

The Peril That Lurks in Even Numbers

SELECTING THE PRESIDENT

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THE CONSTITUTION PROVIDES that if no candidate receives a majority in the electoral college balloting for President, the selection is relegated to the House of Representatives.¹ In recent years only candidates of the two major political parties have garnered votes in the electoral college. Assuming this pattern continues, recourse to the House because of the failure of either candidate to command an electoral college majority is most likely to come about on account of an electoral college tie.²

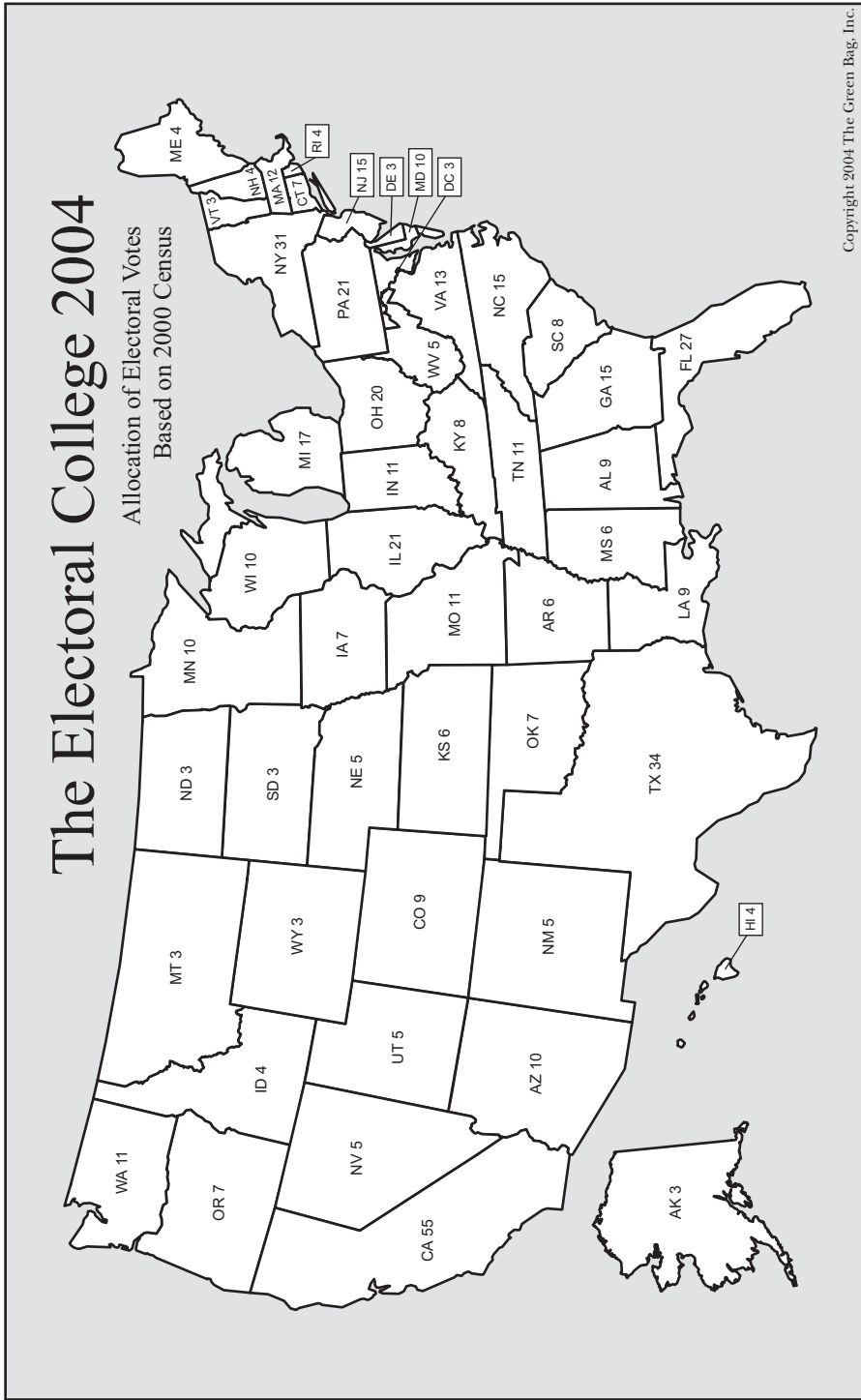
House selection of the President has not been required since 1824, when four different candidates garnered electoral votes. The only

time a tie necessitated recourse to the House was in 1800, and that was due to the use of a now-discarded procedure where electors voted for two persons, with no requirement that they specify which vote was for a presidential candidate and which for a vice-presidential candidate. In the 1800 election Thomas Jefferson and Aaron Burr were the selections of the nascent Democratic Party for President and Vice-President respectively. United by political party, the same group of electors cast ballots for both Jefferson and Burr, leading to the tie. There has in fact never been a tie between presidential candidates of separate political parties. Perhaps for

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¹ U.S. Const., Am. XII.

² The other possibility would be one or more abstentions. In the 2000 presidential election, for instance, one District of Columbia elector pledged to Gore abstained from voting. In that case, of course, it was already known that Bush commanded an electoral college majority. I return below to the possibility of an abstention, and of votes for candidates other than those of the two major parties.



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this reason, commentators seem to assume that these days a tie is a quite remote possibility.³ There has thus been little attention paid to the use of the contingent procedure for House selection of the President.

I am not so sanguine about the remoteness of the tie possibility. In the 2000 presidential election, 267 electors were pledged to Gore and 271 were pledged to Bush.⁴ If Florida with its 25 electoral votes had gone for Gore, and Pennsylvania with its 23 electoral votes had gone for Bush, there would have been an electoral vote tie, 269–269. The same would have been true if Tennessee with its eleven votes had gone for Gore, and Maine and New Mexico with a total of nine votes had gone for Bush, or if Arizona and Nevada with twelve votes had gone for Gore and Minnesota with ten had gone for Bush. Indeed, just by eyeballing the results and focusing on states where the popular vote totals were fairly close, it is possible to identify a dozen or more plausible possibilities for an electoral vote tie in the 2000 election.⁵

Of course, the 2000 election may have been an aberration. The more typical pattern has been for the popular vote winner also to win in the electoral college and by a greater percentage than his popular vote margin. But I wonder if it may be instead that we should

take the 2000 election as a warning sign for the future. The country is closely divided politically, not only in overall totals of popular sentiment, but in divisions among the states as well. This is reflected in the close divisions of the House and Senate, as well as in the 2000 election. It is also reflected in the recent pattern of presidential elections, in which the two major political parties have essentially alternated in winning the presidency.

Candidates for the presidency run with an electoral college strategy, essentially oblivious to popular vote totals. Due to technological advances, techniques of campaigning have become much more sophisticated in recent years. By definition the 2000 election represents our most recent – and fullest – experience with the application of new technology to an electoral college strategy. The result was a popular vote winner who lost the election in the electoral college. That has also been unusual over the years. The last time the electoral college victor clearly lost the nationwide popular vote was in 1888.⁶ Given modern techniques of campaigning, we might well expect divergence between the popular vote and electoral college “winners” to be more frequent. And we might also do well to pay serious attention to the possibility of an electoral college tie.

3 This is implicit, for instance, in Judith Best, *Weighing the Alternatives: Reform or Deform?* and Keith E. Whittington, *The Electoral College: A Modest Contribution*, both of which are contributions to *The Longest Night: Polemics and Perspectives on Election 2000* (Jacobson & Rosenfeld, eds. 2002).

4 One of the electors pledged to Gore did not vote for him, see note 2, *supra*, but I am assuming that she would have voted as pledged had her vote mattered. Note that if there would have been a tie with her vote, then she could have voted or not voted and the choice would still have been relegated to the House of Representatives. In neither case would either candidate have commanded the required majority of the electoral college.

5 Just a few other possibilities are switches in Ohio, New Hampshire and Pennsylvania, or Ohio, Nevada and Pennsylvania, or West Virginia and Vermont, or Arizona, Louisiana, Minnesota and New Mexico.

6 The 1960 election is also plausibly viewed as an instance where the popular vote winner lost in the electoral college balloting. See Lawrence D. Longley & Neal R. Peirce, *The Electoral College Primer 2000* at 46-59 (1999).

The point is not simply that the chances of a tie are real. The societal costs of a tie could be substantial, for the House contingent procedure is fraught with problems. In that House vote, each *state* has one vote. This means that states with less than twenty-three percent of the electoral votes (122 electoral votes, out of 538) – and a good deal smaller percentage of the popular vote – could select the President.⁷ This might cause anguish in the land, but it probably would not, for the winner would also have tied in the electoral college balloting. A second problem is that the District of Columbia, which does have electoral college votes by virtue of the Twenty-third Amendment, would have no say in the House procedure. Alas, outside of the District, that problem might not cause much anguish either. But real trouble does lurk in the further possibilities of ties in the House.

Under the House procedure, a *majority* of states is necessary to select a President. There are, of course, fifty states – an even number – and that poses the possibility of a tie. But even numbers and the possibility of ties present an even more pervasive problem in the House contingent procedure. The minimum size of a House delegation is one, and seven states have one representative.⁸ Because the Constitution excludes the possibility of a state with zero representatives, as the population of the country increases there will likely be an increasing number of states receiving a solitary representative, which will lead to more states having an odd number of

representatives than an even number.⁹ Still, a typical House configuration would include a significant number of states with an even number of representatives. At the present time, there are seventeen states with an even number of House members.¹⁰ With an even number, a delegation could be disabled from casting a vote at all. The effective abstention of just a few states due to tie votes in their delegations would substantially increase the possibility that the House might not be able to muster the majority required for a choice.

A state delegation deadlocked by a tie vote is not just a theoretical possibility. Even when delegations are not evenly divided between the parties, an occasional representative might be persuaded to break party ranks by an argument that he should vote for the winner of the nationwide popular vote or for the winner of the popular vote in his state or district. But a state deadlock becomes an even more likely possibility when the delegation is split evenly between the major political parties. At the present time, four states with an even number of representatives – Minnesota, Wisconsin, Texas, and Mississippi – have House delegations made up of half Democrats and half Republicans. This would not likely lead to a deadlock in the House as constituted at present, for the Republicans control twenty-nine delegations.¹¹ But there is no particular reason to expect that one party will typically control a majority of state delegations (*i.e.*, twenty-six). At the present time, for instance, the Republicans control twelve of those twenty-nine delegations by

7 These calculations are based on the electoral college allocations in 2000, but the essential points will hold for subsequent elections (with the allocation based on the 2000 census) as well.

8 Montana, Wyoming, North Dakota, South Dakota, Vermont, Delaware, and Alaska.

9 See U.S. Const. Art. I, § 2, cl. 3. Paul Edelman helped me puzzle through this point.

10 Arizona (8), Arkansas (4), Hawaii (2), Idaho (2), Kansas (4), Kentucky (6), Maine (2), Maryland (8), Massachusetts (10), Minnesota (8), Mississippi (4), New Hampshire (2), Ohio (18), Rhode Island (2), South Carolina (6), Texas (32), and Wisconsin (8).

11 This was thirty before South Dakota Congressman Janklow's resignation in light of his conviction of manslaughter.

just one vote.¹²

Sooner or later, any deadlock would likely be broken. In the 1800 House choice between Jefferson and Burr, it took thirty-six ballots over six days, but the standoff was finally resolved in Jefferson's favor. But the peril in a deadlock is not confined to the possibility that no decision will ever be forthcoming. If the decision is delayed, the country could be thrown into turmoil, with an acting President.¹³ But perhaps the more serious concern is that the deadlock might be broken with momentous matters thrown into a bargaining process.

As mentioned, in 1800 the two candidates left in the House balloting both represented the same political party. The other party, the Federalists, either controlled or (because of even numbers and partisan standoffs) could prevent a vote in enough delegations to withhold a majority of states for either candidate. But the Federalists had no hope of securing the Presidency for their own candidate, for he had been eliminated before the selection went to the House. In a contemporary standoff, in contrast, political party control of the Presidency would be at stake, and that is a big enough prize to bring lots of other matters into the bargaining that would almost surely take place.

For this purpose, the election of 1876 provides the more apt object lesson. It was the era of post-Civil War Reconstruction. Federal troops were still in the South, and greatly resented by portions of the white southern population. The Democratic presidential can-

didate Samuel Tilden had won a popular vote plurality, but the electoral college outcome was put in doubt by disputes in three southern states (including Florida!). The possibility of a tie and of recourse to the House contingent procedure did not loom large, because there was an odd number of electors and only the two major candidates. The disputes had to be resolved, however, and the Constitution is decidedly obscure on how that is to be done. State electors are to send their votes to the President of the Senate (the Vice President of the United States), who is to open them "in the presence of the Senate and the House of Representatives." Without saying who is to do it, the Constitution then commands that "the votes shall then be counted." The Vice President at the time was a Republican, but the two Houses of Congress were controlled by different parties. Initially a commission was appointed, which resolved all the disputes in favor of the Republican candidate, Rutherford B. Hayes. The Democrats could have continued to cause trouble, but relented instead. Hayes became President, and Reconstruction was ended. There is continuing dispute about just what was encompassed in the "Bargain of 1877" but little doubt that momentous matters of policy and interest were caught up in the choice of the President.¹⁴

In similar fashion, any contemporary House standoff with the Presidency at stake would likely put a great many other things in play. There seems no reason to welcome such a prospect. Bargain and compromise is, of course, a necessary – indeed a welcome – part

¹² Four of the twelve are single-member delegations, and some of those may well be ones where Republican control is in no short-term jeopardy.

¹³ If there had been an electoral vote tie in the presidential choice, there likely would also have been a tie in the choice of Vice-President. In that case, the choice is sent to the Senate, where each Senator presumably is to have one vote. U.S. Const., Am. XII. There being an even number of Senators, there could be a tie in that choice as well, but the chance of a standoff is not nearly as great as in the House. Assuming the Senate is able to select a Vice-President, that person would then act as President. U.S. Const., Am. XX, § 3.

¹⁴ See Eric Foner, *Reconstruction*, at 566-580 (1988).

of politics, but the heated atmosphere of selection of a President in a House of Representatives where some states are unable to vote because of partisan standoffs within their own delegations hardly seems conducive to a salutary bargaining process.

Short of a constitutional amendment, there is no ironclad guarantee against use of the House contingent procedure with the possibility of a deadlock that could in turn lead to unruly bargaining. But the peril is in great measure a product of the possibility of a tie in the electoral college, and the chances of that can be greatly reduced by a simple expedient. The size of the electoral college can be thought of as having three components: the size of the Senate; the number of electors awarded by the Twenty-third Amendment to the District of Columbia; and the size of the House of Representatives. The first is always an even number, since each state has two Senators. While the second need not be an odd number, it will almost surely remain at the present size of the District electoral college delegation – the odd number “three.”¹⁵ Only the third component can be readily changed, for the size of the House of Representatives is a matter for legislative determination.¹⁶ The size of the House is now set at 435,¹⁷ an odd number which combines with the other two compo-

nents to yield an even number of electors. If the Congress were to increase the House size by one, the electoral college would similarly be increased by one member. The resulting odd number would greatly reduce the possibility of an electoral college deadlock and the consequent recourse to the House to select the President.

The possibility would be reduced but not entirely eliminated. Even with an electoral college with an odd number of members, electors need not be committed to particular candidates. They are chosen as the legislature of each state determines,¹⁸ and that means that they need not have precommitment to any candidate. Or they can be committed, but to more than two candidates in various states. That has not been the recent pattern, but there have been electors pledged to more than two candidates on a number of occasions over the years, most recently in 1968, when 46 electors voted for third-party candidate George Wallace. Richard Nixon nonetheless commanded a majority of the electors in 1968, but when multiple candidates command electoral votes, the chances increase that no one of them will have the necessary majority. In addition, even if previously pledged to candidates, it is assumed that electors can be “faithless,” that they remain free to vote for someone other than the person to whom they were

15 The number is “in no event [to be] more than the least populous State.” A major component of the size of a state’s electoral college delegation is the size of its House delegation. The text turns to that component momentarily. Even if the size of the House were to remain constant at its present 435, it is conceivable – albeit only barely – that the distribution of population would lead to the smallest House delegation being two or more (rather than one, as at the present time), and hence to the smallest electoral college delegation being four, or some larger even number. This is such a remote possibility that it can safely be ignored. Another possibility is that the House could be increased in size so substantially that even without population shifts the least populous states would have larger delegations than they do at present. I am assuming that we can safely ignore that possibility as well, and I turn to the more realistic ones discussed in the text.

16 The only constitutional limitations are that “The number of representatives shall not exceed one for every thirty Thousand [people in the census count]” and that “each state shall have at least one representative.” U.S. Const., Art. I, § 2, cl. 3.

17 See Act of Aug. 8, 1911, c. 5, §§ 1, 2, 37 Stat. 13, 14.

18 U.S. Const., Art. II, § 1, cl. 2.

committed. That includes the possibility of abstention. As mentioned, one elector pledged to Gore abstained in the 2000 election, and a smattering of electors have voted “faithlessly” in presidential elections over the years. If one or more electors abstains, no candidate might obtain an electoral college majority even though there is no tie.

A move to increase the size of the House, moreover, is not without potential cost. The present House of Representatives has 435 members, and larger bodies raise the danger that the leadership increasingly makes all the

important decisions. It would thus be important to hold the increase to one, or at most a small-odd-number.¹⁹ But each state in line for the next incremental seat might push for a yet larger House, and the process could then become hard to contain. It might be possible to stave off such pressure by delaying the effectiveness of the increase to a date after the next census, making it hard to predict which state (or states) would benefit. But it would not be advisable to defer for too many presidential elections, for we are put in some peril by an even number of presidential electors. *GB*

¹⁹ I don't seriously treat the possibility of a reduction in the size of the House, because the political considerations make that essentially impossible.