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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, and the Vice President is elected by the Senate. This process is referred to as contingent election. It has occurred only twice since the adoption of the 12th Amendment in 1804: for President in 1825, and for Vice President in 1837. In the House, the President is elected from among the *three* candidates who received the most electoral votes. Each state casts a single vote for President, which is arrived at by an internal vote conducted within each state delegation. A majority of 26 or more state votes is required to elect. The District of Columbia, however, does not participate in contingent election of either the President or Vice President. In 1825, the House decided that a majority of votes of Representatives in each state was required to cast the state's vote for a particular candidate; if none received a majority, the state's vote was counted as "divided" and was forfeit for that round of voting. This and other decisions reached in the 1825 procedure would be precedential, but not binding, in future contingent elections. In cases where a state has only one Representative, that Member decides the state vote. In the Senate, the Vice President is elected from among the *two* candidates for Vice President who received the most electoral votes, with each Senator casting a single vote. A majority of the whole Senate, 51 or more votes, is necessary to elect. Contingent election would be conducted by the newly elected Congress immediately following the joint session (held on January 6 of the year following a presidential election) that counts electoral votes. 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. For additional information on the electoral college, consult CRS Report RS20273, *The Electoral College: How it Works in Contemporary Presidential Elections*. This report will be updated if events warrant.

Original Constitutional Provisions

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. 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 elected the President from among the five candidates receiving the most electoral votes. Voting was by states, with each state casting a single vote. The rise of national political parties that nominated candidates for both President and Vice President on a joint ticket doomed this arrangement, which did not anticipate such joint candidacies. In theory, party electors needed to cast one vote for the party presidential candidate, and one for the vice presidential nominee. In order to avoid tying the electoral vote, however, it was necessary for one or more electors to withhold his second vote from the designated vice presidential candidate, a cumbersome arrangement at best.

The 12th Amendment

The system's deficiencies became disastrously apparent in the election of 1800, when all Democratic-Republican electors cast one vote each for presidential candidate Thomas Jefferson and vice presidential candidate Aaron Burr, resulting in a tie, and thus requiring contingent election in the House when it met to count the electoral votes on February 11, 1801. A constitutional crisis resulted as Burr supporters allegedly sought support from Federalist Representatives in order to gain the presidency for the vice presidential candidate.¹ Enough Federalists voted for Burr to deny Jefferson a majority in the first round (the vote was eight states for Jefferson, six for Burr, with two divided). 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.²

Shocked by the election crisis, Congress, in 1803, proposed a constitutional amendment designed to prevent any repetition of the events of 1801. State ratifications followed quickly, and the new, 12th Amendment to the Constitution was declared to be in effect on September 25, 1804. The amendment's provisions, which remain in effect, are summarized as follows.

¹The 1800 presidential election was a bitter contest between incumbent President John Adams, representing the Federalists, and his Vice President, Thomas Jefferson, candidate of the Jeffersonian-, or Democratic-Republicans. The results were not in doubt: Jefferson and Burr won 73 electoral votes to Adams's 65 (the Federalist electors had correctly cast one less electoral vote for their vice-presidential candidate, Charles C. Pinckney, who received 64). Further, the contingent election was conducted by a lame duck House session of the 6th Congress, which was controlled by the Federalists. The Democratic-Republicans had gained control of the House in the 1800 congressional elections, but the new 7th Congress did convene until March 4, 1801.

²Neal R. Peirce and Lawrence D. Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative*, rev. ed. (New Haven, CT.: Yale University Press, 1981), pp. 35-41.

- 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 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. Contingent election would also apply in the case of an electoral vote tie, since a tie vote does not produce a majority.
- 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), 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) 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) are necessary to elect the Vice President.

The amendment made no attempt address the question of which Congress (lame duck or newly elected) would conduct contingent elections in the future. During this period, electoral votes were cast in January, and counted in February, while congressional and presidential terms expired on March 4. Thus, in 1801, contingent election was conducted by the lame duck House of the 6th Congress, as noted elsewhere in this report. Questions as to the propriety and fairness of this arrangement, by which a Congress controlled by a party repudiated in the immediately preceding elections could choose the President, seem not to have occurred to the framers of the 12th Amendment.

Contingent Election in 1825: Philosophy, Procedures, Precedents

The emergence of four major presidential candidates in the 1824 presidential election led to a fragmentation of the electoral vote, necessitating contingent election of the President by the House of Representatives in 1825. The dominant Democratic-Republicans divided into four largely geographical factions, nominating Andrew Jackson, John Quincy Adams, William H. Crawford, and Henry Clay for President. When no candidate received the requisite majority of electoral votes, contingent election was conducted in the House on February 9, 1825.³ The 18th Congress convened its lame duck session in December of 1824, by which time it was already apparent that the House would elect the President, a situation that was complicated by charges from Jackson supporters

³The electoral vote totals for President were: Jackson, 99; Adams, 84; Crawford, 41; and Clay, 37. Clay was thus eliminated from the contingent election. Curiously, Vice Presidential candidate John C. Calhoun received an overwhelming electoral vote majority.

that Henry Clay had agreed to support the Adams candidacy in the House in return for his appointment as Secretary of State.⁴ Spirited debate as to the nature and requirements of contingent election preceded the actual vote. 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 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.⁵ Given Clay's active support of Adams, the election itself was almost a foregone conclusion: in contrast with 1801, the House required only one ballot to choose Adams, who received 13 state votes, to seven for Jackson and four for Crawford.

While most of the 12th Amendment's provisions are specific, some sections were the subject of further interpretation when the House conducted contingent election in 1825. After days of debate, the House adopted rules of procedure for the impending election that are summarized as follows.

- The House met in closed session, with only stenographers, House officers, Representatives, and Senators 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.
- Each state delegation received a ballot box, and Representatives cast paper ballots inscribed with the name of the candidate for whom they were voting. A majority of votes of a state delegation was required to cast a vote for any candidate; if there was no majority, the vote was declared "divided" and was forfeit for that round.
- State votes were determined, the results were recorded on two ballots, and deposited in duplicate ballot boxes in the House chamber. The contents were counted by tellers, compared, and reported to the House.⁶

⁴Theodore G. Venetoulis, *The House Shall Choose* (Margate, NJ: Elias Press, 1968), pp. 130-135.

⁵U.S. Library of Congress, Congressional Research Service, *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*, Typed Report, by Joseph B. Gorman (Washington: Nov. 20, 1980), pp. 13-22.

⁶U.S. Congress, House, *Hind's Precedents of the House of Representatives* (Washington: GPO, 1907), vol.3, pp. 292-293.

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.

Contingent Election in 1837

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.⁷ Electoral votes were counted on February 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. Procedures adopted by the Senate differed from those of the House in 1825: the roll was called in alphabetical order, at which time each Senator gave the name, *viva voce*, of the person for whom he voted.⁸ Johnson was elected in the first round of voting, receiving 33 votes to 16 for Granger.

The 20th Amendment and the Presidential Succession Act of 1947

The contingent election process has been 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 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, or, alternatively, the President *pro tempore* of the Senate in the event the

⁷Van Buren won 170 electoral votes to 124 for four Whig candidates; Johnson took 147, while independent Democrat William Smith won 23, and two Whig candidates won 124.

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

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

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

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.¹¹

Conclusion

American presidential elections have, with few exceptions, been dominated by two major parties since the early 19th century. Under this informal, but enduring, arrangement, and within the existing electoral college system, the presidential and vice presidential candidates of one of the major parties have gained a majority of electoral votes in every election since 1836. The 12th Amendment's contingent election provisions have thus been "standby" equipment for more than 160 years. The presence of a popular third party or independent candidate (or candidates) in the race has the potential of preventing an electoral vote majority, however. Moreover, such candidacies have emerged in four of the last eight presidential elections (1968, 1980, 1992, and 1996), and could recur more frequently in the future. It is, therefore, conceivable that the House and Senate could be called on to elect the President and Vice President at some point in the future. Barring any comprehensive reform of the presidential election system, any such contingency would be governed by the provisions of the 12th Amendment.

¹⁰For additional information on presidential succession, see: U.S. Library of Congress, Congressional Research Service, *Presidential and Vice Presidential Succession*, by Thomas H. Neale, CRS Report 989-931 GOV (Washington, Aug. 21, 1998).

¹¹U.S. Library of Congress, Congressional Research Service, *Would the District of Columbia Be Allowed to Vote in the Selection of the President by the House of Representatives*, by Thomas B. Ripy, Memorandum (Washington: July 7, 1980), p. 4.