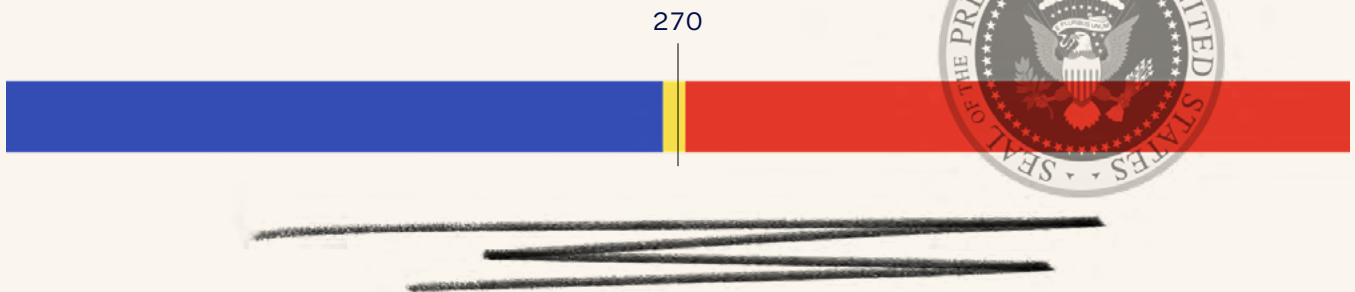




THE RISK OF A CONTINGENT ELECTION

Hidden Dangers in the 2024 Race
for the White House



United to Protect Democracy

SEPTEMBER 2023

THE RISK OF A CONTINGENT ELECTION

By winning even a few electors in the 2024 presidential election, a third-party ticket like the one proposed by the political organization No Labels could prevent any candidate from securing an Electoral College majority. This would trigger a **contingent election** in January 2025, which is the process by which Congress, not the voters, selects the president and vice president. At every point in the process, there are unsettled procedural and legal questions that could invite congressional abuse, gridlock, and delay. Given the high stakes, both Democrats and Republicans would face strong incentives to play hardball—accusations of an illegitimate process and a prolonged presidential vacancy are among several foreseeable and disconcerting consequences. And there is a real chance that, at the end of the process, candidates who decisively lose at the ballot box and in the Electoral College could ascend to the highest offices in the land.

There is an urgent need for reform to make our politics more representative of and responsive to the diverse views of the American electorate. Yet, any effort must account for its collateral consequences. If No Labels falls short of completing the biggest upset in U.S. political history, a contingent election is possible—and the risk of chaos and crisis is dangerously high.

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INTRODUCTION

Ensuring that power changes hands in accordance with electoral outcomes is the cornerstone of democracy. But in recent years, this fundamental principle of democratic self-governance has come under siege. Leaders across the political spectrum have started to recognize the threat, and in 2022 Senators Joe Manchin (D-WV) and Susan Collins (R-ME) led a bipartisan effort to [reform](#) the rules governing the process of casting and counting Electoral College votes for the presidency. By addressing key legal ambiguities central to the effort to overturn the 2020 election, the new law seeks to [protect](#) the will of the voters and the peaceful transfer of power in 2024 and beyond.

At the same time, the rules governing presidential elections remain imperfect and vulnerable to abuse. In the current election cycle, one foreseeable threat to the health and stability of U.S. democracy is beginning to emerge as a real possibility: a **contingent election**, which is the process by which the result of the presidential election is not determined by the voters, but by Congress. This process is triggered if no candidate secures a majority of appointed electors in the Electoral College—a serious possibility if the political organization No Labels follows through on its [tentative plan](#) to run a third-party presidential ticket in 2024. In fact, No Labels has [explicitly highlighted](#) a contingent election as a potential path to the White House.

A contingent election could be triggered by **any third party** winning electors and preventing a majority in the Electoral College. As of September 2023, No Labels is the only group organizing to field a third party ticket that has a plausible chance of winning electors and forcing a contingent election.

Unlike many other threats to our democracy, this one is entirely avoidable. There is [widespread agreement](#) that the chances of a No Labels ticket winning an Electoral College majority are [extremely low](#), and No Labels supporters privately [acknowledge](#) as much. But a No Labels victory in one or several states is plausible, and just a handful of electoral votes might be enough to deprive any candidate of a majority, setting in motion the first contingent election in nearly two centuries. In that process, federal lawmakers would have sole discretion to select the president and vice president from among the leading candidates, regardless of the preferences of their constituents and the electorate writ large. A candidate could easily ascend to the presidency after finishing second (or third) in the Electoral College, losing popular vote, and lacking majority support among members of the House.

With so much at stake and few constitutional guardrails, procedural uncertainties could invite congressional abuse, gridlock, and delay on both sides of the aisle. In a closely divided Congress, a small handful of extremist lawmakers could be handed dangerous leverage, and each side would face strong incentives to maximize their advantage. Unstable outcomes, like a presidential vacancy, disputed line of succession, or the selection of political adversaries as president and vice president are plausible. While it's impossible to predict the precise impact of these stressors, they would no doubt introduce volatility and instability into our already-fragile democratic institutions. It is not difficult to imagine civic unrest, or worse, with an aggrieved faction believing that their candidate is being denied their rightful place in the White House. The potential for crisis is clear.

To be sure, the impulse behind the No Labels effort is understandable: our rigid two-party system is [exacerbating](#) polarization, rewarding extremism, and undermining moderating forces. Our democracy would be stronger

with more than two competitive parties, and voters in the center are particularly underserved by the binary status quo. Our politics should be more representative of and responsive to the diverse views of the electorate. Yet, there are ways to build real political power and give disaffected voters real choice at the ballot box; [fusion voting](#)—where third parties can exert real influence by cross-nominating candidates without creating the risk of a contingent election—is one [promising](#) alternative.

As No Labels considers whether to nominate a third-party ticket in 2024, it is important to understand the basics of the contingent election process; the realistic possibility that a No Labels ticket could trigger a contingent election in January 2025; and the potential consequences of a contingent election in today’s political environment. We discuss each of these issues below.

WHAT IS A CONTINGENT ELECTION?

The Constitution provides for the election of the president and vice president through the Electoral College, and its basic operation is well-known: every state has a number of electors equal to the total number of the state’s seats in the House and Senate; Washington D.C. has the same number of electors (3) as afforded to the smallest state; nearly every state allocates its electors on a winner-take-all basis based on the state’s popular vote;¹ electors cast their votes for their party’s pledged ticket; and the winners of the Electoral College become president and vice president.

Yet, simply winning the most votes in the Electoral College is itself not enough—the Constitution requires a **majority** in the Electoral College (today, 270 electors). For nearly two centuries, every Electoral College winner has passed the majority threshold, ensuring that the candidate prevailing in the Electoral College assumed the presidency. But a majority in the Electoral College isn’t inevitable. When there is an even number of electors—538 today—the top two candidates [could tie](#). Or, if a third candidate wins one or more electors, then the top candidate could have just a plurality. What then?

The Twelfth Amendment provides the fallback plan in this situation: the election is thrown to Congress, where the House selects the president, and the Senate selects the vice president. The constitutional rules for this process, known as a “[contingent election](#),” are as follows:

- A contingent election would be one of the first items of business by the newly elected Congress in early January 2025.
- House members choose the president among the three presidential candidates who received the most votes in the Electoral College. Rather than voting as individual members, House members vote as state delegations, where each state delegation gets a single vote and a candidate becomes president with the support of a majority (26) of state delegations.
- The Senate chooses the vice president among the two vice presidential candidates who received the most electors, and a candidate becomes vice president with support of a majority (51) of the Senate.
- Washington D.C., which has three electors in the Electoral College, does not vote in either House or Senate proceedings.²

¹ Only two states, Maine and Nebraska, allocate their electoral votes through an alternate method, awarding two electors to the winner of the popular vote statewide and one elector to the popular vote winner in each congressional district.

² Ratified in 1961, the 23rd Amendment for the first time gave Washington, D.C. a role in the presidential election by authorizing it to appoint the same number of electors to the Electoral College as the least populous state. However, the amendment did not provide for the District to have any role or representation in a contingent election.

- If the House fails to select a president by January 20th, the vice president-elect serves as the acting president until a candidate wins the support of 26 state delegations in the House.
- If the Senate fails to select a vice president-elect by January 20th and the House has still not selected a president, then the next eligible person in the presidential line of succession serves as acting president until either of these impasses are resolved.

Since ratification of the Twelfth Amendment in 1804, this process has been triggered only twice.³ In 1824, Andrew Jackson won the Electoral College (and popular vote) over three other candidates, but fell short of a majority. In the House's contingent election, runner-up John Quincy Adams was selected as the nation's sixth president with support of several states that had originally voted for either Jackson or House Speaker Henry Clay (whose fourth-place finish eliminated him from consideration in the contingent election). Jackson leveraged widespread public frustration with his congressional defeat into a populist movement that delivered him a landslide victory in his 1828 rematch with Adams.

In 1836, incumbent Vice President Martin Van Buren won the presidency with a majority in the Electoral College, but Virginia's electors defected on the vice presidential vote and deprived Van Buren's running mate Richard M. Johnson of a majority in the Electoral College. The matter then went to the Senate, where a large Democratic majority selected Johnson as vice president.

Apart from the parameters set forth in the Constitution, there are no federal laws setting forth the specific congressional procedures for a contingent election. In the House, a majority of members would have to adopt a special rule at the onset of the new Congress establishing the procedures for selecting the president. In that rule, several crucial decisions would need to be addressed, including setting the quorum requirements within state delegations; identifying a process and threshold for a state delegation to register a decision for a candidate (e.g., plurality, majority, or supermajority); and determining the treatment of a state's vote when no candidate clears that threshold.⁴

In the Senate, the process would be governed by the chamber's [standing rules](#), which can only be set aside with the unanimous consent of all 100 senators. Under the standing rules, the only way to cut off debate on a matter when there is an objection is to invoke cloture, requiring a three-fifths vote (usually 60 senators). If the Senate was unable to proceed under the chamber's existing rules, a majority could take the rarely-used and contentious step of lowering the vote threshold to defeat a filibuster on a contingent election by invoking the so-called "nuclear option," changing the rules to allow the chamber to cut off debate with a simple majority.⁵

³ In 1948, the U.S. narrowly avoided a contingent election after the breakaway Dixiecrat ticket won several states in the South. If 12,000 more voters in California and Ohio had instead supported Dewey, Truman would have fallen short of an Electoral College majority, setting in motion a contingent election. A recent [Politico Magazine essay](#) by Jeff Greenfield discusses how that likely would have produced "a constitutional crisis and an episode that would have thrown into doubt Americans' sense that their electoral system worked."

⁴ In 1825, the House created a select committee comprised of one member from each state that drafted rules for the contingent election. For more details on the 1825 rules, see Volume III of [Hinds' Precedents of the House of Representatives](#) at pages 292-293.

⁵ In only two situations has the Senate invoked the nuclear option to lower the vote threshold needed to overcome a filibuster: in 2013, to allow a simple majority to end debate on all nominations except for the Supreme Court, and in 2017, to remove the Supreme Court exception.

IS A CONTINGENT ELECTION REALLY POSSIBLE?

If No Labels runs a third-party ticket in 2024, there is a realistic possibility that no presidential candidate will secure a majority in the Electoral College. 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 many other states. Individuals widely viewed as possible No Labels nominees—Senator Bill Cassidy (R-LA), Senator Joe Manchin (D-WV), Senator Krysten Sinema (I-AZ), Governor Chris Sununu (R-NH), former Governor Larry Hogan (R-MD), and former Governor Jon Huntsman (R-UT)—are prominent public figures whose moderate politics could appeal to a meaningful number of voters. No Labels has raised a substantial sum of money and has the capacity and infrastructure to continue to raise considerable sums to support an actual campaign.

To be clear, a No Labels **majority** in the Electoral College is highly improbable. A substantial amount of work remains for No Labels to secure ballot access in a sufficient number of states to provide even a theoretical path to an Electoral College majority. No third party presidential candidate in U.S. history has come remotely close to winning;⁶ indeed, it has been over 50 years since a third party candidate won even a single vote in the Electoral College. No Labels leaders have **implicitly acknowledged** these challenges by **openly admitting** that they are preparing for a scenario in which their ticket wins just enough electors to prevent other candidates from securing an Electoral College majority.

They suggest their electors **could play kingmaker** in such a scenario, but we discuss below why that is improbable.

With the presidential race expected to be **highly competitive**, a No Labels victory in even one state could be enough to force a contingent election, and one or a few scattered victories is not out of the question. For example, Alaska and Maine have proudly independent political cultures that often defy national political conventions. Both states use versions of ranked-choice voting in presidential elections, which could further increase the likelihood of a No Labels victory, as voters who might be reluctant to cast their only vote for a third-party ticket on an ordinary ballot can instead rank both the third-party and their preferred major party option.⁷ Maine separately allocates electors to the candidates who win each of the state's congressional districts, as does Nebraska, meaning No Labels would not need to prevail statewide to win an elector in either state. In New Hampshire, independent politics have **long been dominant**. Utah stands out as another outlier, where a first-time independent candidate (Evan McMullin) won over 20 percent of the vote in the 2016 presidential election. Former Utah Governor Huntsman could provide a unique local advantage there, as could other potential nominees in their respective home states.⁸

The following maps illustrate several plausible scenarios where a No Label victory in one or several of these places could force a contingent election:

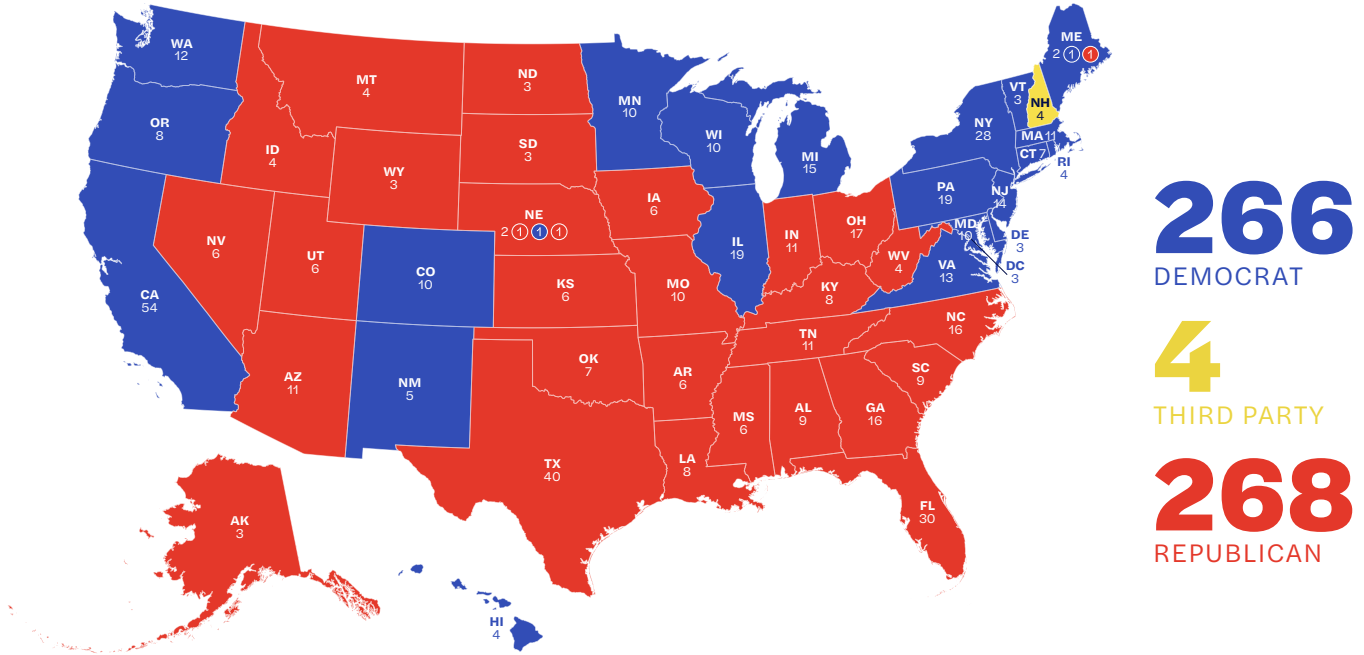
⁶ The highest-performing third-party candidate in the modern era was the Reform Party's Ross Perot, who earned nearly 19 percent of the popular vote in 1992, but not a single elector. The last third-party candidate to win any states (and thus, any electors), was the American Independent Party's George Wallace, who in 1968 won five states and 46 electors in the Deep South on a segregationist platform. The most successful third-party effort of all time was Teddy Roosevelt in 1912, who ran on the Progressive Party ticket and earned 88 electors—splitting the Republican vote with Howard Taft and losing in a landslide to Democrat Woodrow Wilson and his 435 electors.

⁷ Because voters can list multiple preferences, ranked-choice voting in theory reduces the chance that a third-party ticket would be a “spoiler” and lead to the election of the major party ticket that was the least preferred choice for a majority of the electorate.

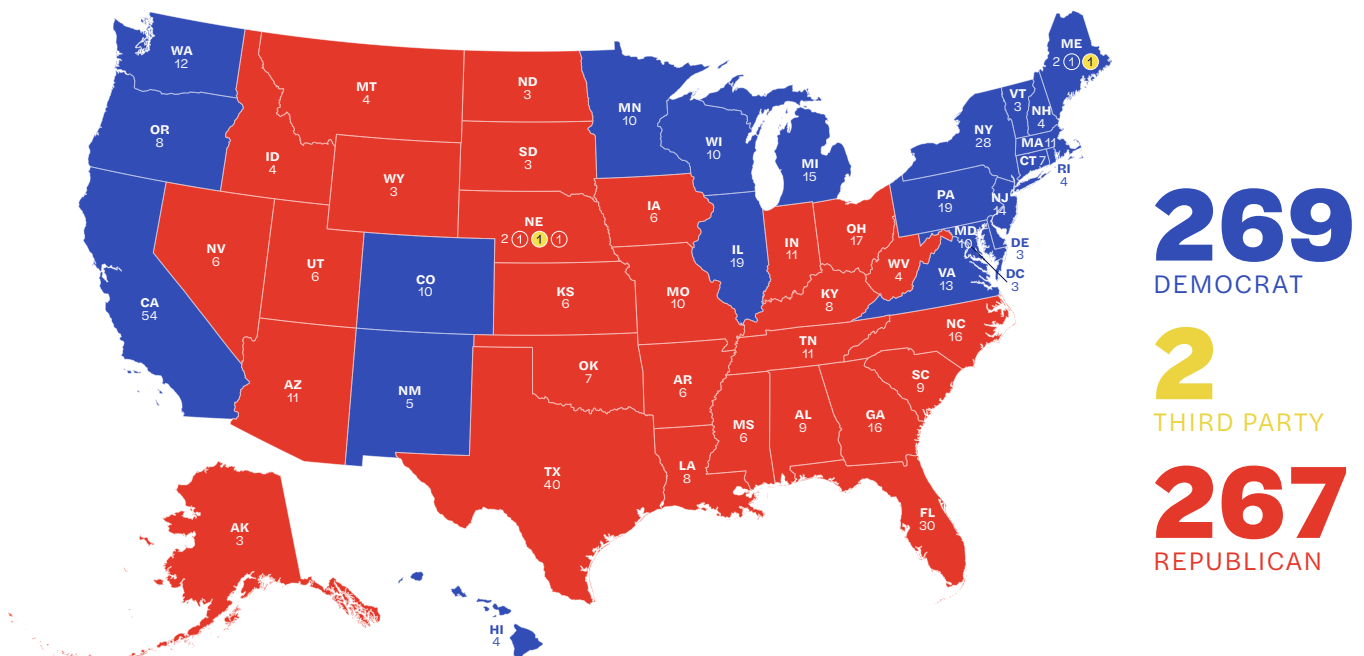
⁸ In 1992, Ross Perot's **best performances** were in Maine (30.4 percent of statewide vote, finished second), Alaska (28.4 percent), and Utah (27.3 percent, finished second). He also secured nearly a quarter of the vote in both Nebraska and New Hampshire.

HOW NO CANDIDATE GETS TO 270

THIRD PARTY WINS NEW HAMPSHIRE



THIRD PARTY WINS MAINE CD-2 AND NEBRASKA CD-2



WHAT ABOUT “FAITHLESS ELECTORS”?

An elector is “faithless” if they do not cast their vote in the Electoral College for the candidate they pledged to support before the presidential election. While such votes have never changed the outcome in the Electoral College, there has been [at least one](#) faithless elector in more than half of all presidential elections since 1948, with a peak of [seven](#) in 2016. The relative infrequency is unsurprising, given that electors are typically leaders and other prominent figures loyal to the party.

There is no federal law or constitutional provision that prohibits faithless voting. However, in roughly two-thirds of states (representing roughly two-thirds of electors), [state law](#) explicitly requires that electors support their pledged candidates. In some of these, state law makes it impossible for an elector to cast a vote for someone other than their pledged candidate by automatically canceling such votes or replacing the elector. In others, civil or criminal penalties are imposed on electors who break their pledge. In 2020, the U.S. Supreme Court [confirmed](#) that states have the constitutional authority to require and enforce faithful voting. It’s possible that state laws lacking explicit enforcement provisions could be used to prevent an elector from casting a faithless vote, though this remains an [unsettled question](#).

In the other one-third of states, electors are not bound by state statute to support their pledged candidate. It is unclear whether anyone—i.e., the state government, individual voters, a candidate—could intervene to prevent electors in these states from casting faithless votes. [Federal law](#) requires that electors cast their votes “in accordance with the laws of the State enacted prior to election day”; barring an elector from casting a faithless vote in the absence of a pre-existing state law prohibition would arguably conflict with this requirement. On the other hand,

at least one prominent legal scholar has [suggested](#) that states might have the inherent constitutional authority to prevent faithless voting.

These rules could play a major role in 2024. If No Labels wins some, but not enough electors to deny the leading candidate a majority in the Electoral College, their modest success could shrink the margin of victory such that any faithless votes could trigger a contingent election. With so much at stake, there could be enormous pressure on individual electors and a meaningful risk of improper influence, coercion, and other foreseeable abuses. Depending on the state, there could be substantial uncertainty as to whether and how an elector could be stopped from casting a faithless vote.

Even assuming electors in some states could successfully cast a faithless vote, the mathematical options for piecing together a negotiated majority during the Electoral College are limited, and the politically plausible options are even more circumscribed. This is particularly true given that the states where No Labels might have the best chance of winning electors are among the most restrictive: Alaska and Maine require electors to support their pledged candidate, and Nebraska and Utah make it impossible for electors to cast a faithless vote. Thus, even if the No Labels ticket wanted to encourage faithless votes to either help their own or a preferred competitor and avoid a contingent election, it could be very difficult for them to do so.



WHAT MAKES A CONTINGENT ELECTION SO CONCERNING TODAY?

If no candidate wins a majority in the Electoral College, the selection of the president by a majority of state delegations in the House would comply with the Twelfth Amendment. As would the selection of the vice president by a majority of senators. However, just because a procedure is constitutional does not mean we should invite its use.

No Labels is not wrong to note that millions of voters believe our politics should better reflect the diverse views of the American people and that our elected officials should be more accountable to their constituents. Yet, a contingent election in today's political climate could do the opposite—empowering a minority of federal lawmakers to ignore the clear preferences of the American people. On their own, profoundly undemocratic outcomes would likely have destabilizing socio-political and [economic](#) effects. But the absence of clear rules and procedures, combined with the extraordinary stakes, could invite congressional abuse and present a serious risk of systemic crisis.

A Contingent Election Could Produce Chaos and Crisis

At the center of the subversive efforts preceding and culminating on January 6, 2021 was a nineteenth century law governing the process of casting and counting electoral votes, the [Electoral Count Act](#). Those unwilling to accept that Joe Biden and Kamala Harris were victorious seized upon antiquated language in the statute in the hopes of reversing the outcome. Given the longstanding tradition of losing candidates peacefully conceding defeat in presidential elections, no one had previously sought to abuse the statute to such a degree. Fortunately, the vice president and majorities in the House and Senate understood that this law and the Constitution required them to heed the will of the voters,

faithfully count the electoral votes cast, and certify the election. To safeguard against some of the particular vulnerabilities exposed in January 2021, Congress passed the [Electoral Count Reform Act of 2022](#) to modernize and clarify the rules for casting and counting Electoral College votes.

Unlike the updated procedures for counting votes cast by the Electoral College, there are no federal laws establishing specific rules for a contingent election. There are some constitutional guardrails, but many of the anticipated issues would quickly bring us into uncharted legal territory. The transition of power would turn upon the interpretation and application of a constitutional amendment that has been all but ignored for nearly two centuries and that leaves open a host of fundamental questions.

Given the high stakes, both Democrats and Republicans would have strong incentives to use all possible leverage to undermine the other side in the hopes of securing victory—or, at the very least, forestalling defeat. The prospects for self-restraint are dim when many voters and elected officials view the presidential election in [existential terms](#) and question the fundamental legitimacy of the other side's nominee.

In today's political climate, a contingent election could produce multiple crisis risks, opportunities for abuse, and flash points triggering instability and chaos. As we know from recent history, these conditions can open the door for bad actors to abuse the process and stoke civil unrest—or even violence. Even those acting in the name of democracy could, despite their best intentions, make things worse.

History does not repeat itself, but it often rhymes. If no candidate emerges from the November 2024 election with an Electoral College majority, it is not difficult to imagine the disconcerting echoes of January 6th when

the newly elected Congress convenes in January 2025. Some of the foreseeable risks include:

Faithless electors and court challenges could consume the process and change the results: If no candidate has secured a majority of pledged electors after the November election, and the anticipated winner of a contingent election is not the candidate preferred by a majority of electors, some electors—even those from states with faithless elector laws—could attempt to cast faithless votes to give a preferred candidate an Electoral College majority. Not only could that lead to contentious and potentially determinative court challenges, but attempts to cast faithless votes—whether successful or thwarted—could trigger objections when Congress convenes to count electoral votes, complicating that process and potentially inviting attempts to abuse it.

Narrow margins in the House could empower a small handful of extremist lawmakers: A contingent election would not happen in a vacuum—it would be inextricably linked to the speakership election on January 3, 2025 and the [joint session](#) of Congress to count electoral votes on January 6. Only once these steps are complete may either chamber start its respective contingent election, meaning that delays in these proceedings would shorten the time available to select a president and vice president before triggering the line of succession on Inauguration Day.

And yet, the shadow of a forthcoming contingent election would itself increase the risk that the fights over the speakership and counting electoral votes are contentious, drawn-out affairs. With the majority in the House expected to be [razor-thin](#) in the 119th Congress, a small group of ideologically extreme lawmakers could [once again](#) have enormous leverage in selecting a speaker. Given the high stakes, some members-elect might be particularly inclined to demand concessions relating to the administration of the contingent election (and possibly the [joint session](#)) in exchange for their vote for speaker. There is already a latent risk that the House majority will adopt self-serving rules that undermine the perceived legitimacy of the contingent election process—but giving a handful

of lawmakers far outside of the political mainstream effective veto power over whether and how the process plays out could yield profoundly concerning outcomes.

Further, even a modest delay in the election of a House speaker—i.e., three days—would itself [jeopardize](#) the timely counting of electoral votes on January 6. And a protracted stalemate approaching January 20 could create additional [uncertainty around presidential succession](#), with the speaker being first in line under federal law.

The presidency could hinge on a single House seat: Which party controls the House has important consequences, even in ordinary times. But in this context, the stakes are monumental: majority control could allow a party to adopt contingent election rules that favor the selection of a preferred candidate, or at least prevent the selection of an opponent in order to trigger a favorable line of succession. Republicans currently have a slim majority of seats in the 118th Congress, but [a number of factors](#) suggest Democrats could further shrink that margin or retake the majority in 2024. With a historically thin margin likely determining control of the House in the 119th Congress, every seat could matter.

Individual seats could also have tremendous importance in determining whether a state delegation can register sufficient support for a candidate—and whether that candidate can secure a 26-state majority. Some states, like California, Texas, Illinois, and Florida, are so heavily weighted with members from one party to eliminate any real doubt as to their vote, but the margins are much closer elsewhere. Absent a substantial change from the status quo—where Republicans have a majority in 26 states and Democrats have a majority in 22—the path for any candidate to secure 26 states could be tenuous. A single member could be the difference between a delegation registering support for one candidate or another, or deadlocking in a tie. Moving one or two states to a different column could make all the difference.

Thus, the votes of one or several individuals in early January 2025 could have profound consequences for selecting our next president. As a result, the outcomes in close

congressional races will take on outsized importance, and it would be unsurprising if pivotal races were [formally contested](#) in the House. And there is always the risk that illness, incapacity, and death could play a factor too.

The House majority could manipulate voting rules or ensure a stalemate: While the Twelfth Amendment requires the House to vote by state delegation, it leaves unanswered fundamental questions: what quorum is required within each delegation to reach a decision? Are delegation results determined by a plurality, majority, or supermajority of members? What happens when a state's delegation fails to meet the prescribed threshold? To address these questions, the House would have to adopt a rule to govern the contingent election process. With the voting preferences of most, if not nearly all, lawmakers known at the onset of the election, there will be powerful incentives for the party with a majority of seats in the House to adopt procedures that favor their desired outcomes. This dynamic would be especially pronounced if the other party has an apparent state delegation advantage.

If there is not a viable path for the party with a House majority to design the rules to deliver their preferred candidate with an outright victory, there might be strong pressure to instead delay proceedings or adopt rules that at least ensure their opponent cannot secure a majority of states, potentially leaving the presidency vacant and triggering the line of succession.

A presidential candidate could die, with no way to replace them: Under the Twelfth Amendment, the House may only select as president someone who finished in the top three in the Electoral College. If one of those candidates dies after the Electoral College meets, there is currently [no way](#) to substitute an alternative choice from their party (their running mate, or otherwise). Thus, an untimely death could categorically prevent a majority of supportive House delegations from giving the presidency to the party that won a plurality of electors. This is the only stage in the presidential election process without a method to replace a deceased candidate. (The Twentieth

Amendment contemplates this scenario, authorizing Congress to pass a law to fill this gap, but to date, Congress has [failed to act](#).) While there is, unfortunately, a risk of political violence or assassination during any presidential campaign, the threat could be pronounced in this scenario, given that a candidate's untimely death could ensure their party was excluded from the White House.

A Senate filibuster could lead to a vice-presidential vacancy: Given the possibility of House inaction or deadlock triggering a presidential vacancy, the Senate's role in selecting the vice president could have outsized importance. In the absence of a unanimous consent agreement, the Senate's standing rules would apply to the contingent election process—meaning that 60 senators would need to agree to cut off debate and proceed to the vote selecting the vice president. With neither party likely to control anywhere near 60 seats in the 119th Congress, substantial bipartisan support would likely be needed to defeat a filibuster. If this option fails, a majority of senators could invoke the “nuclear option,” amending the rules to allow a simple majority to cut off debate in this context. Absent the Senate being able to act, the vice presidency would remain vacant.

There could be uncertainty over presidential succession: If the presidency and vice presidency remain vacant on Inauguration Day, the speaker of the House would be next in line to serve as acting president under the [Presidential Succession Act](#), followed by the President Pro Tempore of the Senate. However, that law would require either person to first resign, giving up their leadership position and seat in Congress, before they could be eligible to serve as acting president. If it is unclear how long the presidential vacancy will last, these individuals may decline a potentially brief term in the White House and instead retain their prominent positions in Congress. If both declined, the highest ranking qualified cabinet member of the prior administration would take over instead.

If a vacancy were to arise during a presidential term, there is an [unsettled debate](#) as to whether these congressional leaders are constitutionally eligible to

serve as acting president under Article II. In this context, where there is a risk of vacancy on Inauguration Day, the [prevailing view](#) among scholars is that these individuals would be eligible to serve as acting president under the Twentieth Amendment. However, legal scholar Scott Anderson [notes](#) that “some adherents to a strict vision of the separation of powers have persisted in the view that the speaker of the House and president pro tempore can never serve as acting president.” If this distinction were to determine which party controls the White House, even temporarily, this could become a contested and consequential issue.

Moreover, the prospects of a favorable line of succession could provide incentives for some lawmakers to prolong or indefinitely postpone the contingent election selection process. While the Twelfth Amendment requires that the House select the president “immediately” after the joint congressional session counting electoral votes, it is unclear what this requirement would mean in practice and whether a determined House majority could nonetheless use procedural devices to forestall a final decision. In the Senate, the constitutional text imposes no comparable timing requirement. And, of course, an entrenched stalemate—where no candidate can secure 26 states in the House or 51 votes in the Senate—is possible.

The vice president could cast a tiebreaking vote to elect themselves: In the event of a tie vote in the Senate, it is an open and unresolved question if the vice president, acting in their capacity as president of the Senate, has the authority to cast a tie breaking vote. In January 2025, could Vice President Harris cast the decisive vote between herself and her Republican opponent? It is unclear.

The House and Senate could select political adversaries as president and vice president: If there is divided control of Congress, the House and Senate could select political adversaries who are unwilling to work together. This situation was destabilizing both times it happened in American history, in 1796 and 1800, inspiring ratification of the Twelfth Amendment to minimize the chances of it happening again.

The scope of judicial review is unknown: It is unclear to what extent and through what means the relevant constitutional requirements are enforceable. It is also an open question as to what role federal courts could play in resolving disputed procedures or outcomes. Under what circumstances would the U.S. Supreme Court try to resolve a dispute between co-equal branches? What about disputes within one chamber of Congress, or between the House and Senate? The Electoral Count Reform Act of 2022 clarified the role for federal courts in connection with the casting and counting of electoral votes, but in the context of a contingent election, many open questions remain. Thus, there is not just uncertainty on the substance of key legal issues—but fundamental uncertainty as to which branch will have the final say.

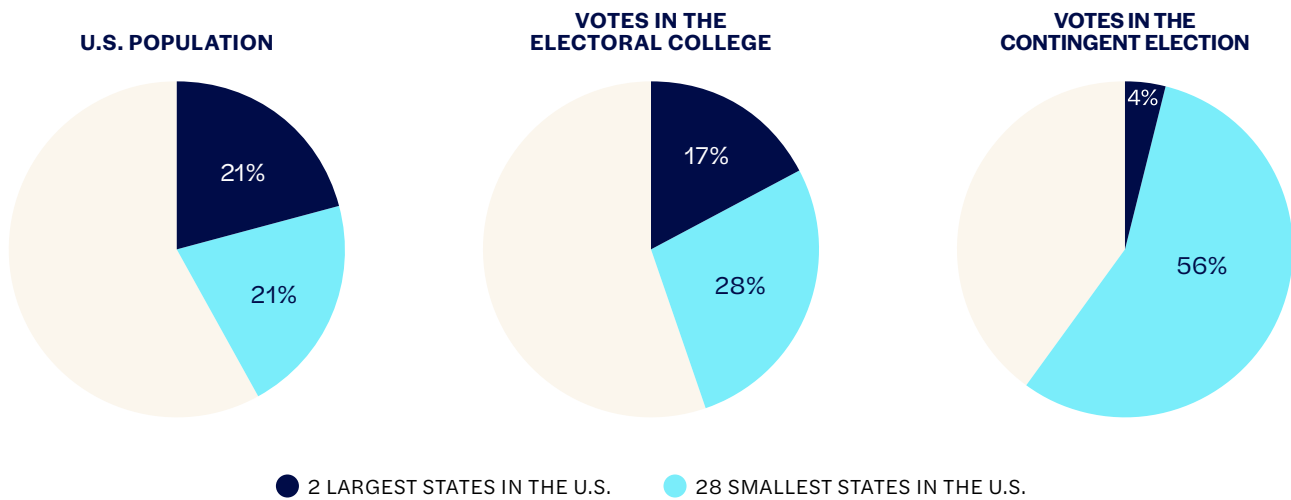


It is impossible to predict how political leaders and other key actors would behave in any of these circumstances. Recent experience has thrown into sharp relief the fragility of democratic norms and practices that we long took for granted—chief among them, the peaceful and lawful transition of power. We cannot know the full landscape of risks presented by a contingent election, but we can begin to appreciate its disruptive and destabilizing potential. The serious possibility that Congress might, at the end of this process, elevate to the White House a candidate who lost the presidential election further amplifies the risk.

A Contingent Election Could Disregard the Will of the Voters

Even if Congress does succeed in selecting a president and vice president in January 2025, the final outcomes could raise serious concerns around democratic legitimacy and stability. Why? Because Congress has no legal obligation to defer to the preferences of the electorate, meaning that the leading candidate could lose the presidency to a competitor who lost decisively in the Electoral College (and popular vote). This was the outcome in 1825, the only presidential contingent election since the adoption of the Twelfth Amendment.

GEOGRAPHY DETERMINES VOTING POWER IN A CONTINGENT ELECTION



At the state level, an electorate’s presidential preference often does not align with the partisan makeup of its congressional delegation.⁹ Arizona, Georgia, and Wisconsin all voted for Joe Biden in 2020, but each state’s House delegation has a Republican supermajority. Flipping just one Democratic seat in Michigan, Virginia, or Pennsylvania would switch each state’s House delegation to Republican control, which is plausible even if the Democratic presidential nominee wins each state again in 2024. Assuming most House members would support their party’s nominee in a contingent election, several state delegations could vote for a candidate opposed by the state’s voters just two months prior.¹⁰

In a contingent election, where a voter lives would determine the relative power of their vote, disenfranchising some voters entirely and all but silencing millions more. In the Electoral College, voters in large states have slightly less relative power than their share of the U.S. population would suggest. In a contingent election, this imbalance becomes extraordinary, with each state—regardless of size—given just one vote in the House. For example, the combined population of the two most populous states (roughly 69

million residents in California and Texas) is nearly equal to the 28 least populous states put together.¹¹ The two largest states control 17 percent of votes in the Electoral College (94 out of 538), but they have only 4 percent of the votes in a contingent election. By contrast, the twenty-eight smallest states control nearly 28 percent of votes in the Electoral College (148)—yet, they control 56 percent of the votes in a contingent election.

This problem is even more pronounced for the nearly 700,000 residents of Washington, D.C., who control three electors in the Electoral College but are afforded no representation in a contingent election. And in states whose congressional delegations are unable to reach an electoral decision under the House’s rule governing the contingent election, those states might not be able to register support for any candidate. For example, the House rules adopted in 1825 required majority support for a candidate within a state delegation; absent a majority for any candidate, a state would cast a null vote.¹² If a similar rule were adopted in 2025, millions of voters could be left without a voice in this process: Minnesota’s delegation is evenly split between Democrats and Republicans and is expected to remain so in the 119th

⁹ Reasons for this phenomenon include, but are not limited to, ticket-splitting; gerrymandering; geographic self-sorting; and the *inherently non-proportional* effects of using single-member districts for House elections.

¹⁰ This dynamic occurred in 1825: Adams attained a delegation majority with the support of several states (Illinois, Maryland, and Louisiana) that had voted for Jackson in the Electoral College.

¹¹ The 28 least populous states are: Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wyoming.

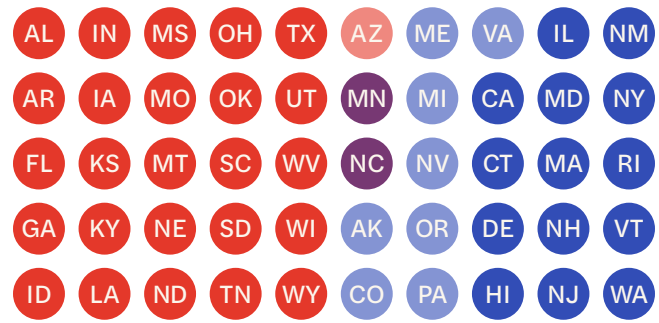
¹² Under the Twelfth Amendment, “a majority of all the states shall be necessary” for the House to select a president. The threshold for victory is always twenty-six states, regardless of whether some states are unable to register a decision for any candidate.

Congress. Competitive races in 2024 could easily divide the delegations in Colorado, Maine, Nevada, and New Hampshire, and a single abstention or absence could force many other states into a tie.¹³

The aggregated effects are no less troubling. Voters could deliver a clear plurality of the Electoral College to one candidate **and** a clear majority to that candidate’s party in the House—but a losing candidate from another party could still be made president. This risk is particularly acute in the present day, as the Republican Party has held a notable advantage in state delegations regardless of which party controls a majority of seats in the House. Even if Democrats retake control of the House in the 2024 elections, it remains **very likely** that the Republican Party will retain (and potentially expand) their majority of state delegations—providing a crucial, and potentially dispositive, edge in the event of a contingent election.

While Congress is not constitutionally required to respect the will of the voters in this process, political leaders on all sides will no doubt try to frame their preferred

HOUSE DELEGATIONS BY PARTY



Purple states currently have an even split in their delegation. Light blue/red states have at least one race in 2024 deemed “competitive” by the Cook Political Report as of August 2023, where flipping that seat would move the delegation to an even split or give the other party a delegation majority in the 119th Congress.

outcome as democratically legitimate. For a candidate who cannot rest upon the actual vote totals, there would be a clear incentive to question the legitimacy of those results, and suggest that, but for fraud, interference, or other abuses, they would have emerged victorious. A similar conspiracy in 2020 inspired the submission of “**fake electors**” and threatened the peaceful transition of power for the first time in U.S. history.

CONCLUSION

Make no mistake: our political system remains deeply flawed, and we should embrace reforms to empower underrepresented voices. But efforts to challenge the status quo cannot ignore the reality of the electoral system as it exists today. That is why our organization **advocates for fusion voting and structural electoral reforms** that would allow third parties to gain real power and exert constructive influence in our elections.

In 2024, the odds of a third-party ticket securing a majority in the Electoral College are, by any estimation, a long shot. If No Labels falls short of pulling off the biggest upset in U.S. political history, we could all pay the price. Some threats to the health and stability of our democracy are difficult to foresee. A contingent election and the risks it would pose, however, are both apparent and entirely avoidable.

¹³ North Carolina currently has an equal split in its delegation, but the use of new congressional maps are expected to produce a clear Republican majority after the 2024 elections.