not covered explicitly in the language of the 12th Amendment is what happens if there is a tie vote within a House state delegation? The delegations of both Minnesota (4-4) and North Carolina (7-7) are split evenly between Democrats and Republicans. If the 1801 contingent election provides precedent, if there is a tie within the delegation the delegation cannot cast a vote for any candidate and must record a null vote. This does not change the number of votes needed for a majority, which remains at 26.

If the contingent election were held by the present outgoing House of Representatives, I predict that these state delegations would vote for Donald Trump:

Alabama	Kentucky	South Carolina
Arizona	Louisiana	South Dakota
Arkansas	Mississippi	Tennessee
Florida	Missouri	Texas
Georgia	Montana	Utah
Idaho	Nebraska	West Virginia
Indiana	North Dakota	Wisconsin
Iowa	Ohio	Wyoming
Kansas	Oklahoma	

And these state delegations would vote for Harris:

Alaska	Maryland	Oregon
California	Massachusetts	Pennsylvania
Colorado	Michigan	Rhode Island
Connecticut	Nevada	Vermont
Delaware	New Hampshire	Virginia
Hawaii	New Jersey	Washington
Illinois	New Mexico	
Maine	New York	

As stated earlier, Minnesota and North Carolina would both have to cast null votes.

As I look at the 27 House races the [Cook Report](#) classifies as “toss-up” next Tuesday, I see only two that could make a difference in the contingent election: a win by Republican Laurie Buckhout in NC-01 over incumbent Democrat Don Davis would break the tie in the North

Carolina delegation and give Donald Trump one extra vote over the 26 he would need. A win by Republican Joe Teirab in MN-02 over incumbent Democrat Angie Craig would likewise give Republicans a majority within the Minnesota delegation and boost Trump to a two-vote margin. The other toss-up races, while they might indeed give Democrats a majority of House *seats* overall, as some predict, and thus control of the House, they would not change any other internal delegation majorities.

The other possible change to the contingent election results would be if Republicans take control of the Senate, as they seem likely to do (forecast by some to be as much as 55-45); in that case the Vice-Presidency should go to JD Vance.

Now do you see why House and Senate races are equally important in light of a close Presidential race?

Conclusion: The contingent election is a “wild card” in any close presidential race; we ignore at our peril the impact congressional races could have.

For further reading:

[Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis](#) – Congressional Research Service

[Contingent Election](#) – Wikipedia

[Makeup of the current \(118th\) Congress](#)

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¹ <https://constitutioncenter.org/the-constitution/full-text>.