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Election of the President and Vice President by Congress: Contingent Election

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Summary

The 12th Amendment to the Constitution requires that candidates for President and Vice President receive a majority of electoral votes (currently 270 or more of a total of 538) to be elected. If no candidate receives a majority, the President is elected by the House of Representatives (which occurred once, in 1825), and the Vice President is elected by the Senate (which also occurred once, in 1837). This process is known as contingent election.

The 12th Amendment prescribes some contingent election procedures for the President: the President is elected from among the three candidates who received the most electoral votes; each state casts a single vote for President; a majority (26 or more) state votes is required to elect a President; the House must vote “immediately” to the exclusion of all other business, and by secret paper ballot. In cases where a state has only one Representative, that Member would decide the state vote. For other procedures, precedents exist from the contingent election rules for 1825, as drawn up by a select committee established for that purpose. In 1825, the House decided that a majority of votes of Representatives in each state delegation was required to cast the state vote for a particular candidate, or the state vote would be registered as “divided” and not credited to any candidate. These decisions reached in 1825 would be precedential, but not binding, in future contingent elections.

The Senate elects the Vice President under contingent election procedures. It chooses from among the two candidates who received the most electoral votes, with each Senator casting a single vote. A majority of the whole Senate, (51 or more), is necessary to elect. Precedent suggests that, unlike the House, the Senate would choose the Vice President by voice vote.

The District of Columbia does not participate in contingent election of either the President or Vice President.

Contingent election would be conducted by the newly elected Congress immediately following the January 6 joint electoral vote count session. If the House is unable to elect a President by January 20 (when the new presidential and vice presidential terms begin), the Vice President-elect serves as Acting President until the impasse is resolved. If the Senate is unable to elect a Vice President by January 20, then the Speaker of the House serves as Acting President.

In the 108th Congress, Representative Brad Sherman introduced H.J.Res. 113, a proposed constitutional amendment that would revise voting procedures for President in a contingent election. Under the proposed amendment, Representatives would cast votes on an individual basis; the candidate who received the greatest number of votes, provided it was a majority of votes cast, would be elected President. The resolution was referred to the House Committee on the Judiciary, which took no further action before the House adjourned.

This report will be updated if events warrant.

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The 12th Amendment in Constitutional History

The 12th Amendment to the U.S. Constitution was proposed by Congress in 1803, following the constitutional crisis that marred the presidential election of 1801.¹ State ratifications followed quickly, and the 12th Amendment was declared to be in effect on September 25, 1804. The amendment's provisions, which remain in effect, are summarized as follows.

- The electors cast separate ballots for President and Vice President.
- The votes are opened and counted in a joint session of Congress presided over by the President of the Senate (the Vice President or the President pro tempore).
- The person having a majority of electoral votes for each office is elected.
- If no candidate for President gains a majority, then the House votes “immediately, by ballot” for President (contingent election), choosing from among the *three* candidates who received the most electoral votes.
- A quorum of at least one Representative from two-thirds of the states (34 at present) is necessary for the purposes of contingent election.
- The vote is taken by states, with each state casting a single vote.
- The votes of a majority of states (26 at present) are necessary to elect the President.
- If the House is unable to elect prior to expiration of the presidential term (January 20 since ratification of the 20th Amendment), then the Vice President, assuming one has been elected, serves as Acting President until a President is chosen.
- If no candidate for Vice President receives a majority of electoral votes, then the Senate elects, choosing between the *two* candidates receiving the most electoral votes. A quorum of two-thirds of the Senate (67 Members at present) is necessary for the purposes of contingent election of the Vice President. Each Senator casts a single vote. The votes of a majority of the whole Senate (51 or more at present) are necessary to elect the Vice President.

¹ The Constitution's original provisions (Article II, Section 1) required each elector to cast two undifferentiated votes for President—one each for two preferred candidates. There was no separate electoral vote for Vice President. Failing (or having been unwilling) to anticipate the growth of political parties that would offer unified tickets of a presidential and vice presidential nominee, the Constitutional Convention had not provided distinct votes for the two executive offices. The candidate receiving the most votes was elected President, provided the votes constituted a number equal to a majority of electors, *not* electoral votes. The runner-up was elected Vice President. In the event of a tie vote, or if no candidate received a vote from a majority of electors, the House of Representatives was to elect the President from among the five candidates receiving the most electoral votes. Again, the runner-up would be Vice President. Voting was by states, with each state casting a single ballot. By 1796, both nascent political parties, the Federalists and Jeffersonians (or Republicans, but not to be confused with the contemporary Republican Party) arranged to have one of their electors withhold his vote for the de facto vice presidential candidate, to prevent a tie, and thus avoid contingent election. The deficiencies of this awkward arrangement became apparent in the election of 1800, when all Jeffersonian electors cast one vote each for presidential candidate Thomas Jefferson and vice presidential candidate Aaron Burr. The failure to cast one less vote for Burr was an oversight, but it resulted in an electoral college tie, requiring contingent election in the House when it met to count the electoral votes on Feb. 11, 1801. Some Federalist Representatives voted for Burr in the contingent election, hoping to deny Jefferson the presidency. A constitutional crisis resulted as voting continued in the House for seven days and required 36 ballots before the impasse was broken and Burr's support collapsed. Jefferson's final margin was 10 states to Burr's four, with two remaining divided.

The 12th Amendment and Contingent Election

As noted previously, the 12th Amendment established what has become known as contingent election as a “fall-back” procedure that takes place only when no candidate wins an electoral college majority.² Contingent election could occur as a result of several series of events: (1) three or more candidates split the electoral vote so that no one receives a majority; (2) a sufficient number of “faithless” electors cast blank ballots or vote for candidates other than those to whom they are pledged, thus denying a majority to any candidate; or (3) the electoral college could tie at 269 votes each for two candidates. Contingent elections have been conducted only twice since ratification of the 12th Amendment: for the President in 1825, following the election of 1824;³ and for the Vice President in 1837, following the election of 1836.

Contingent Election of the President: What Rules Would Govern the Procedure?

The 12th Amendment itself provides some of the rules for contingent election of the President.

- First, it requires that the House “shall choose immediately ... the President.” This was interpreted in 1825 as directing that the election be conducted not only immediately, but to the exclusion of any other business until a President was chosen.
- The same sentence prescribes election “by ballot.” In 1825, this was interpreted as requiring the use of secret paper ballots.
- The vote must be taken by states, with each state casting a single vote, again by a secret paper ballot.
- A quorum for contingent election consists of a Member or Members representing two thirds (34 at present) of the states.
- Finally, the votes of a majority of states, 26 of the present total of 50, is necessary to elect the President.
- If the House has been unable to choose by the date the incumbent President’s term expires (January 20, under the 20th Amendment), then the Vice President (assuming one has been chosen) acts as President until a President is chosen.

Procedures adopted for the 1825 election filled in some of the 12th Amendment’s gaps. These would provide a precedent for any future contingent election, as they were themselves largely based on procedures used in 1801, but they would not be binding on future Congresses. A summary of these rules, which were drawn up by a select House committee consisting of one Representative from each state, follows.

² “Candidate” or “candidates” refers interchangeably to the nominees for President and Vice President.

³ The emergence of four major presidential candidates in 1824, all of whom were Democratic Republicans, as the former Jeffersonians were then known, led to fragmentation of the electoral vote, resulting in contingent election in 1825. Under the 12th Amendment, the top three electoral vote-getters, Andrew Jackson (99 votes), John Quincy Adams (84 votes), and William Crawford (41 votes) could be considered by the House. The fourth candidate, Henry Clay (37 votes), was excluded by the Amendment. Although out of the running, Clay threw his considerable support to Adams, so that when contingent election was conducted in the House on Feb. 9, 1825, Adams was chosen on the first ballot with 13 state votes to Jackson’s seven, and four for Crawford. Jackson supporters attacked the Adams-Clay alliance as a “corrupt bargain” and immediately began planning for their candidate’s campaign and ultimate victory in 1828. In contrast with the contentious presidential vote, John C. Calhoun received an overwhelming majority of 182 of 260 electoral votes cast for Vice President in the 1824 election.

- The House met in closed session, with only stenographers, House officers, Representatives, and Senators allowed to be present.
- Motions to adjourn were not entertained unless offered and seconded by state delegations, not individual Members.
- State delegations were arranged in the House chamber from left to right in the order in which the roll was called. At the time, the roll began with Maine, proceeded north to south through the original states, and concluded with subsequently admitted states, in order of their entry into the Union.
- The election consisted of a two-round process: Members of the state delegations voted internally in the first round and the results of the state votes themselves were cast in the second round.
- Each state delegation received a ballot box for first round voting and two additional general ballot boxes were provided for the second round.
- All votes were cast anonymously, on paper ballots, in both rounds.
- If one candidate received a majority of votes cast in the state delegation⁴ in the first round, the state vote was cast for that candidate in the second round. The state delegations prepared two ballots for the second round, each inscribed with the name of the winning candidate, if any. If there was no majority, the ballot was inscribed “divided.”
- The duplicate second round results were collected by tellers and deposited in duplicate ballot boxes in the House chamber. The contents were counted by tellers, compared, and reported to the House.⁵

It should be noted again that these decisions applied only to the rules under which the House of Representatives conducted contingent election of the President in 1825; although they would provide a reference for the House in any future application of the contingent election process, they would not be prescriptive, and could be subject to different interpretations. For instance, in the modern context, there would almost certainly be strong pressure for contingent election sessions in both chambers to be not only open to the public and reporters, but covered by radio and television as well. Similarly, there might be strong support for individual Members’ votes to be made public in the House of Representatives, given the fact that the constitutional injunction that voting be “by ballot,” and therefore secret, arguably applies only to the votes of the states in the second round.

Contingent Election in 1825: Representatives Debate Their Options

Spirited debate as to the nature and requirements of contingent election preceded the actual vote in 1825. One question concerned the role of individual Representatives. Some asserted that it was the duty of the House to choose Jackson, the candidate who had won a national plurality of the popular and electoral vote. Others believed they should vote for the popular vote winner in their state or district. Another school of opinion suggested that House Members should give prominence to the popular results, but also consider themselves at liberty to weigh the comparative merits of the three candidates. Still others asserted that contingent election was a constitutionally distinct process, triggered by the failure of the people (and the electors) to arrive

⁴ The majority required was of those votes cast, not a majority of the entire delegation.

⁵ U.S. Congress, House, *Hind’s Precedents of the House of Representatives* (Washington: GPO, 1907), vol. 3, pp. 292-293.

at a majority. Under this theory, the popular and electoral college results had no bearing or influence on the contingent election process, and Representatives were, therefore, free to consider the merits of the contending candidates without reference to the earlier contest.⁶ It is likely that many of these considerations, or similar ones, would be raised in any future contingent election.

Contingent Election of the Vice President in 1837

Procedures adopted by the Senate in 1837 differed from those of the House in 1825, and were simpler. The 12th Amendment's requirements the House vote "immediately, by ballot" do not appear in the language governing contingent election of the Vice President. Consequently, the Senate decided that the roll would be called in alphabetical order, at which time each Senator would name the person for whom he voted.⁸ Nor does the *Senate Journal* provide any evidence that the gallery was closed. It is also interesting to note that President pro tempore William R. King presided over the contingent election of 1837. This may have been due to the fact that the incumbent Vice President, Martin Van Buren, was also President-elect, and had "retired" from the Senate on January 28, 1837.

The 20th Amendment and the Presidential Succession Act of 1947

The contingent election process was modified in the 20th century by the 20th Amendment to the Constitution, and the Presidential Succession Act of 1947 (61 Stat. 380; 3 U.S.C. 19). Section 1 of the amendment set new expiration dates for congressional and presidential terms, changing the former to January 3 and the latter to January 20. Previously, both terms had expired on March 4. The primary purpose of this change was to eliminate the historical anomaly of lame duck congressional sessions, while also shortening the period between election and inauguration of the President and Vice President by six weeks. A subsidiary purpose, as revealed by the amendment's legislative history, was to remove the responsibility for contingent election from a lame duck Congress.⁹ Section 3 restates the 12th Amendment provision that the Vice President (assuming one has been chosen) acts as President in the event the House is unable to elect a President in the contingent election process. It also empowers Congress to provide by law for situations in which neither a President nor a Vice President "qualifies," (i.e., neither has been elected).

The Presidential Succession Act, among other effects, reinforces this safeguard by naming the Speaker of the House of Representatives to serve as Acting President in such situations (i.e., neither a President nor Vice President has qualified) or, alternatively, the President pro tempore of

⁶ CRS archived report, *Election of the President by the House of Representatives and the Vice President by the Senate: Relationship of the Popular Vote for Electors to Subsequent Voting in the House of Representatives in 1801 and 1825 and in the Senate in 1837*, by Joseph B. Gorman (out of print; available to congressional clients upon request from author of this report).

⁷ An internal dispute in the Democratic Party led to contingent election of the Vice President in the Senate in 1837. Democratic presidential nominee Martin Van Buren won a comfortable electoral vote majority in the 1836 election, but his controversial running mate, Richard Mentor Johnson, split the vote with an "independent" Democratic vice presidential nominee, thus requiring contingent election. Electoral votes were counted on Feb. 8, 1837, in a joint session of the 24th Congress, and the Senate then immediately returned to its own chamber to elect the Vice President. Since the Senate's choice was limited by the 12th Amendment to the two candidates gaining the most electoral votes (rather than three, as required for presidential contingent elections), it chose between Johnson and his leading Whig opponent, Francis Granger. Johnson was elected with 33 votes to 16 for Granger.

⁸ U.S. Congress, Senate, *Journal of the Senate*, 24th Cong., 2nd sess. (Washington: Gales and Seaton, 1836 [sic]), pp. 229-230.

⁹ U.S. Congress, Senate Committee on the Judiciary, report to accompany S.J.Res. 14, 72nd Cong., 1st sess. S.Rept. 26 (Washington: GPO, 1932), p. 4.

the Senate in the event the Speaker is ineligible, or declines, or the speakership is vacant. The Speaker would be required to resign both as Representative and as Speaker to become Acting President. Similarly, the President pro tempore would be required to resign both as a Senator and as President pro tempore to assume the acting presidency. If both the Speaker and the President pro tempore decline the office, or fail to qualify for any reason, then the acting presidency would devolve upon the head of the most senior executive department (Department of State). The other cabinet secretaries would be similarly eligible in the order of their department's seniority.¹⁰ By taking the oath of office as Acting President, they would automatically vacate their appointment as a Cabinet officer, thus avoiding the prohibition against dual office holding.¹¹

Both the Succession Act and the 20th Amendment specifically limit the service of an Acting President in such circumstances: he holds office only until either a President or Vice President has qualified.

District of Columbia Participation

Although the 23rd Amendment empowers citizens of the District of Columbia to vote in presidential elections, the nation's capital is not considered a state for the purposes of contingent election. Thus, the District would not participate in the election, despite the fact that its citizens cast both popular and electoral votes for President and Vice President.¹²

Recent Legislative Proposals

Near the end of the 108th Congress, Representative Brad Sherman introduced H.J.Res. 113, a proposed constitutional amendment, on November 18, 2004. Section 1 of his proposal would alter the formula for electing the President under contingent election. Instead of each state casting a single vote, the House of Representatives would vote per capita in such situations, with each Member casting a single vote. The person receiving the greater number of votes would be elected, provided that this number constituted a majority of votes cast. The amendment would also change the existing quorum, which requires that "a member or members from two-thirds of the states" be present. Section 2 would establish the quorum for contingent election as a majority of the House of Representatives; furthermore, a Member or Members representing at least two thirds of the states would need to be present.

Representative Sherman's proposal would eliminate state equality in the contingent election process for the President. Instead of each state casting a single vote, each Representative would vote. For instance, California would cast 53 votes, while Wyoming, the least populous state as measured by the 2000 Census, would cast one vote, as would other states represented in the House by a single Member. The argument here is that this process would be more democratic, reflecting the great disparities in population and the number of votes cast among the states.¹³

¹⁰ These would presumably be Cabinet officers of the outgoing administration whose resignations had yet to be accepted.

¹¹ For additional information on presidential succession and the role of the Cabinet in this process, see CRS Report RL31761, *Presidential Succession: An Overview with Analysis of Legislation Proposed in the 108th Congress*, by Thomas H. Neale.

¹² CRS general distribution memorandum, *Would the District of Columbia Be Allowed to Vote in the Selection of the President by the House of Representatives*, by Thomas B. Ripy, July 7, 1980 (available to congressional clients upon request from the author of this report).

¹³ It would, however, preserve a small arithmetical advantage for less populous states, analogous to the advantage they currently enjoy in the allocation of House seats.

Arguments against the proposal could center on the assertion that amendment would weaken the federal nature of the existing contingent election process, in which each state casts a single vote. Moreover, it could be noted that the amendment does not alter existing vice-presidential election procedures in the Senate, which would continue to incorporate the concept of state equality, given the fact that each Senator casts a single vote.

H.J.Res. 113 was referred to the House Committee on the Judiciary on November 18, 2004. No further action was taken before the 108th Congress adjourned.

Concluding Observations

American presidential elections have generally been dominated by two major parties since the early 19th century, with the major party candidates winning a majority of electoral votes in every election since 1836. A popular third party or independent candidacy has the potential of preventing an electoral vote majority—such candidacies have emerged in four recent presidential elections (1968, 1980, 1992, and 1996). Furthermore, a contest over election results in Florida in the very closely contested presidential election of 2000 raised the possibility that Florida’s electoral votes might be excluded in the electoral vote count session, an action that could have resulted in neither presidential candidate receiving a majority of electoral votes, thus requiring a contingent election.

Under either of the above mentioned scenarios, or in similar circumstances, the House and Senate could be called on to elect the President and Vice President in some future election. Barring any comprehensive reform of the presidential election system, such an election would be governed by the provisions of the 12th Amendment. As noted previously in this report, while important elements of contingent election procedure in both chambers would be prescribed by the 12th Amendment, the Members of the House and Senate would be confronted with the same questions that faced their predecessors in 1800, 1824, and 1836. Particularly in the case of the House of Representatives, a body of precedent exists dating from its two previous experiences with contingent election. These precedents would offer guidance, but would not be considered binding in any future contingent election.

With respect to proposals to change the constitutional arrangements that govern contingent election, such efforts would face the stringent requirements imposed on all proposed amendments, including passage by two-thirds vote in each chamber of Congress, and approval by three-fourths of the states, generally within a seven-year time frame.¹⁴ These constraints have meant that successful amendments are usually the products of broad national consensus, a sense that a certain reform is urgently required, or active support by congressional leadership.¹⁵ In many cases, all the aforementioned factors contributed to the success of an amendment. Given the high hurdles—both constitutional and political—faced by any proposed amendment, it seems likely that contingent election procedures will remain in place unless or until their alleged failings

¹⁴ Article V of the Constitution also provides for amendment by a convention, which would assemble on the application of the legislatures of two-thirds of the states. Any amendment proposed by such a convention would also require approval of three-fourths of the states. This alternative method, however, has never been used.

¹⁵ These conditions have been met in some cases only after a long period of national debate; for example, in the case of the 19th Amendment, which extended the right to vote to women, was the culmination of decades of discussion and popular agitation. In other instances, amendments have been proposed and ratified in the wake of a sudden galvanizing event or series of events. An example of this may be found in the 12th Amendment itself, or in the more recent 25th Amendment, providing for presidential succession and disability, which received a tremendous impetus following the 1963 assassination of President John F. Kennedy.

become so compelling that large concurrent majorities in the public, the Congress, and the states, are prepared to undertake their reform.

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