How the 12th Amendment Would Handle an Electoral College Tie

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A 269-269 electoral tie could happen in the 2012 presidential election. If it did, how would the United States determine who would win the election? The answer lies in the 12th Amendment to the U.S. Constitution.

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How the 12th Amendment Would Handle an Electoral College Tie

CHUCK TODD, anchor:
It’s one of those strange twists in the American political experiment that the Electoral College decides the presidency and not your vote, not the popular vote. It’s produced its share of controversial results. Most recent, of course, George W. Bush losing the popular vote but winning the White House in 2000. Nevertheless, even if you’re okay with the Electoral College system, this system has a built-in flaw. The problem? The number of electoral votes available 538, meaning, it’s possible for two candidates to both reach two hundred and sixty-nine and not get a majority. That political time bomb has never actually gone off. But this year, the chance that it could is higher than it’s been in a while. In today’s Deep Dive, we’re going to start with a few scenarios demonstrating how we could get to that point. Let me start with scenario number one. And right now, I’m just dealing with the battleground as we know it. If we give the president Colorado, Wisconsin and Virginia and you give Romney Florida, North Carolina, Ohio, Iowa and Nevada and New Hampshire, you get your 269. That’s scenario one. You could argue with that saying, uh, I don’t see how all three of those states go there, by the way, that’s one of those, you know, okay, fine. You don’t like that one? I can give you another one. Give the president Colorado, Wisconsin and Virginia. Give Mitt Romney Nevada, Iowa, Ohio. Oops, oops, I went blue there. Nevada, Colorado-- excuse me, Nevada, now, this is the beauty of live television. Iowa, Ohio, North Carolina, New Hampshire and Florida. Come on, Florida. There you go. There’s scenario two. And then here’s the one I think is the most likely scenario if it does happen. It’s Wisconsin, Ohio and New Hampshire right now. And then Romney, everything else, Florida, North Carolina, Virginia, Iowa, Colorado, Nevada. That’s the one that I think is most likely of the three. And, by the way, in case you’re wondering, here’s one plausible scenario that would include Maine. As
you know—see, we even have this nifty ability—it is possible. You could see Maine split its electoral votes. The second congressional district there, a little more rural. If that happens, then-- and the president and--and Romney grabs one there and the president gets Nevada, Colorado and Ohio, and there you have it. You give the rest Iowa, Wisconsin, Florida, North Carolina, Virginia and New Hampshire. There’s your scary scenario. It’s not good.

If any of these scenarios actually occurs, the fate of the next president would be decided in a wonderful institution that America loves, the United States Congress. It’s happened before. It was the election of 1800. Party politics were brand new and instead of voting for a ticket, each elector was allowed to cast two votes for president. The idea being that whoever came in second would become the vice president. Yeah, that was good idea. Instead, Thomas Jefferson and Aaron Burr, both members of what was called the new Democrat-Republican Party, they each had 73 electoral votes. The two federalist candidates came in third and fourth. Ultimately, the House had to step in. They voted for Jefferson to be our third president. The uproar forced Congress to confront that issue and in the summer of 1804, passed the 12th Amendment that laid out new ground rules and an emergency plan in case of an electoral deadlock. Well, if we’re talking crazy legal issues, who else we’re going to bring in but my friend, Mr. Pete Williams.

Just as the number of-- of available electoral votes creates problems, the contingency plan that Congress put together had some interesting wrinkles as well. Mr. Williams.

PETE WILLIAMS reporting:

So two ways to get here Chuck. One is a tie that you’ve been talking about, the other is a potential problem known as faithless electors, the electors which, you know, you go-- who you are actually voting for when you go to the polls refuse to vote for whoever the state voted for, for president. It could happen. It’s happened ten times in history. It’s never made a difference.

TODD: It never made a-- it never cost somebody the majority--

WILLIAMS: Right.

TODD: --of the Electoral College.

WILLIAMS: But what the 12th Amendment says if you don’t get a majority, if you don’t get to 270, then you have a contingent election. The House would choose the president with each state getting one vote.

TODD: Right.

MR. WILLIAMS: So you would need at least 26 votes to win. The Senate would choose the vice president with each senator getting one vote. So, you’d need at least 51 senators to win. Now let’s carry the tie scenario out one step further. If the House divided equally, 25-25, they just have to keep voting--

TODD: Until--

WILLIAMS: --until somebody get the majority.

TODD: Now that is unlikely. Let me-- let me just stop you there because I want to get to our more interesting possible scenario here. The way redistricting is done and all of this, it is very likely, I think, Republicans will have at least 28-29 state delegations. They will have-- be in a majority of the House delegations, after that.

WILLIAMS: Right.

TODD: By the way, it’s the new Congress that would decide this. That’s another thing we got to let
people know.
WILLIAMS: That’s right. The new Congress is sworn in on January 3rd, the electoral votes are counted this year probably January 7th on a Monday.
TODD: Okay. Now, the United States Senate--
WILLIAMS: Okay.
TODD: --jeez, the likelihood of a 50-50 United States Senate is only a very--
WILLIAMS: Right.
TODD: Tell us this.
WILLIAMS: So, if the Senate tied 50-50 then the sitting vice president, remember you have a new Congress but you have a sitting vice president who is also the President of the Senate--
TODD: Joe Biden.
WILLIAMS: --would cast the deciding vote.
TODD: And we say this, there is no-- we weren’t sure if this was possible. You said there would probably be an objection from a Republican senator saying, “Joe Biden shouldn’t be able to cast the tie vote on this specific vote.”
WILLIAMS: Right.
TODD: What would then happen?
WILLIAMS: Well, two answers to that. One is the constitution does say that whenever there’s a tie vote in the Senate, the President of the Senate casts the tie vote. So, in essence the constitution answers the question but, if there were still a question about it, the Senate parliamentarian would rule and then the Senate would vote on that. And on that it would be clear the vice president could cast the deciding vote.
TODD: So and you get your 51-50.
WILLIAMS: So, no matter how you stretch it out. That’s right.
TODD: Okay. And then I want to go back to this issue of faithless electors because my theory on this has been if we do have a 269-269, we have the sort of potential constitutional crisis scaring us in the face.
WILLIAMS: Not a crisis, just a constitution inaction.
TODD: I know. I’m sorry. It feels like a crisis to me. But this polarized environment I don’t think they can handle it but maybe I am underestimating the wisdom of the American public.
WILLIAMS: Fair enough.
TODD: Under this scenario, then you would have-- when would we know if there were a faithless elector? We would actually not know until the vice president of the United States tears open those votes. Is that correct?
WILLIAMS: That’s right. Till-- you know, the way it works under the-- under the constitution and federal laws, the electors meet, the first Monday after the second Wednesday in December--
TODD: And they still can cast their votes in a secret ballot, right?
WILLIAMS: That’s right. And they are all transmitted to the Congress and they are counted in a joint session of Congress. And that’s when you would find out if there’s a faithless elector. Ten times in history, the most recent time was 2000--
TODD: Mm-Hm.
WILLIAMS: --when an elector from the District of Columbia abstained instead of voting for Al Gore.
TODD: And it had to do with protesting the entire election itself.
WILLIAMS: That’s right.
TODD: I hope--
WILLIAMS: By the way, one little--
TODD: Hope we didn’t lose people on this.
WILLIAMS: One would know, it’s fascinating. One little point here, Washington DC gets three electoral votes, that’s why there is 538 electoral votes even though there’s only 538 members of Congress in the Senate. But D.C. does not get a role in these contingent elections. They-- they--
TODD: No vote in the Senate--
WILLIAMS: Right.
TODD: --and obviously, and--
WILLIAMS: No membership in the House.
TODD: --no membership in the House so that delegation doesn’t happen. Hey Congress, how about passing the-- in case of a tie popular vote gets the extra electoral vote. Think, maybe it’d be easy.
Anyway, Pete Williams, thank you for doing a bunch of legal research on this.
WILLIAMS: You bet. I would love this if it happened, by the way.
TODD: Of course, you would. See this is your-- my-- you know, honestly, I love the recounts and all that.
WILLIAMS: Yeah.
TODD: You want a constitutional--
WILLIAMS: Absolutely.
TODD: --excuse me, in action.
WILLIAMS: Exactly.