



# Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis

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## Summary

The 12<sup>th</sup> Amendment to the Constitution provides backup, or standby, procedures by which the House of Representatives would elect the President, and the Senate the Vice President, in the event no candidate for these offices wins a majority of electoral votes. Although this procedure, known as contingent election, has been implemented only once for each office since the amendment's ratification, the failure to win an electoral college majority is a possible outcome in any presidential election that is closely contested by two major candidates, or which includes one or more additional major third-party or independent candidacies. Such a development would require Congress to consider and discharge functions of great constitutional significance, which could be complicated by the protracted and contentious political struggle that might stem from an electoral college deadlock. This report provides an examination of constitutional requirements and historical precedents associated with contingent election. It also identifies and evaluates contemporary issues that might emerge in the modern context.

The 12<sup>th</sup> Amendment, ratified in 1804, provides that the House of Representatives will elect the President, and the Senate the Vice President, if no candidate receives a majority of electoral votes (currently, 270 or more of 538). Since then, each chamber has performed this function once: the House in 1825, and the Senate in 1837. The amendment requires that the President be elected from among the three candidates who received the most electoral votes; that each state casts a single vote for President; that a majority of state votes (currently 26 or more) is required to elect; and the House must vote "immediately" and "by ballot." Additional precedents exist from 1825, but they would not be binding on the House in a contemporary contingent election. The Senate elects the Vice President in a contingent election, choosing one of the two candidates who received the most electoral votes cast. Each Senator casts a single vote, and a majority of the whole Senate (51 or more) is necessary to elect. The District of Columbia, which is not a state, would not participate in contingent election, despite the fact that it casts three electoral votes.

Contingent election would be conducted by a newly elected Congress, immediately following the joint session that counts and certifies electoral votes. This session is set by law for January 6, but is occasionally rescheduled. If the House is unable to elect a President by January 20, inauguration day, the Vice President-elect acts as President until the impasse is resolved. If the Senate is similarly deadlocked, then the Presidential Succession Act applies, and some other official would act as President until a President or Vice President qualifies.

Two relevant constitutional amendments were proposed in the 110<sup>th</sup> Congress: H.J.Res. 73 (Representative Brad Sherman), and H.J.Res. 75 (Representative Virgil H. Goode, Jr.). Both proposed to change the voting formula for President in a contingent election: instead of each state casting a single vote, each Representative would do so. Both bills were referred to the House Committee on the Judiciary, but no further action was taken. No similar legislation has been introduced to date in the 111<sup>th</sup> Congress. This report will be updated as events warrant.

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## **Introduction**

The 12<sup>th</sup> Amendment to the Constitution provides backup, or standby, procedures by which the House of Representatives would elect the President, and the Senate the Vice President, in the event no candidate wins a majority of electoral votes. Although this procedure, known as contingent election, has been implemented only once for each office since the amendment's ratification, the failure to win an electoral college majority is a possible outcome in any presidential election that is closely contested by two major candidates, or which includes one or more additional major third-party or independent candidates. Such a development would require Congress to consider and discharge functions of great constitutional significance. Moreover, the magnitude of these responsibilities might well be further highlighted by the fact that an electoral college deadlock would arguably lead to a period of protracted and contentious political struggle. This report examines constitutional requirements and historical precedents associated with contingent election. It also identifies and evaluates contemporary issues that might emerge in the modern context.

## **Origins of the 12<sup>th</sup> Amendment and Contingent Election**

The 12<sup>th</sup> Amendment to the U.S. Constitution, with its provisions for contingent election, was Congress's urgent response to the constitutional crisis that marred the presidential election of 1800 and threatened the still-new American system of federal government.

### **Original Action: The Electoral Vote and Contingent Election as Established in the Constitution**

The Constitution's original provisions established a system of undifferentiated voting by presidential electors that proved unworkable after only four elections. Article II, Section 1 of the Constitution required each elector to cast *two* votes for his two preferred choices for President (at least one of whom was required to be from a different state than that of the elector<sup>1</sup>) but *none* for Vice President. The candidate who received the most electoral votes was elected President, provided that the total number of votes also was a majority of the total number of electors, *not* electoral votes. The runner-up was elected Vice President. If no candidate received electoral votes equal to or greater than a majority of electors, or if there were a tie, then the House of Representatives would elect the President from among the five candidates receiving the most electoral votes. Again, the runner-up would be Vice President. Voting in this original form of contingent election was by states, with each state's House delegation casting a single ballot.

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<sup>1</sup> The convention delegates feared that once George Washington, the "indispensable man," had passed from the scene, there would never again be a political figure commanding such broad recognition and prestige. The convention expected that electors would be likely to vote only for citizens of the same state for President. The requirement that each elector cast one vote for someone outside his home state was thus intended to promote a broader, more national outlook. The requirement continues, in altered form, in the 12<sup>th</sup> Amendment: each elector currently votes "by ballot for President and Vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves...."

The problem was that the Philadelphia Convention of 1787 failed, or perhaps was unwilling, to anticipate the genesis and rapid growth of political parties that would offer joint tickets for the two highest offices that comprised both a presidential and vice presidential candidate, running as a team. The consequences of this oversight were evident almost immediately.

George Washington retired in 1796. During his second term, two political factions, the pro-administration Federalists and the anti-administration Jeffersonians, or Jeffersonian Republicans,<sup>2</sup> began to assume most of the classic characteristics of political parties. In the presidential election to choose his successor, that year, both groups offered unified tickets, with clearly identified party candidates for President and Vice President. In order to avoid a tie vote in the electoral college, and thus a second round, or contingent election by the House, party strategists decided to instruct one of their electors to withhold a vote for the de facto vice-presidential candidate, and cast it for someone else. Although the Federalists won a majority of electors and electoral votes, they miscalculated, and withheld more than one vote for their presidential candidate, John Adams. The result was that although Adams was elected chief executive with 71 electoral votes, his rival, Thomas Jefferson, the runner-up with 68 electoral votes, was elected Vice President.

## **Constitutional Crisis: The Election of 1800**

The deficiencies of the arrangement established in the Constitution became further apparent in the election of 1800, when the two incumbents, President Adams and Vice President Jefferson, opposed each other for the presidency a second time. In a hard-fought contest, the Jeffersonian Republicans prevailed, winning 73 electors to the Federalists' 65. In a remarkable omission, however, all the Jeffersonian electors cast one vote each for presidential candidate Jefferson *and* one vote for his vice presidential running mate, Aaron Burr. The failure to cast at least one less vote for Burr was an oversight,<sup>3</sup> but it resulted in an electoral college tie between the two, requiring contingent election.<sup>3</sup>

The House met to count the electoral votes on February 11, 1805. The situation was complicated by the fact that the count session was conducted by the lame-duck Sixth Congress, in which the Federalists controlled the House of Representatives. After the extremely bitter campaign, certain Federalist Members were inclined to vote for Burr to thwart Jefferson. At the same time, some Jefferson supporters threatened to take up arms if he were denied the presidency. Alarmed equally by threats of violence and the prospect of Burr as President, Alexander Hamilton, former Treasury Secretary and a senior Federalist leader, intervened. He urged Federalist Representatives to put aside partisan rancor in favor of national interest and vote for Jefferson.<sup>4</sup>

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<sup>2</sup> This group was the ancestor of the current Democratic Party, and should not be confused with the contemporary Republican Party, which emerged in the 1850s, and chose its title as a deliberate reference to Jeffersonian roots.

<sup>3</sup> Jefferson and Burr, as noted, each received 73 electoral votes. Adams received 65, his running mate, Charles C. Pinckney, 64, and John Jay, one. The Federalists calculated correctly, at least as far as ensuring that their presidential candidate received more electoral votes than the vice presidential nominee.

<sup>4</sup> The dubious character of Aaron Burr seems to have dominated considerations after the election. While his brilliance was conceded, he was widely regarded as ambitious and cynical — one of the reasons some Federalist Representatives supported him was their hope that he would govern as a Federalist. Even his running mate, Thomas Jefferson, is considered to have distrusted Burr. The fact that Hamilton was willing to endorse Jefferson, his political arch-enemy, speaks to the level of his anxiety over the prospect of a Burr presidency. See Lucius Wilmerding, *The Electoral College* (New Brunswick, NJ: Rutgers University Press, 1958), pp. 31-32.

The first round of voting revealed that Hamilton's appeal had had limited effect: a number of Federalists had voted for Burr, leading to deadlock. Of 16 state delegations in the House, eight supported Jefferson, six Burr, and two were divided.<sup>5</sup> Nineteen ballots were cast the first day, and the House returned to cast an additional 15 on February 12, 13, 14, and 16 (February 15 fell on a Sunday in 1801), but the state results remained unchanged. Meanwhile, behind the scenes, negotiations continued to break the impasse. On Tuesday, February 17, the House cast a 35<sup>th</sup> ballot, which showed the same results as the preceding 34, but on the next round, a Federalist Burr supporter from Vermont cast a blank ballot, swinging that state into Jefferson's column and delivering him the presidency. With the shift in momentum, the previously divided Maryland delegation switched to Jefferson, while Delaware and South Carolina swung from Burr into the divided column. The final tally was Jefferson, 10 states, and Burr, four, with two states divided.

## **Congress Responds: The 12<sup>th</sup> Amendment**

By the time the Seventh Congress convened, support was spreading for a constitutional amendment that would establish a separate electoral vote for President and Vice President. Federalist opposition prolonged debate over the proposal, delaying approval until the first session of the Eighth Congress, which convened on October 17, 1803, but on December 9 of that year the amendment was submitted to the states. The ratification process proceeded with notable alacrity for an era characterized by poor communications and state legislative sessions that were both short and infrequent. By July of 1804, 13 of 17 states<sup>6</sup> had ratified the proposal, and on September 25, Secretary of State James Madison declared the new 12<sup>th</sup> Amendment to be ratified, so that it was in effect for the 1804 presidential election, which followed within weeks.<sup>7</sup>

The Amendment made important changes in electoral college procedures. First, the electors continued to cast two votes, but they would henceforth cast separate ballots for President and Vice President, one vote for each office. This change was an implicit concession to the prevalence of unified party tickets for the two offices. Second, a majority was still required to win both positions, but reflecting the separation of votes for the two offices, it would be a majority of electoral votes, rather than electors. Contingent election procedures were retained largely intact, aside from two revisions. First, the amendment eliminated the provision that the electoral college runner-up would be Vice President; contingent election of that officer was transferred to the Senate. Second, it reduced the number of presidential candidates eligible for consideration by the House in a contingent election from five to three.<sup>8</sup> Finally, it established the same qualifications for Vice President as for President. Qualifications for the vice presidency had been deemed unnecessary by the Convention, since all contenders were candidates for the presidency, and were therefore required to meet that position's standards.

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<sup>5</sup> States for Jefferson: GA, KY, NC, NJ, NY, PA, TN and VA; for Burr: CT, DE, MA, NH, and RI; divided: MD and VT.

<sup>6</sup> Ohio had joined the Union in 1804, raising the total number of states to 17.

<sup>7</sup> *The Constitution of the United States of America, Analysis and Interpretation*, prepared by the Congressional Research Service, Library of Congress, (name redacted), editor, 99th Cong., 1st sess., 1987, S. Doc. 99-16 (Washington: GPO, 1987), pp. 28-29.

<sup>8</sup> The original provision for five candidates in contingent election further reflected the founders' failure to anticipate the two party system. Rather, they assumed that presidential elections would be contested by numerous regional candidates.

In one sense, the 12<sup>th</sup> Amendment has been a substantial success: its separation of presidential and vice presidential ballots has guaranteed that there will never be an exact repeat of the 1800 election. Much of the electoral stability achieved in the ensuing two centuries may also be attributed to the domination of American presidential politics by the two party system, which was implicitly sanctioned in the amendment. Notwithstanding the complaints of would-be minor party or independent candidacies, the two party system, in conjunction with the winner-take-all system of awarding electoral votes, generally delivers an electoral college majority to one ticket. One potential drawback is that it has also tended to discourage presidential bids by independent candidacies or new parties, for better or worse.<sup>9</sup> Contingent elections have been conducted only twice since ratification of the 12<sup>th</sup> Amendment: for President in 1825, following the election of 1824; and for Vice President in 1837, following the election of 1836.

Notwithstanding its demonstrated success, the amendment remains in place as a fallback in the event of electoral college deadlock, and although such an event is arguably improbable, there is a range of circumstances that might lead to contingent election, including the following:

- three or more candidates (tickets) split the electoral vote so that none receives a majority;
- “faithless” electors in sufficient numbers either cast blank ballots or vote for candidates other than those to whom they are pledged so as to deny a majority to any ticket or candidate; or
- the electoral college ties at 269 votes for each candidate (ticket).

## **Implementing the 12<sup>th</sup> Amendment: Contingent Elections Since 1804**

As noted previously, Congress has conducted contingent elections twice since the 12<sup>th</sup> Amendment was ratified. The first instance occurred in 1825, following the presidential election of 1824. In this election, four candidates split the electoral vote for President, requiring contingent election in the House of Representatives. In the second case, the Senate elected the Vice President in 1837, when no candidate for the second office received a majority of electoral votes in the 1836 election.

### **1824/1825: Contingent Election of the President in the House of Representatives**

The presidential contest of 1824 was a milestone election in that the revolutionary generation, the “greatest generation” of that epoch passed from the scene as James Monroe retired from the presidency. The patrician ascendancy of the republic’s first decades would soon be superseded by a more democratic, rough-and-tumble political milieu. One contributing development was the increasing influence of the new states of the west and southwest, in which frontier cultures were

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<sup>9</sup> For additional information on these and other contemporary characteristics of the electoral college system, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by (name redacted)

less deferential to the established order. At the same time, states throughout the Union continued to liberalize their voter requirements, leading to rapid growth in the electorate as property and income qualifications were dropped, at least for white males. Moreover, the democratization trend also extended to the electoral college: for the election of 1800, in 10 of 16 states the legislature picked electors, with no popular vote at all. By 1824, the number of states had grown to 24, of which 17 used some form of popular vote for presidential electors.<sup>10</sup> In fact, 1824 is the first presidential election for which reasonably complete popular vote election results are available.

By 1824, the Federalists had shrunk to a regional rump party, confined largely to New England; its congressional delegation comprised only 44 Representatives, of a total of 213, and four Senators, of a total of 48. The party had not, in fact, even nominated presidential candidates in the 1820 election. In comparison, since 1800, the Democratic Republicans, directly descended from the Jeffersonians, had controlled the presidency and both houses of Congress for over two decades. Throughout this period, the party's presidential nominees had generally emerged by consensus, and were subsequently proposed by the Democratic Republican congressional caucus. Moreover, for the succession elections of 1808 and 1816, the caucus had settled on the incumbent Secretaries of State, James Madison and James Monroe, as the party's choice for President. By this reasoning, Monroe's Secretary of State, John Quincy Adams, son of the second President, was the logical nominee, but in 1824, no fewer than three other candidates presented themselves, leading to multiple nominations by the contending factions. These included Adams; Treasury Secretary William Crawford, another establishment favorite; Senator Andrew Jackson, hero of the Battle of New Orleans and a favorite son of the emerging western states; and House of Representatives Speaker Henry Clay, also a western favorite, and one of the ablest politicians of the day.

As the election results became known late in 1824, it was clear that the contest had resulted in an electoral college deadlock. Andrew Jackson won a clear plurality of both popular and electoral votes – 99 of the latter. Adams followed with 84 electoral votes, Crawford was next with 41, and Clay came in last with 37.<sup>11</sup> Under the 12<sup>th</sup> Amendment, Jackson, Adams and Crawford, the top three electoral vote getters, would be considered by the House. The fourth candidate, Henry Clay, was excluded by the terms of the amendment.

Although Clay was out of the running, as House Speaker he wielded great influence, and ultimately threw his considerable support to Adams. This led to charges by Jackson partisans that Clay had offered his backing in return for the promise of a high office in an Adams administration — a “corrupt bargain,” as they termed it. Clay's approval was regarded as an important boost to the New Englander's chances, and when contingent election was conducted in the House on February 9, 1825, Adams was chosen on the first ballot, with 13 state votes to Jackson's seven, and four for Crawford.<sup>12</sup>

Eleven days later, Adams announced his choice of Clay to be his Secretary of State, giving fresh credence to the “corrupt bargain” charge. Adams and Clay always denied it, but true or not, the

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<sup>10</sup> Neal R. Peirce and Lawrence B. Longley, *The People's President, The Electoral College in American History and the Direct Vote Alternative* (New Haven, CT: Yale University Press, 1981), p. 247.

<sup>11</sup> For the record, Jackson received 152,933 popular votes; Adams, 115,696; Crawford, 46,979; and Clay, 47,136. Source: Peirce and Longley, *The People's President*, p. 241.

<sup>12</sup> States for Adams: CT, IL, KY, LA, MA, MD, ME, MO, NH, NY, OH, RI, VT; states for Jackson: AL, IN, MS, NJ, PA, SC, TN; states for Crawford: DE, GA, NC, VA.



charge overshadowed his presidency. It both enraged and energized Jackson and his supporters, who started planning the Tennessean's next presidential campaign immediately. Four years later, Jackson won the rematch, soundly defeating Adams in the 1828 election.<sup>13</sup>

## **1836-1837: The Senate Elects the Vice President**

Just 12 years after the contentious presidential election of 1824, the Senate was called on to elect the Vice President for the first and only time to date.

In 1836, Vice President Martin Van Buren was the Democratic Party's choice to succeed retiring President Andrew Jackson. The party's national convention<sup>14</sup> also nominated Representative Richard Mentor Johnson for Vice President. The opposition Whig Party, successor to the departed Federalists, was unable to agree on a single candidate for either President or Vice President, fielding four candidates for the highest office, and two for the vice presidency. In the general election, Van Buren won just a slight popular vote majority, but took a commanding lead of 170 electoral votes to the 124 cast for the several Whig candidates. Johnson, however, won 143 electoral votes, five short of a majority, thus requiring a contingent election in the Senate.<sup>15</sup> The electoral votes were counted by the 24<sup>th</sup> Congress at the traditional joint session on February 8, 1837, at which time the Senate immediately returned to its own chamber to elect the Vice President. Since the Senate's choice was limited by the 12<sup>th</sup> Amendment to the two candidates who won the most electoral votes, rather than three, as required for presidential contingent elections, it chose between Johnson and his leading Whig opponent, Representative Francis Granger. Johnson was elected by voice vote in one round, with 33 votes to 16 for Granger.

## **Contingent Election of the President: Constitutional Requirements and 1825 House Procedures**

Rules governing contingent election of the President in the House of Representatives may be divided into two categories: constitutional requirements and procedures adopted by the House to "flesh out" the rules for its 1825 contingent election. In addition, the House in 1825 made certain other procedural decisions that were not dictated by the 12<sup>th</sup> Amendment.

### **Constitutional Requirements**

The 12<sup>th</sup> Amendment sets certain requirements for contingent election in the House of Representatives, as follows.

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<sup>13</sup> For a more detailed account of the election, please consult Theodore G. Venetoulis, *The House Shall Choose*, (Margate, NJ: Elias Press, 1968).

<sup>14</sup> This was the second Democratic National Convention, the first having been held in 1832.

<sup>15</sup> Virginia's 23 Democratic electors refused to cast their votes for Johnson as a protest against his long-time common law marriage to Julia Chinn, an African American slave, a relationship he openly acknowledged. The Virginians instead cast their votes for William Smith, a former Senator.

## **The Three-Candidate Limit**

The Amendment limits the number of presidential candidates eligible for consideration by stating that if no candidate receives a majority of electoral votes, then the House shall choose the President “from among the persons having the highest numbers [of electoral votes] not exceeding three....” In the contemporary context, it is unlikely, but not impossible that more than three presidential candidates would gain electoral votes. The most recent presidential election in which a “third party” presidential candidate gained any electoral votes was 1968, when American Independent Party candidate George C. Wallace received 46.<sup>16</sup>

## **Voting “Immediately” and “by Ballot”**

The 12<sup>th</sup> Amendment next provides that the House “shall choose immediately, by ballot ... the President.” Most observers agree that the first part of this clause requires that the House must literally proceed to the contingent election without any delay.<sup>17</sup> It should also be noted that the rules adopted for contingent election in 1825 required the House to “ballot for a President, without interruption by other business, until a President be chosen.”<sup>18</sup>

The meaning of voting “by ballot” has been debated over the years. At the time of the 1801 and 1825 contingent elections, this was interpreted as requiring a secret, paper ballot, and a two-stage process. In 1825, each state delegation was provided with a dedicated ballot box for its internal voting, while two additional general election ballot boxes were provided for the plenary voting by the states. In the two-round system, the state delegates would first cast their internal ballots; they would then mark the results on two additional secret ballots, and deposit one in each of the two general ballot boxes.

## **Quorum Requirements**

The 12<sup>th</sup> Amendment states that “a quorum for this purpose (contingent election of the President) shall consist of a member or members from two thirds of the states....” In the contemporary context, this would require one or more Representatives from 34 of the 50 states.

## **House Procedures in 1825**

In common with other parts of the Constitution, the 12<sup>th</sup> Amendment established a framework for a particular procedure, but left many details to the discretion of Congress. In the case of contingent election of the President, the House was called on in 1825 to flesh out the constitutional requirements with a package of supplementary procedures. These rules, which were drafted by a select House committee composed of one Member from each state, may be summarized as follows:<sup>19</sup>

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<sup>16</sup> More recently, a faithless elector cast one vote for President for Senator John Edwards in 2004, while in 1988, another faithless elector cast a vote for Senator Lloyd Bentsen. These votes went unchallenged in the electoral vote counting joint sessions of Congress in 2005 and 1989, and were recorded as cast.

<sup>17</sup> Lucius Wilmerding, *The Electoral College* (New Brunswick, NJ: Rutgers University Press, 1958), p. 205.

<sup>18</sup> U.S. Congress, House, *Hinds' Precedents of the House of Representatives*, vol. 3 (Washington: GPO, 1907), pp. 292-293.

<sup>19</sup> Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907), (continued...)

- The Speaker of the House of Representatives was designated as presiding officer for the contingent election. This had also been the case in 1801.
- As noted previously, the “voting by ballot” stipulation requirement was interpreted in 1825 as requiring the use of secret paper ballots.
- For the first round vote, within state delegations, a majority of state delegation Members present and voting was required to cast the state vote. If a majority was obtained, the name of the preferred candidate was written on the second round ballot. If there was no majority, the second round state ballot was marked “divided.”
- The House met in closed session: only Representatives, Senators, House officers, and stenographers were admitted. It is worth noting, however, that despite the precautions of a closed session and secret ballots, the votes not only of state delegations, but individual Members, were widely known soon after the 1825 contingent election, and subsequently reported in the press.
- Motions to adjourn were entertained only when offered and seconded by state delegations, not individual Representatives.
- State delegations were physically placed in the House chamber from left to right, beginning at the Speaker’s left, in the order in which the roll was called. At that time, the roll began with Maine, proceeded north to south through the original states to Georgia, and concluded with subsequently admitted states, in order of their entry into the Union.

## Contingent Election of the Vice President: Constitutional Requirements and Senate Procedures in 1837

The 12th Amendment’s requirements for contingent election of the Vice President are not as complex as those for the House in the case of the President. It prescribes only the quorum necessary to conduct the election, two-thirds of the whole number of Senators (67 of 100 at present, assuming there are no vacancies), and the margin necessary to elect the Vice President, a majority of the whole number of Senators (51 at present, again assuming there are no vacancies).

Some constitutional requirements in the House are conspicuous by their absence from constitutionally contingent election procedures in the Senate. For instance, the 12<sup>th</sup> Amendment’s requirement that the House vote “by ballot” does not appear in the constitutional language governing election of the Vice President. Consequently, the Senate decided in 1837 that the election would be *viva voce*. The roll was called in alphabetical order, at which time each Senator named the person for whom he voted.<sup>20</sup>

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(...continued)

vol III, pp. 291-294.

<sup>20</sup> U.S. Congress, Senate, *Journal of the Senate*, 24<sup>th</sup> Congress, 2<sup>nd</sup> session (Washington: Gales and Seaton, 1836 [sic]), pp. 229-230.

Further, the compelling requirement to vote “immediately,” to the exclusion of other business, does not appear in the amendment. In 1837, this presented no problem, as the likely result was known well in advance, and Richard Mentor Johnson was elected with a comfortable majority. With respect to secrecy or confidentiality, neither the *Senate Journal* nor the *Register of Debates in Congress* entries for the session stated that the gallery was closed, so it may be assumed that spectators from the House and the general public were present. It is also interesting to note that President pro tempore William R. King, rather than outgoing Vice President Martin Van Buren, presided over the 1837 contingent election.<sup>21</sup> As with the case with election of the President in the House, no particular officer is designated as presiding over the session, but the Vice President, as President of the Senate, would seem to be a likely choice. In 1837, however, Vice President Van Buren was also President-elect, and had “retired” from the Senate on January 28, 1837.<sup>22</sup>

## Contingent Election Modified: The 20<sup>th</sup> Amendment and the Presidential Succession Act

The contingent election process was modified twice in the 20<sup>th</sup> century, first by the 20<sup>th</sup> Amendment to the Constitution, which took effect in 1933, and later by the Presidential Succession Act of 1947.

### The 20<sup>th</sup> Amendment

The 20<sup>th</sup> Amendment to the Constitution was proposed to the states by Congress on March 22, 1932; the ratification process was completed in less than a year, on January 23, 1933. Section 1 of the Amendment set new expiration dates for congressional and presidential terms: for Congress, the date was changed from March 4 every odd-numbered year to January 3; for the President, it was changed from March 4 to January 20 of every year following a presidential election. The primary purpose of these changes was to eliminate lame duck post-election sessions of Congress<sup>23</sup> and to shorten the period between election and inauguration of the President from four months to about 10 weeks.

A subsidiary purpose, as revealed by the amendment’s legislative history, was also to remove the responsibility for contingent election from a lame duck session. This would ensure that the President was chosen by the newly elected House of Representatives, and the Vice President by

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<sup>21</sup> U.S. Congress, *Register of Debates in Congress*, vol. 13, pt. 1, 24<sup>th</sup> Congress, 2<sup>nd</sup> session (Washington: Gales and Seaton, 1837), pp. 738-739.

<sup>22</sup> *Ibid.*, p. 618.

<sup>23</sup> Lame duck sessions were the result of legislation scheduling congressional sessions that endured from the 18<sup>th</sup> century through 1935. Under this arrangement, the first session of a newly elected Congress did not generally convene until December of the year *after* it was elected. The second session also customarily convened in December of the following year, after congressional elections for the next Congress had been held. The results was that a substantial number of Senators and Representatives who continued their lawmaking role for the three to four months of the second session had been defeated in the November elections, or had announced their retirement. Exceptions to this scheduling practice included special sessions of Congress, and special Senate sessions traditionally held when a new President took office for the primary purpose of considering his nominations to cabinet and other federal appointive offices.

the newly elected Senate.<sup>24</sup> Section 3 of the 20<sup>th</sup> Amendment also bears on contingent election, by reinforcing the 12<sup>th</sup> 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 by the time the presidential term expires. Section 3 also empowered Congress to provide by law for situations in which neither a President nor a Vice President qualified.

## **The Presidential Succession Act of 1947<sup>25</sup>**

Congress implemented the authority provided in Section 3 of the 20<sup>th</sup> Amendment when it passed the Presidential Succession Act of 1947, a major overhaul of presidential succession procedures. The act, which remains in effect, provides that the Speaker of the House would act as President during situations in which neither a President nor Vice President has qualified, and would continue to do so until the situation is resolved or the term of office expires.<sup>26</sup> If there is no Speaker, or if the Speaker does not qualify, then the President pro tempore of the Senate acts as President. Before being sworn as “acting” President, either officer would be required to resign their leadership offices and membership in their respective chambers. If both the Speaker and President pro tempore were to decline the office, or fail to qualify for any reason, then the acting presidency would devolve on the head of the most senior executive department, provided that officer has been regularly nominated by the President and confirmed by the Senate. According to the act, by taking the oath of office to act as President, a cabinet officer would automatically vacate the cabinet position, thus avoiding the constitutional prohibition against dual office holding.<sup>27</sup>

Both the Succession Act and the 20<sup>th</sup> Amendment specifically limit the service of a person acting as President under such circumstances: he or she holds office only until either a President or Vice President has qualified.

## **Contingent Election of the President: Contemporary Analysis**

Almost two centuries have passed since the House of Representatives last elected a President of the United States, and nearly as long since contingent election of a Vice President. What are some of the factors the House or Senate might consider should either chamber — or both — be called on to perform this function in the contemporary context?

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<sup>24</sup> U.S. Congress, Senate Judiciary, *Report to Accompany S.J. Res 14*, 72nd Cong., 1<sup>st</sup> sess., S.Rept. 26 (Washington: GPO, 1932), p. 4.

<sup>25</sup> 61 Stat. 380. The Succession Act as amended is codified at 3 U.S.C. 19.

<sup>26</sup> Prior to the 1947 act, the Secretary of State had been first in line of succession, following the Vice President, as prescribed by the Succession Act of 1886 (24 Stat. 1).

<sup>27</sup> For additional information on presidential succession and the role of the Cabinet in this process, please consult CRS Report RL34692, *Presidential Succession: Perspectives, Contemporary Analysis, and 110th Congress Proposed Legislation*, by (name redacted).

## **The 1825 House Procedures: To What Extent Would They Be Applicable in the Contemporary Context?**

It should be noted that many of the decisions reached in 1825 applied only to the rules under which the House of Representatives conducted contingent election in that specific instance, and in that particular year. Although they may arguably provide a point of reference for the House in any future application of the contingent election process, they would not be prescriptive, and might well be subject to different interpretations.

### **Committee of Jurisdiction in Contingent Election of the President<sup>28</sup>**

Several committees of the House of Representatives could claim primary jurisdiction of the rules and regulations governing a contingent election of the President. The existing precedent is not directly applicable: in both 1801 and 1825, the House voted to establish a select committee to prepare rules governing contingent election. During this period, the House did, in fact, have a Committee on Elections, but its authority was restricted to the adjudication of congressional elections.<sup>29</sup> A Committee on election of the President, Vice President and Representatives in Congress was later established, but its authority was ultimately transferred to the Committee on House Administration by the Legislative Reorganization Act of 1946. The current House Administration Committee might assert its authority over the contingent election process on these grounds.<sup>30</sup> The Committee on Rules could also assert at least partial authority on the basis of its jurisdiction over rules and procedures for the House.<sup>31</sup> Finally, the House Committee on the Judiciary might arguably claim jurisdiction on the basis of its primacy in the area of the Constitution and presidential succession.<sup>32</sup>

### **House Proceedings: Open or Closed?**

In both 1801 and 1825, the House conducted contingent election of the President behind closed doors. In the modern context, however, there would be strong, perhaps irresistible, pressure for a contingent election session to be open to the public and covered by radio, television, and webcast. Proponents of an open session would likely note that there is no secrecy requirement for contingent election sessions in the 12<sup>th</sup> Amendment, while opponents might assert that the constitutional gravity of the contingent election process requires both confidentiality and the free exchange of debate that a closed session would facilitate.

### **Individual Members' Votes and State Votes: Confidential or Public?**

Similarly, there would likely be strong demands that the votes of individual Representatives in the first round of the election, that which occurs within state delegations, be made public. This

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<sup>28</sup> The author extends his thanks to (name redacted), Specialist on the Congress and Legislative Process, for his assistance in preparing this section.

<sup>29</sup> U.S. Congress, House, *Precedents of the House of Representatives of the United States*, by Asher C. Hinds (Washington: GPO, 1907), vol. IV, sec. 4301-4303.

<sup>30</sup> Rules of the House of Representatives, 110<sup>th</sup> Congress, Rule X(1)(j)(12).

<sup>31</sup> *Ibid.*, Rule X(1)(n)(1).

<sup>32</sup> *Ibid.*, Rule X(1)(k)(6) and X(1)(k)(15).

position could be justified on the grounds that the 12<sup>th</sup> Amendment’s instruction that voting be “by ballot,” and therefore secret, applies only to the votes of the states in the second round, and not to Members as they vote within their state delegations. Taking this assertion to the next level, it could be further argued that the entire process should be open to the public. Advocates might argue that the amendment’s language is not prescriptive, that “by ballot” could just as easily be interpreted as meaning by paper ballot, but not necessarily a secret ballot. They could argue the position that a decision of such great constitutional consequence must be made in the bright light of public awareness, and that both individual Representatives and state House delegations should be fully accountable for their votes. In opposition, defenders of a secret ballot might assert that this was the original intent of the 12<sup>th</sup> Amendment’s authors, and that an open ballot might subject Representatives to pressure, subvention, or perhaps even threats from outside sources. They might also note that the sanctity of the secret ballot should extend no less to Representatives — or states — in a contingent election than it does to ordinary citizens in the voting booth.

### **Plurality or Majority Voting Within State Delegations?**

Another precedent from 1825 that might be open to question was the House’s decision to require a majority vote within a state delegation during the first round to cast that state’s vote in the second round. States that failed to reach a majority were required to mark their ballots as “divided.” This requirement does not appear in the Constitution, and the question could be raised as to whether the House might legitimately set a plurality requirement for the first, intra-state round of voting. In favor of the original provision, it may be argued that the majority requirement echoes the electoral college, which requires a majority of votes nationwide in order to be elected. Conversely, a first-round plurality requirement might be justified on the grounds that 48 states and the District of Columbia require only a plurality of popular votes to win all the state’s electoral votes.<sup>33</sup> A Congressional Research Service legal analysis prepared at the time of the 1980<sup>34</sup> presidential election concluded that the intra-state delegation majority vote provision was not required by the 12<sup>th</sup> Amendment, and that this 1825 decision could be revisited and reversed by the House in a future contingent election.<sup>35</sup>

### **The Role of the Representative in Contingent Election**

Representatives participating in a contemporary contingent election of the President would be subject to competing demands as to how they should vote. While the 12<sup>th</sup> Amendment is silent on the constitutional duties of individual Members in this situation, several alternative positions were identified and debated in the House during its consideration of contingent election arrangements in 1825. The concerns voiced by the Representatives of that era would be arguably similar to those faced by their modern day counterparts.

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<sup>33</sup> Maine and Nebraska use a congressional district system to award electoral votes. For additional information, please consult CRS Report for Congress CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by (name redacted).

<sup>34</sup> The 1980 presidential election was contested for the major parties by incumbent Democratic President Jimmy Carter, and his Republican challenger, former California Governor Ronald Reagan. It also included a viable independent candidacy by Representative John Anderson. Anderson’s high levels of popular support, especially early in the general election campaign, seemed to many observers to foreshadow an electoral college deadlock.

<sup>35</sup> Congressional Research Service Memorandum, *Majority or Plurality Vote Within State Delegations When the House of Representatives Votes for the President?* June 10, 1980, by Robert L. Tienkin.

Some Representatives asserted in 1825 that notwithstanding the silence of the 12<sup>th</sup> Amendment, it was the duty of the House to elect the candidate who had won the most popular and/or electoral votes, and who was the choice of at least a plurality of the voters and electors. Others suggested that Members should give prominence to the popular election returns, but also consider themselves at liberty to weigh the comparative merits of the three candidates before them. Still another alternative was presented suggesting that contingent election was a constitutionally distinct process, triggered by the failure of both the voters and the electoral college to arrive at a majority decision. The contingent election, its supporters reasoned, was an entirely new event in which individual Representatives were free to consider the merits of contending candidates without reference to the earlier contest.<sup>36</sup>

These alternatives debated in the House in 1825 might arguably carry less weight in the 21<sup>st</sup> century, in an era when the ideal of majoritarian democracy is almost universally honored, if not always perfectly respected. Nevertheless, House Members would have before them a range of options, which might arguably claim legitimacy, and they could, in choosing among them cite Edmund Burke's famous defense of the elected representative's right to exercise individual judgment, "Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion."<sup>37</sup> A range of choices would be available for consideration by Members of the House, which would arguably include the following:

- *The candidate who won a nationwide plurality or majority of the popular vote.* As noted previously, this choice would have a strong claim on the grounds of fairness and democratic majoritarianism.
- *The candidate who won a plurality of electoral votes.* A Member choosing this person could justify the decision on the grounds that it respects the electoral college provisions of the Constitution, and the conception of the presidential election as combined national and federal process in which the electors have a constitutionally mandated role.
- *The winner in the Member's state or district.* Here, a Representative could argue that the freely expressed choice of the voters he or she represents — on either the state or district level — are deserving of respect and deference.

To these competing, but related claims of "equity," "acceptance of the people's choice," and state or local preferences, might be added further alternatives, such as the following.

- *The candidate of the Member's party.* Party loyalty and agreement with the platform and principles of the Representative's own party could also make a legitimate claim for his or her vote.
- *The Member's personal preference.* A Representative, citing Burke, and trusting his eventual electoral fate to the ultimate judgment of his fellow citizens, might also cite personal preference, trust, and shared principles as justification for a particular vote in contingent election.

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<sup>36</sup> These options were identified and evaluated in a Congressional Research Service Memorandum, *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, November 20, 1980. Available from the author of the present report.

<sup>37</sup> Edmund Burke, "Speech to the Electors of Bristol," November 3, 1774, in *Familiar Quotations ... by John Bartlett*, Emily Morison Beck, ed. 14<sup>th</sup> ed. (Boston: Little, Brown and Co.), 1968, p. 452.



These and other factors would arguably call for a serious examination of the alternatives, not only by and among individual Members, but also in open debate on the floor of the House. While the 12<sup>th</sup> Amendment, as noted previously, requires a vote “by ballot” in contingent election of the President, it does not prohibit Representatives from announcing how — and why — they cast their votes. Such a colloquy might emerge as one of the most dramatic and portentous deliberations in either chamber in the long history of congressional debate. In the modern context, it would certainly be the subject of unprecedented publicity, examination, and commentary by all the organs of public information and opinion.

## **The Role of the District of Columbia**

Although the 23<sup>rd</sup> Amendment empowers citizens of the District of Columbia to vote in presidential elections, where it casts three electoral votes, it makes no mention of the contingent election process. The District is thus not considered a state for the purposes of contingent election, and its Delegate to Congress would therefore not participate in the contingent election of either the President or Vice President.<sup>38</sup> It should be noted that legislation to provide the District of Columbia with a voting Member in the House of Representatives is currently under consideration in the 111<sup>th</sup> Congress. Neither the Senate nor House bill currently under consideration would provide for District participation in contingent election, however.<sup>39</sup>

## **Contingent Election of the Vice President: Contemporary Analysis**

The 12<sup>th</sup> Amendment, as noted earlier, imposes fewer procedural demands on the Senate in its language establishing contingent election of the Vice President than it does on the House of Representatives. The comparative simplicity of the process would thus arguably require fewer process-driven decisions by the Senate if it were called on to elect a Vice President today. As noted earlier in this report, in 1837, the roll was called and the Senators declared their preference *viva voce*. Further, it is likely that the proceedings were open to the public, since neither the *Register of Debates in Congress* nor *The Journal of the Senate* provide any indication that the galleries were cleared, or that the Senate otherwise met in closed session. For the Senate, therefore, historical precedent appears to support, but does not mandate, a voice vote in open session.

In the Senate, proposals relating to procedures for contingent election of the Vice President would likely be referred to the Committee on Rules and Administration. Under the Rules of the Senate, this committee has jurisdiction over both “congressional ... rules and procedures, and Senate rules and regulations, including floor ... rules,” and “Federal elections generally, including the election of the President [and] Vice President....”<sup>40</sup> The Senate customarily refers each measure in its

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<sup>38</sup> Congressional Research Service Memorandum, *Would the District of Columbia Be Allowed to Vote in the Selection of the President by the House of Representatives?* by (name redacted), July 7, 1980.

<sup>39</sup> For additional information, please consult CRS Report RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by (name redacted).

<sup>40</sup> Senate Rule XXV, paragraph 1(n)2 and 1(n)(10)5. In U.S. congress, Senate, *Senate Manual*, prepared by Andrea LaRue under the direction of Kennie L. Gill, Staff Director and Chief Counsel, Committee on Rules and (continued...)

entirety to the committee with predominant jurisdiction over the subjects in the legislation. As in the House, the Senate Committee on the Judiciary has jurisdiction over constitutional amendments, and would presumably receive proposals for constitutional change in this area.<sup>41</sup>

## Recent Legislative Proposals

During the 108<sup>th</sup> through 110<sup>th</sup> Congresses, constitutional amendments were proposed that would have altered the formula by which the House of Representatives would vote in a contingent election of the President. In addition, contingent election has traditionally figured indirectly in most broader scale proposals that seek to reform the electoral college or establish direct popular election. Nearly all these measures would eliminate contingent election and effectively repeal the 12<sup>th</sup> Amendment<sup>42</sup>

Most recently, Representative Brad Sherman introduced H.J.Res. 73 in the 110<sup>th</sup> Congress on December 18, 2007. A similar resolution, H.J.Res. 75, was introduced on December 19 by Representative Virgil H. Goode, Jr. Both resolutions proposed a fundamental change in contingent election of the President. Instead of each state casting one vote, each Representative would cast a vote. The person receiving the greatest number of votes would be elected, provided that this number constituted a majority of votes cast.

The only difference between the two proposals centered on quorum requirements for the House in contingent election sessions. H.J.Res. 73 would have changed the 12<sup>th</sup> Amendment's quorum, "a member or members from two-thirds of the states" to "a majority of the House." By comparison, H.J.Res. 75 proposed a higher threshold for contingent election: "two thirds of the members of the House shall constitute a quorum." The evident purpose of these provisions would be to ensure that a majority (H.J.Res. 73) or a super majority (H.J.Res. 75) would be present for a contingent election. The 12<sup>th</sup> Amendment's quorum requirement of a Member or Members from two thirds of the states, is markedly less rigorous; in fact, it would be theoretically possible to hold a contingent election session under the present arrangements with as few as 34 Members present.<sup>43</sup> The argument favoring this change is straightforward: since contingent election of the President is one of the most constitutionally significant functions assigned to the House of Representatives, it is appropriate that the largest possible number of Members be present for this session.

Perhaps the most important element in both proposals was the proposed elimination of state equality in the contingent election process for the President. Instead of each state casting a single vote, each Representative would cast one vote. The change in comparative state voting power in a contingent election would be dramatic. States represented in the House by a single Member<sup>44</sup>

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(...continued)

Administration, S. Doc. 107-1, 107<sup>th</sup> Congress, 1<sup>st</sup> session (Washington: GPO, 2002).

<sup>41</sup> (name redacted), Specialist on Congress and the Legislative Process, Government and Finance Division, Congressional Research Service, prepared this paragraph.

<sup>42</sup> For additional information, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by (name redacted) and (name redacted), and CRS Report RL34604, *Electoral College Reform: 110th Congress Proposals, The National Popular Vote Campaign, and Other Alternative Developments*, coordinated by (name redacted).

<sup>43</sup> If 34 Representatives, one from each of 34 states, were present, the 12<sup>th</sup> Amendment quorum requirement would be fulfilled.

<sup>44</sup> Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming.

would be outmatched by the votes of the larger delegations of more populous states. By comparison, California's House delegation at present comprises 53 Representatives. The argument here is that the change in formula would be far more democratic, reflecting the great disparities in population and the number of popular votes cast among the states.

Arguments against these proposed amendments could center on the assertion that either one would weaken the federal nature of the existing contingent election process, in which each state casts a single vote. Moreover, it might be noted the contingent election process for both executive officers is roughly symmetrical, with all states having the same weight in election of the President in the House and the Vice President in the Senate. Why, they might ask, change the formula for election of the President, while that for the Vice President remains unchanged? Logic suggests, they might assert, that the same population-based formula be established for the contingent election of both executive officers.

Both H.J.Res. 73 and H.J.Res. 75 were referred to the House Committee on the Judiciary, but no further action was taken on either measure before the 110<sup>th</sup> Congress adjourned.

## **Concluding Observations**

American presidential elections have generally been dominated by two major parties since the early 19<sup>th</sup> century, with major party candidates for President and Vice President having won a majority of electoral votes in every election since 1836. A popular third party or independent candidacy has, however, always had the potential of disrupting this traditional rhythm. While they seldom have a realistic expectation of winning the presidency, such efforts carry with them the potential for denying either major party ticket a majority in the electoral college. Such candidacies have, in fact, emerged in four presidential elections since 1968.<sup>45</sup> Another possibility involved the contest over election results in Florida in the closely fought 2000 presidential election; the extended political struggle 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. Barring any comprehensive reform of the existing arrangements, a contingent election would be governed by the provisions of the 12<sup>th</sup> Amendment and such other supplementary procedures as the House and Senate would establish. Rules adopted for past contingent elections would offer guidance, but would not be considered binding in any future contingent election.

As previously noted, constitutional amendments that would change the contingent election process have been introduced in recent Congresses, but these have experienced the fate of the vast majority of proposed amendments: assignment to the appropriate committee, and then, oblivion. By design of the founders, the Constitution is not easily amended; the stringent requirements include passage by two-thirds vote in both chambers of Congress, followed by approval by three-

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<sup>45</sup> In 1968, former Alabama Governor George C. Wallace was the candidate of the American Independent Party. Representative John Anderson ran as an Independent candidate for President in 1980. Industrialist H. Ross Perot mounted two candidacies for President, as an Independent in 1992, and as candidate of the Reform Party in 1996.

fourths of the states, generally within a seven-year time frame.<sup>46</sup> These constraints have meant that successful amendments are usually the products of several factors, including, but not limited to the following:

- a broad national consensus, arrived at after lengthy debate, sometimes measured in decades, that an amendment is necessary and desirable, e.g., the 17<sup>th</sup> Amendment (direct election of Senators), and the 24<sup>th</sup> Amendment (the 18-year-old vote); or
- an equally broad, but in this case urgent, consensus demanding a response to a galvanizing event or events, e.g. the 12<sup>th</sup> Amendment itself, and the 25<sup>th</sup> Amendment (providing for presidential succession and disability, in the wake of the 1963 assassination of President John F. Kennedy); and
- the active and persistent support and guidance of prominent members, relevant committee chairs, and chamber leaders in both houses of Congress.

The time and energy of Congress is limited, and the institution must pick and choose from among the most pressing demands for its attention. Would-be constitutional amendments sharing one or more of the characteristics noted above are far more likely to reach “critical mass,” and meet the hurdles — both constitutional and political — faced by such proposals. Failing in that, it seems more likely that existing provisions, such as contingent election, which might be characterized as a quiet backwater of the Constitution, will remain unaltered unless or until their alleged failings become so compelling that the necessarily large concurrent majorities of the public, Congress, and the states, are prepared to undertake reform.

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<sup>46</sup> 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 an Article V convention would also require approval of three-fourths of the states. This alternative has not been used since the Constitution came into effect in 1789.

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