

August 2023

## **The Constitution's indirect process of electing presidents might provide a way to bypass incompetent frontrunners produced by the major party duopoly**

Karl Polzer – [Center on Capital & Social Equity](#)

Democrats and Republicans seem to agree on one thing: the other party's frontrunner in the 2024 presidential race is not [mentally](#) or [morally](#) fit to hold the office. They might be on the something – even more so next year as time takes its toll on aging party leaders.

American voters might be wondering whether these two old men are best that the major political parties can offer to lead the country. Would you trust either [Joe Biden](#) or [Donald Trump](#) to handle your finances, run your business, or make major decisions for your family? What about keeping the government in business? Navigating a more dangerous world? Knowing when to declare war?

The Founding Fathers knew something like this could happen. The delegates who hammered out the U.S. Constitution distrusted both the potential influence of political parties and the whims of pure democracy. The electoral college system they developed embodied a [compromise](#) between electing a president by popular vote or by legislators. Choosing a chief executive was too important to result from a popular vote alone.

U.S. voters still elect the president and vice president indirectly through what is collectively called the electoral college. They vote in their states and the District of Columbia for presidential electors pledged to the candidates. Article II, Section 1 of the Constitution assigns to each state a number of electors equal to the total of the state's senators and members of the House of Representatives (538 at present, including three electors for the District of Columbia). The presidential candidate with the highest national vote count usually wins the most electoral votes. However, in four presidential elections— 1876, 1888, 2000, and 2016— candidates were elected who won a majority of electoral votes, but fewer popular votes than their principal opponents.

Forty-eight states use a "winner-take-all" method. Whichever party's candidate receives the most votes sends its slate of electors to cast all allotted votes for president and vice president on behalf of the state. Two states (Maine and Nebraska) use a "district" method. One electoral vote is awarded to the presidential candidate who wins the popular vote in each congressional district and two electoral votes are awarded to the candidates receiving the most votes statewide. Under the "district" method, the total number of electoral votes may be split among candidates.

### **Absent an electoral college majority, Congress decides**

While electors today have far less latitude in how to vote than two centuries ago, enough wiggle room remains to influence a close election or possibly bar candidates from winning a needed majority of electoral votes. The Twelfth Amendment requires that candidates for president and vice president each win a **majority** of the electoral votes cast for their office to be elected.

If no candidate receives at least 270 electoral votes (a majority), then the president is elected by the House of Representatives and the vice president by the Senate in a process known as "[contingent election](#)." This process creates a narrow opportunity to bypass establishment candidates with the most votes.

Although a contingent election has been held only once each for president and vice president, failure to win an electoral college majority is a potential outcome in any presidential election, according to the [Congressional Research Service \(CRS\)](#). "Some examples include an election closely contested by two major candidates, one in which one or more third-party or independent candidacies might win a portion of the electoral vote, or one involving defections by a significant number of so-called 'faithless' electors." It might be possible in 2024 should either or both parties fractionate in a tight race or if a strong third party emerges. What if the Republicans dumped Trump and he decided to run anyway? If Joe Manchin or other Democrats ran as independents?

Congress has conducted contingent elections twice, the first by the House following the 1824 presidential election in which four candidates split the electoral vote. The Senate elected the vice President in 1837 after no candidate for the second office received a majority of electoral votes in the 1836 election.

A contingent election would be held by the newly elected Congress immediately following the joint congressional session that counts and certifies electoral votes. The House would choose among the three candidates who received the most electoral votes (the Constitution originally specified five). Each state, regardless of population, would cast a single vote for president. A majority of state votes, 26 or more, is required to elect, and the House must vote “immediately” and “by ballot.” While there is precedent for how to proceed, the rules are not set in stone. A deadlocked House could result in the candidate with the third most electoral votes being chosen as a compromise.

In a contingent election, the Senate elects the vice president, choosing one of the two candidates who received the most electoral votes. It’s possible that the Senate could elect a vice president from a different party than the president chosen by the House.

Although the chances of disturbing the rhythm of the U.S. two-party system remain slim, a popular third party or independent candidacy has always had the potential to deny a major party ticket a majority in the electoral college. Such conditions have been present in four presidential elections since 1968, according to CRS scholar Thomas Neale. He adds: “Another possibility involved the contest over election results in Florida in the closely fought 2000 presidential election; the extended political struggle about which candidate won the state raised the possibility that its electoral votes might be challenged and excluded by Congress, an action that would have denied either candidate a majority of electoral votes, thus requiring contingent election. Under either of the scenarios cited above, the House and Senate could be called on to choose the President and Vice President in some future election.”

If the courts decide a close election, judges might notice that role of the electoral college and contingent elections in selecting a chief executive is laid out in the Constitution, which is silent on the role of [political parties](#) that currently dominate the process.

As to the leading candidates’ fitness to run the country, perhaps Biden and Trump are in better shape than many think. Then again, could we make it through four more years without White House architects being asked to install nursing or memory care facilities, psychiatric capacity, or technology to enforce house

confinement? If needed, doors that can't open from the inside could help prevent unintentional wandering or elopement by the next commander in chief.

Sources:

[Should the nation be concerned about Biden's cognitive abilities? | The Hill](#)

[Donald Trump surrenders in Atlanta in fourth criminal case brought against ex-president this year \(msn.com\)](#)

[Poll shows Americans worried about Biden & Trump's mental fitness ahead of 2024 : NPR](#)

[Bolton: Trump's not 'fit for office,' doesn't have 'competence to carry out the job' - ABC News \(go.com\)](#)

<https://guides.loc.gov/federalist-papers/full-text> - election of the President and Vice President - #68.

[Introduction - The Law of the Electoral College - Research Guides at Library of Congress \(loc.gov\)](#)

[U.S. Constitution | Constitution Annotated | Congress.gov | Library of Congress](#)

[Presidents and Vice Presidents: How They Are Elected \(thoughtco.com\)](#)

[Who Are The Electors In The Electoral College And How Are They Picked? : Biden Transition Updates : NPR](#)

[About the Electors | National Archives](#)

[The Electoral College: Options for Change and 117th Congress Proposals](#)

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

[The Stupid Party vs. the Evil Party \(msn.com\)](#)

