

# ARTICLE

## OF DEATH AND DEADLOCKS: SECTION 4 OF THE TWENTIETH AMENDMENT

BRIAN C. KALT\*

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\* Professor of Law and Harold Norris Faculty Scholar, Michigan State University College of Law. Thanks to Robert William Bennett, Reb Brownell, Brady Bustany, Joel Goldstein, Adam Pavlik, Jorge E. Souss, Glen Staszewski, Seth Barrett Tillman, and the participants in the MSU faculty workshop for their helpful input, and to Barbara Bean, Brett Domann, Jane Meland, and the rest of the research staff at MSU Law for their usual outstanding research assistance.

*When no presidential candidate wins a majority in the Electoral College, the House of Representatives holds a “contingent election” between the top three candidates. Unfortunately, if one of those three candidates should die, there is no way to provide a substitute, so the dead candidate’s supporters and party would be disenfranchised.*

*Section 4 of the Twentieth Amendment, ratified in 1933, addresses this situation; it authorizes Congress to legislate a process for substituting a new candidate. But for eighty-three years Congress (along with scholars) has never seriously considered Section 4, let alone passed legislation under it. This neglect has fostered a dangerous gap in the presidential electoral system. At every other stage in the process, dead candidates can be replaced; only here can a death eliminate an entire party from consideration in the election.*

*While we could wait for an actual case before passing a Section 4 law, actual cases present too high a chance of a political impasse, yielding either inaction or suboptimal legislation. Moreover, without a Section 4 law on the books, the possibility of eliminating an entire party from consideration would loom as an unacceptable incentive—and prize—for would-be assassins any time there is a contingent election. To head off these risks, it would be prudent to pass a Section 4 law now.*

*Part I of this Article provides context and background on Section 4 of the Twentieth Amendment. Part II, after considering what Congress should provide if it ever enacts Section 4 legislation, proposes draft legislation. Part III briefly considers why Congress has failed for so long to use its Section 4 power.*

## I. INTRODUCTION

Imagine the most dramatic presidential election ever: Williams vs. Miller vs. Garcia. Garcia runs a strong third-party candidacy, so when the dust settles the day after the election no candidate appears to have a majority in the Electoral College. The country waits with bated breath for the new Congress to confirm the indecisive result on January 6 and then, pursuant to the Constitution’s procedures, to choose a president in the House and a vice president in the Senate.<sup>1</sup>

In mid-December, disaster strikes as an assassin kills Garcia in an attempt to knock him and his party out of the House’s runoff election. Pandemonium erupts. Before Garcia is even buried, Williams’s and Miller’s partisans start fighting, wheeling, and dealing to win Garcia’s supporters in the House—who include several newly elected representatives and dozens more whose districts strongly favored Garcia in the election—over to their respective sides.

Garcia’s supporters feel disenfranchised. Surely there must be a way for them to continue to support Garcia and his movement, while opposing Williams and Miller. But how? Vote for a dead man? Replace Garcia in the House runoff with his running mate or another replacement candidate? Or are they just out of luck, meaning that the assassin’s goal will be fulfilled?

Because the Constitution provides no way to replace a dead candidate in the House runoff, that last result starts looking like the most likely one. Every politico and pundit across the country debates how to handle this, but

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<sup>1</sup> See U.S. CONST. amend. XII.

no consensus emerges. The stakes are simply too high for Williams or Miller to do anything that might allow Garcia's supporters to field a new candidate. The obligatory flood of litigation settles nothing either.

Adding to the drama is a stunning irony. Section 4 of the Twentieth Amendment, ratified in 1933, states:

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a vice president whenever the right of choice shall have devolved upon them.<sup>2</sup>

In an act of unprecedented proactivity, the drafters of the Twentieth Amendment empowered Congress to solve the precise problem of dead presidential-runoff candidates. But in all the years since 1933, Congress has never even come close to using its Section 4 power to provide for candidate substitutions. Congress's failure gave Garcia's assassin a powerful incentive to act, transforming this deadlocked election from a drama into a crisis.

Section 4 is helpful in one respect: it makes clear that the proper mechanism for resolving this mess is legislation (as opposed to, say, a House rule). Unfortunately, legislation requires consensus among the House, Senate, and president, and such consensus is in predictably short supply in the midst of the deadlocked presidential election and the transition to a new congressional term. Eventually there will be a final result—either Williams or Miller almost certainly will be the next president—but the process looks unlikely to be quick, fair-minded, or sensible. Worst of all, the assassin looks to have gotten his way.

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This Article considers the striking contradiction that is Section 4 of the Twentieth Amendment. On one hand, Section 4 represents congressional vigor, working to resolve a potential problem before it ever erupted into a very real one. On the other hand, the eight decades of inaction following Section 4's enactment stand as a shining beacon of congressional fecklessness.<sup>3</sup> If a presidential election is ever deadlocked, and one of the candidates dies (even from natural causes), Congress's failure here will have produced needless turmoil.

Part II of this Article provides the background behind Section 4. This includes examinations of the relevant constitutional provisions for deadlocked elections, of the three elections in which the Electoral College failed to produce a winner, and of the two elections in which a candidate died. This background was both thin and distant at the time of Section 4's genesis, but they show that the risks here are real; Part II continues with Section 4's

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<sup>2</sup> *Id.* amend. XX, § 4.

<sup>3</sup> Section 4 has been largely ignored by scholars as well.

unusual legislative history, showing how Congress engaged a problem that was purely hypothetical.

Part III considers the type of Section 4 legislation Congress should enact. In other words, what is the best way to handle the death of a candidate in a presidential election thrown into the House, or in a vice-presidential election thrown into the Senate? After considering multiple options, Part III concludes that the best one for most cases will be for a dead presidential candidate in the House to be replaced by his or her running mate, and for a dead vice-presidential candidate in the Senate to be replaced by a new party nominee. After this discussion, Part III considers a number of special cases and other issues, before concluding with a draft of proposed legislation.

Part IV briefly considers why Congress has failed for three generations to use its Section 4 power. The principal reason is that Section 4's creation was motivated by unusual sentiments. That spirit had faded by the time Section 4 was actually ratified, and has only grown fainter since.

## II. CONTEXT AND BACKGROUND

Section 4 confronts the possibility of a contingent election (the term that this Article will use for a presidential election thrown into the House, or a vice-presidential election thrown into the Senate) in which a candidate dies. There has never been a situation like this. There have been contingent elections, and there have been candidate deaths, but never a combination of the two.

### A. *Contingent Elections*

The Constitution provides that if nobody wins a majority of the electoral votes for president, the House of Representatives chooses the president from the top three electoral-vote recipients.<sup>4</sup> Each state delegation gets one vote, and a "majority of all the states" is necessary for victory.<sup>5</sup> For a vice-presidential deadlock, the Senate makes the choice from those candidates getting the top two numbers of electoral votes.<sup>6</sup> Each senator gets one vote and a "majority of the whole number of Senators" is necessary for victory.<sup>7</sup>

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<sup>4</sup> *Id.* amend. XII. The most comprehensive article on the nuts and bolts and potential complications of contingent elections is William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597 (2009).

<sup>5</sup> U.S. CONST. amend. XII.

<sup>6</sup> *Id.* The use of "numbers" instead of "persons" in the vice presidential provision may affect the handling of ties. See *infra* note 27.

<sup>7</sup> U.S. CONST. amend. XII. Another distinction between the House and Senate procedures is that the Constitution specifies that the House make its choice "immediately, by ballot," but makes no such specification for the Senate and its choice. *Id.*

There are four principal ways that a contingent election could arise:<sup>8</sup>

1. Two candidates could tie with exactly half of the electoral votes available (currently 269 out of 538). In a presidential election, the House would then choose from those two candidates rather than from three. A tie has occurred once, under the very different rules used before 1804.<sup>9</sup>

2. Three or more candidates could receive electoral votes, with all candidates falling short of a majority. This has happened once,<sup>10</sup> and happened in the fictional scenario that opened this Article.

3. A non-candidate might receive enough electoral votes from “faithless electors” (members of the Electoral College who vote for someone other than to whom they were pledged) to deprive the apparent winner of a majority. This occurred once.<sup>11</sup>

4. A state might fail to award electoral votes to anybody, such that neither candidate can get to 270 electoral votes. This has never happened.<sup>12</sup> It is possible in such a situation that Congress would decide against counting the missing votes in the denominator, in which case someone would be able to get a majority as long as there was not a tie or a strong-enough third-party candidate.<sup>13</sup>

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<sup>8</sup> The first three of these four ways are listed in THOMAS H. NEALE, CONG. RESEARCH SERV., R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS 4 (2009).

<sup>9</sup> See *infra* Section II.A.1 (discussing Election of 1800). It is also possible that two candidates could be short of a majority without tying, for instance if some electors abstained or cast votes for non-qualified candidates.

<sup>10</sup> See *infra* Section II.A.2 (discussing Election of 1824).

<sup>11</sup> See *infra* Section II.A.3 (discussing Election of 1836); see also *infra* note 170 (describing near miss in Election of 1960). More recently, in the last ten elections, there have been faithless electors in four: 2004 (a presidential vote for John Edwards instead of John Kerry), 2000 (an abstention by one of Al Gore and Joe Lieberman’s electors), 1988 (a presidential vote for Lloyd Bentsen and a vice presidential vote for Michael Dukakis instead of vice versa), and 1976 (a presidential vote for Ronald Reagan instead of Gerald Ford). See ROBERT WILLIAM BENNETT, TAMING THE ELECTORAL COLLEGE 96, 225 n.6 (2006).

<sup>12</sup> Some people worried about this happening in 2000 because of the dispute between candidates Bush and Gore over recounting Florida’s vote, but the Supreme Court’s resolution of the dispute put a heavy emphasis on obtaining a timely result. See *Bush v. Gore*, 531 U.S. 98, 110 (2000).

<sup>13</sup> See David Goldiner, *Twilight Zone Time for U.S.?*, N.Y. DAILY NEWS, NOV. 11, 2000, at 6 (discussing this possibility in the context of the 2000 election). It makes sense not to count a missing state in the denominator, given that the Twelfth Amendment requires a majority of “the whole number of Electors appointed” and not the “whole number of Electors that would have been appointed if the states had all gotten their acts together.” U.S. CONST. amend. XII; see, e.g., CONG. GLOBE, 38TH CONG., 2D SESS. 669 (1865) (not counting missing Confederate states in the denominator when counting electoral votes from the Election of 1864, though President Lincoln would have had a majority in either case). But the legitimacy of the election would be imperiled if the number of missing electoral votes were too high and not counting them would change the outcome. In any case, if a state could not resolve a disputed vote count in time, it might prefer to send along two slates of electors and let Congress decide which to count rather than throw the whole election to the House.

Abstentions by electors such as in 2000 are another matter—the elector having been appointed, she counts in the denominator—and thus could deprive an apparent winner of a majority. See *supra* note 9.

The three contingent elections in American history provide context for understanding Section 4 of the Twentieth Amendment, and for the sorts of troublesome situations that might arise.

1. *The Election of 1800 and the Twelfth Amendment*

Under the original terms of the Constitution,<sup>14</sup> each member of the Electoral College would cast two votes for president. The candidate with the most electoral votes would become president, unless that person lacked a majority of the whole number of electors appointed. In such a case, the House of Representatives would choose from among the top five candidates,<sup>15</sup> with each state delegation getting one vote. If two or three candidates had a majority but were tied for the lead, the House would choose between just them. Once a president was chosen—either by regular or contingent election—whichever remaining candidate had the most electoral votes would become vice president, regardless of whether he had a majority. In the case of a tie atop the list of remaining candidates, the Senate would choose a vice president from among those tied, with each senator getting one vote.

In the run-up to the Election of 1800, John Adams's Federalists and Thomas Jefferson's Democratic-Republicans tried to coordinate their respective electors' second ballots so that all of their electors but one would cast their second votes for their candidates' respective running mates.<sup>16</sup> That way if their presidential candidate won, his running mate would be right behind him and win the vice presidency.

Jefferson won a majority in the Electoral College, defeating Adams seventy-three to sixty-five.<sup>17</sup> But Jefferson's running mate Aaron Burr won seventy-three votes too; none of Jefferson's electors had voted for someone else. Even though everyone knew that Burr had been slated for the vice presidency, the House of Representatives had to hold a contingent election.<sup>18</sup>

The Federalists recognized the opportunity for mischief: by voting for Burr they might be able to deprive their enemy Jefferson of the presidency.<sup>19</sup>

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<sup>14</sup> All of the constitutional provisions referenced in this paragraph are in the original version of U.S. CONST. art. II, § 1, cl. 3.

<sup>15</sup> Left uncertain was what would be done if there were a tie for fifth place—include all six people as being in the “five highest on the list” or only include the top four so that there would not be more than five.

<sup>16</sup> NEALE, *supra* note 8, at 2 & n.4.

<sup>17</sup> See *1800 Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/USPRESIDENT/GENERAL/pe1800.html> [<https://perma.cc/5DYG-YACS>].

<sup>18</sup> See NEALE, *supra* note 8, at 2.

<sup>19</sup> See *id.* at 3–4. Aiding them in their intrigue was the fact that under the original Constitution it was the outgoing House, not the newly elected one that held the contingent election. This was because congressional terms and presidential terms expired on the same day. If the president was to be chosen before the start of the new term, the contingent election therefore had to be done by the old House. The Twentieth Amendment changed this, though Congress

The Federalists controlled eight state delegations, versus seven for the Democratic-Republicans (Vermont was evenly split).<sup>20</sup>

With sixteen states represented, Jefferson needed nine to win. On the first ballot, Jefferson won only eight: all seven Democratic-Republican states and one of the Federalist states. Six Federalist states voted for Burr and one split (as did Vermont).<sup>21</sup> The House had to re-vote until someone won nine states. On February 17, after seven days and thirty-six ballots, the two split states shifted to Jefferson, giving him ten states and the presidency.<sup>22</sup>

Although Jefferson won in the end, the episode showed the perils of leaving constitutional processes to partisan political actors. Today, as in 1801, it is not unknown for politicians to privilege their political preferences and interests over vague notions of fair play. Currently, if a candidate in a contingent election died, there is no reason to doubt that modern-day counterparts of Burr's Federalist voters would seize the opportunity to vanquish their political opponents.

The Jefferson-Burr episode also shows how Congress deals with constitutional designs that fail in dangerous ways: by waiting until after they have failed, and then crafting narrowly tailored solutions. Out of the shambles of the Election of 1800 came the Twelfth Amendment, which was ratified just in time for the 1804 election.<sup>23</sup> The principal change the amendment made was to have electors cast separate ballots for president and vice president.<sup>24</sup> If the Twelfth Amendment had been in place in 1800, Jefferson would have won a majority of the presidential electoral votes, Burr would have won a majority of the vice-presidential electoral votes, and the mischievous House would not have been involved.<sup>25</sup>

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technically could legislate a timetable that once again lets the old House choose the president. See *infra* notes 64–65 and accompanying text.

<sup>20</sup> These figures can be pieced together painstakingly from the BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov> (last visited Nov. 3, 2016); but they are also consistent with the information more easily accessible at *6th United States Congress*, WIKIPEDIA, [https://en.wikipedia.org/wiki/6th\\_United\\_States\\_Congress](https://en.wikipedia.org/wiki/6th_United_States_Congress) [https://perma.cc/5C6Y-JJF].

The fact that the new House favored the Democratic-Republicans by ten states to three (with three more states evenly split) did Jefferson no good. See *supra* note 19. These figures can be pieced together painstakingly from the BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov> (last visited Nov. 3, 2016); but they are also consistent with the information more easily accessible at *7th United States Congress*, WIKIPEDIA, [https://en.wikipedia.org/wiki/7th\\_United\\_States\\_Congress](https://en.wikipedia.org/wiki/7th_United_States_Congress) [https://perma.cc/9Q4H-9L38].

<sup>21</sup> See 10 ANNALS OF CONG. 1028–33 (1801); *supra* note 20 (giving sources for party/state breakdowns).

<sup>22</sup> See 10 ANNALS OF CONG. 1028–33 (1801); NEALE, *supra* note 8, at 3.

<sup>23</sup> U.S. CONST. amend. XII; NEALE, *supra* note 8, at 3.

<sup>24</sup> U.S. CONST. amend. XII.

<sup>25</sup> The Twelfth Amendment's change also addressed a problem from the Election of 1796. Because the parties were not then as disciplined in coordinating their electors' second ballots, John Adams was elected president while Jefferson, his fierce rival, became his vice president. See NEALE, *supra* note 8, at 2. That state of affairs had been problematic, to say the least. With the Twelfth Amendment, the possibility of a split ticket being elected is confined mainly to contingent elections. See *infra* note 116 and accompanying text.

The main significance of the Election of 1800 for this Article, though, is that it rewrote the rules for contingent presidential and vice-presidential elections. With the exception of a couple of important changes subsequently made by the Twentieth Amendment, these rules remain in force today.

The Twelfth Amendment kept much of the original Constitution's structure for contingent presidential elections: voting was still by the old House; each state's House delegation still got one vote; and a majority of states was required for victory.<sup>26</sup> But the Twelfth Amendment provided that the House would choose "from the persons having the highest numbers not exceeding three on the list of those voted for as President."<sup>27</sup> By reducing the number of candidates from five to three, the Twelfth Amendment reduced (but did not eliminate) the risk of a deadlock in the House.<sup>28</sup>

The amendment also provided a backstop in case there was a deadlock: if the beginning of the term rolled around without the House having made a choice, the vice president would act as president.<sup>29</sup> Of course, that assumed that a vice president had been chosen. But the Twelfth Amendment added a new requirement to be elected vice president: an electoral-college majority.<sup>30</sup> With a two-party system and with separate balloting for president and vice president, chances were good that if nobody won an electoral-college majority for president, nobody would win one for vice president either.<sup>31</sup> Therefore, the Twelfth Amendment's provisions for contingent vice-presidential elections were more important than those in the original Constitution.

The Twelfth Amendment provided that if no vice-presidential candidate had won a majority, the Senate would choose a vice president from "the two

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<sup>26</sup> U.S. CONST. amend. XII.

<sup>27</sup> *Id.* (emphasis added). There might not be three candidates to choose from; if only two candidates receive electoral votes and they are tied (or otherwise short of a majority), there would only be two candidates. The amendment's language leaves it unclear what happens in the case of other sorts of ties. Specifically, it is unclear whether "the persons having the highest numbers not exceeding three" means the three highest people or the three highest numbers. If it is the latter, then there could be more than three candidates if there are any ties for first, second, or third. If it is the former, it is arguable that if two candidates are tied for third then they cannot participate because that would cause the number of persons to exceed three (and heaven forbid there is a four-way tie for first). See Josephson, *supra* note 4, at 668 (recommending allowing more than three candidates in case of ties); *cf. id.* at 633–35 (discussing "not exceeding three" issues, mainly other than these).

<sup>28</sup> See *infra* note 33 and accompanying text (describing potential deadlocks in the House).

<sup>29</sup> See U.S. CONST. amend. XII. The language of the amendment left it unclear whether the vice president would serve for the entire term or just until the House finally chose a president. See *id.* ("And if the House of Representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as president, as in the case of the death or other constitutional disability of the president."). The Twentieth Amendment resolved this by specifying that the House could select a president even after the beginning of the term, and that that president would then take over. See *id.* amend. XX, § 3.

<sup>30</sup> See *id.* amend. XII.

<sup>31</sup> Curiously, though, the two contingent elections conducted since the adoption of the Twelfth Amendment have been one or the other; neither was for both president and vice president. See *infra* Sections II.A.2–3.



highest numbers on the list.”<sup>32</sup> The House has ample opportunities to deadlock—with three candidates, and with the possibility of split state delegations voiding some state’s votes, it might be hard to win a majority of states.<sup>33</sup> The Senate has fewer. With just two candidates,<sup>34</sup> and with every senator’s vote counting, the Senate could only deadlock if the Senate itself was divided perfectly evenly or if too many senators were absent.<sup>35</sup> This relative certainty of obtaining a result makes the Senate procedure a sounder backstop.

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<sup>32</sup> U.S. CONST. amend. XII. In contrast to the vague language for contingent presidential elections, this language makes it clearer that all of those tied for first or second should be included, even though that would mean there are more than two candidates. See Josephson, *supra* note 4, at 613–14 (discussing Senate’s ability to consider more than two candidates in case of ties). Cf. *supra* note 27 (discussing presidential elections). Notably, the Twentieth Amendment refers to “any” of the contingent vice-presidential candidates dying rather than “either” of them. U.S. CONST. amend. XX, § 4.

<sup>33</sup> To win, a candidate must get a “majority of all the states,” which is harder to achieve with three candidates than with two. The further difficulty posed by split delegations—even if there are only two candidates there might not be a majority winner in a particular delegation, but again this is much more likely if there are three candidates—could be resolved by the House declaring in its rules that a candidate only needs a plurality of the delegation’s ballots to win its vote. This is not how the House did it in 1825, but the House is not bound by previous Houses’ rules. See 1 REG. DEB. 362 (1825) (requiring a majority); Neale, *supra* note 8, at 12 (discussing possibilities for allowing plurality voting). Pluralities were not an issue in 1801 because there were only two candidates, so only ties could prevent a state from casting a vote. See 10 ANNALS OF CONG. 1009–10 (1801) (requiring evenly divided states to vote as “divided”).

There is a third source of potential deadlocks. The Twelfth Amendment requires a quorum of a member or members from at least two-thirds of the states. This gives small groups a potential mechanism to prevent the contingent election from going forward (presumably either to extract concessions or to keep an opponent from winning).

<sup>34</sup> This assumes that there are no ties. But see *supra* note 32 (describing the Twelfth Amendment’s tie-friendly language for contingent vice presidential elections).

<sup>35</sup> The Twelfth Amendment requires a quorum of “two-thirds of the whole number of Senators,” and victory requires a “majority of the whole number” rather than just a majority of those present. A sufficiently large minority of senators (one-third plus one) might thus prevent the majority from making its choice. See Laurence H. Tribe & Thomas M. Rollins, *Deadlock: What Happens If Nobody Wins*, ATLANTIC MONTHLY, Oct. 1980, at 49, 61 (discussing possible Senate quorum shenanigans).

As a separate matter, it is arguable that if the Senate were tied, the sitting vice president could cast a tiebreaking vote. See U.S. CONST. art. I, § 3, cl. 4 (granting the vice president a vote when the Senate is “equally divided”); Roy E. Brownell II, *A Constitutional Chameleon: The Vice President’s Place Within the American System of Separation of Powers Part I: Text, Structure, Views of the Framers and the Courts*, 24 KAN. J.L. & PUB. POL’Y (Fall 2014), at 1, 45–46 (giving broad view of vice president’s power to break ties in contingent vice-presidential elections). However, it is doubtful that this general power extends to contingent elections, because the Twelfth Amendment’s requirement of a majority of the whole number of senators—and the fact that the vice president is not a senator—could be read as requiring fifty-one votes rather than fifty plus the vice president’s. See Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1710 n.246 (2002) (discussing the two sides of this debate).

## 2. *The Election of 1824*

The Twelfth Amendment's procedure for contingent presidential elections has been used only once, after the Election of 1824. That election was also the one that came closest to a Section 4 situation (a dead candidate in a contingent election).

The Election of 1824 came after the end of the first two-party system (Federalists versus Democratic-Republicans) and before the rise of the next one (Democrats versus Whigs).<sup>36</sup> In 1820, the lack of a credible Federalist opponent effectively meant that President Monroe was able to run for reelection unopposed.<sup>37</sup> In 1824, however, the Democratic-Republicans could not unite behind a single candidate. Four contenders—John Quincy Adams, Henry Clay, William Crawford, and Andrew Jackson—mounted serious campaigns.<sup>38</sup>

With all four candidates drawing significant support, nobody won a majority of the Electoral College. Jackson led with ninety-nine votes, followed by Adams with eighty-four, Crawford with forty-one, and Clay with thirty-seven.<sup>39</sup> (Interestingly, Jackson and Adams both had John C. Calhoun as their running mate, so Calhoun won the vice presidency outright.<sup>40</sup>)

The House's contingent election was held in February 1825. Under the Twelfth Amendment, only the top three candidates competed; Clay was out. But once again, it was the old House—which Clay led as Speaker—that selected the president. Clay threw his support to Adams, who won on the first ballot with thirteen states, against seven for Jackson and four for Crawford.<sup>41</sup>

Crawford's health was an issue for him; he suffered a paralytic illness before the election, and while his supporters claimed that he had recovered sufficiently there is little doubt that his condition hindered his electoral prospects.<sup>42</sup> But Crawford's health was good enough that he was under no pressure to drop out of the contingent election, and the situation did not seem to affect (let alone inspire) the creation of Section 4 a century later.<sup>43</sup> Still, the Election of 1824 illustrates the possibility both of contingent elections and of

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<sup>36</sup> See Neale, *supra* note 8, at 5.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See 1 REG. DEB. 526 (1825); *1824 Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/USPRESIDENT/GENERAL/pe1824.html> [<https://perma.cc/SQ7D-64KQ>].

<sup>40</sup> See 1 REG. DEB. 526 (1825); *1824 Election Results*, *supra* note 39.

<sup>41</sup> See 1 REG. DEB. 526–27 (1825); *1824 Election Results*, *supra* note 39; Neale, *supra* note 8, at 5 (describing Clay's actions).

<sup>42</sup> See CHASE C. MOONEY, WILLIAM H. CRAWFORD, 1772–1834, 241–42 (1974).

<sup>43</sup> In the thorough legislative history of the Twentieth Amendment compiled by *ProQuest Legislative Insight*, Crawford is mentioned in Congress only twice. Both times are only in passing, and neither mentions his illness. See 75 CONG. REC. 3823 (1932); 69 *id.* at 4214 (1928).

physically unwell candidates. If Crawford had relapsed and died in the midst of the contingent election, who knows what might have happened?

### 3. *The Election of 1836*

The only contingent vice presidential election occurred in February 1837. In the presidential race, Martin Van Buren won an electoral-college majority with 170 votes against his four Whig opponents' combined 124 votes.<sup>44</sup> But Van Buren's running mate, Richard M. Johnson, was controversial; all twenty-three of Virginia's electors disregarded their instructions and voted for someone else.<sup>45</sup> With 147 votes—exactly half of the total—Johnson was short of a majority and the Senate had to hold a contingent election between Johnson and the leading Whig candidate, Francis Granger. It did, and Johnson won it easily.<sup>46</sup> But if Johnson had died during the pendency of the contingent election, Granger would have become vice president by default.

#### B. *Candidate Deaths*

In two elections, a candidate died during the election process. In both cases, the dead candidate lost and the death did not seem to affect the outcome. They showed, however, that candidates sometimes do, in fact, die. These two episodes also give us a glimpse—one discouraging and one encouraging—of how a candidate death might be handled.

In 1872, Democratic presidential candidate Horace Greeley died between Election Day (when he was soundly defeated by Republican incumbent Ulysses Grant, 286 electoral votes to 66) and the day on which the Electoral College officially convened to cast its votes.<sup>47</sup> It was unclear to the electors how to proceed. Only three voted for the deceased Greeley, and Congress later declined to count those votes, albeit on a questionable basis.<sup>48</sup>

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<sup>44</sup> See *1836 Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/USPRESIDENT/GENERAL/pe1836.html> [https://perma.cc/4E4Q-NX5M].

<sup>45</sup> See NEALE, *supra* note 8, at 6 & n.15 (explaining Virginians' objections to Johnson's common-law marriage to a black woman).

<sup>46</sup> See *1836 Election Results*, *supra* note 44. Johnson won the Senate vote 33 to 16. CONG. GLOBE, 24TH CONG., 2D SESS. 166 (1837).

<sup>47</sup> See *1872 Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/USPRESIDENT/GENERAL/pe1872.html> [https://perma.cc/2TRV-4A4P].

<sup>48</sup> See *id.* (recording all electoral votes). The House voted narrowly against counting the dead Greeley's votes by a margin of 101 to 99, with 40 members not voting. CONG. GLOBE, 42D CONG., 3D SESS. 1297 (1873). The Senate voted overwhelmingly in favor of counting the votes, 44 to 19. *Id.* at 1287; see also 3 Asher C. Hinds, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 270 (1907) (summarizing Greeley episode). Significantly, though, Congress followed its Joint Rule 22, which stated that if an objection was made to counting particular electoral votes, both chambers had to agree that those votes were valid before they could be included. See CONG. GLOBE, 42D CONG., 3D SESS. 1296 (1873). Besides being a bad idea with a discredited genesis, Joint Rule 22's one-house veto was probably

Another eighteen voted for B. Gratz Brown, Greeley's running mate, and three more voted for two other candidates, but the bulk of the votes—the remaining forty-two—went to Thomas Hendricks, the newly elected governor of Indiana.<sup>49</sup> The question of “replacement” has obvious importance for our Section 4 discussion, but the Greeley precedent is relevant to our discussion for a more direct, disturbing reason. Greeley had lost the election so decisively that there was much less incentive for his electors to figure out an optimal resolution of the situation. Unfortunately, a suboptimal resolution is exactly what they delivered, and while the Greeley precedent has never been applied it has also never been disavowed. By suggesting that presidential candidates must be alive to receive electoral votes, the Greeley precedent suggests by analogy that a dead candidate cannot receive votes in a contingent election either.<sup>50</sup>

The Election of 1912 offers a more encouraging result. In 1912, President William Taft and his vice president, James Sherman, were running for reelection. Sherman died six days before the election, and there was no time to replace him on the ballot.<sup>51</sup> But Taft lost badly, winning only 8 electoral votes against 88 for Theodore Roosevelt's third-party effort and 435 for the victor, Woodrow Wilson.<sup>52</sup> Though the issue of whether and how to replace Sherman was now much less salient, the Republican National Committee met after the election and decided to direct the eight Taft electors to cast their vice-presidential ballots for Nicholas Butler, which the electors did.<sup>53</sup> While Sherman died before the election, his ticket's dismal results were known before any discussion of replacement got off the ground, so perhaps Sherman's replacement was not as carefully considered as a candidate death in a contingent election might need to be. Nevertheless, the Republican Party

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unconstitutional, and in any case it was repudiated not long afterward. *See Kesavan, supra* note 35, at 1676–77 (criticizing rule and detailing its demise). One would hope that if the Greeley precedent ever comes up for reconsideration, these weaknesses will be taken seriously.

<sup>49</sup> *See 1872 Election Results, supra* note 47. It is unclear what process resulted in Hendricks receiving so many votes instead of Brown.

<sup>50</sup> *See infra* Section III.C.1.

<sup>51</sup> *See* FORDHAM UNIVERSITY SCHOOL OF LAW'S CLINIC ON PRESIDENTIAL SUCCESSION, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 53 (2012) [hereinafter Fordham Clinic].

<sup>52</sup> *See 1912 Presidential General Election Results, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS*, <http://uselectionatlas.org/RESULTS/national.php?year=1912> [https://perma.cc/V8ZC-7K2E]. Roosevelt had been shot in the chest by a would-be assassin in October, but his injuries were not grave enough to generate any Section 4 overtones. *See generally* GERARD HELFERICH, *THEODORE ROOSEVELT AND THE ASSASSIN: MADNESS, VENGEANCE, AND THE CAMPAIGN OF 1912* (2013).

<sup>53</sup> *See* Fordham Clinic, *supra* note 51, at 53. Butler was the President of Columbia University. *See id.* Some sources report that the Republican National Committee did not meet, in which case the electors somehow chose Butler amongst themselves. *See, e.g.,* CHICAGO DAILY NEWS CO., *THE CHICAGO DAILY NEWS ALMANAC AND YEARBOOK FOR 1915*, at 342 (1914) (stating that the meeting was “called off” and that “no formal action was ever taken on the subject”).

showed that it was feasible to coordinate a replacement candidate in an orderly manner.

### C. *The Origins of Section 4*

Constitutional changes like Section 4 usually emerge when events make their necessity clear. The Twelfth Amendment's inspiration by the Election of 1800, discussed above, is a perfect example. The Twenty-Fifth Amendment's provisions on presidential succession, vice-presidential vacancies, and presidential disability are another; they emerged from long-running consideration of those issues, but the effort was catalyzed by the assassination of President Kennedy.<sup>54</sup>

By contrast, Section 4 emerged almost out of the blue. The precedents discussed above—a few contingent elections and a couple of losing-candidate deaths—did not produce any sort of groundswell for reform. Section 4 emerged instead from a rare burst of proactive problem solving, which piggybacked on a separate reform effort to which Section 4 was related only tangentially.

The core of the Twentieth Amendment is its reform of the awkward calendar with which Congress and the presidency had been saddled, with a long lame-duck period after elections, and an even longer wait for newly elected legislators to begin their service. The Constitution originally specified only the length of congressional and presidential terms, not their starting date. Because it was unclear when the Constitution would be ratified, if at all, the Constitution merely provided that it would go into effect when nine states ratified it, which occurred in summer 1788.<sup>55</sup> At that point, though, states still needed to hold elections and the new government needed time to assemble. Considering all of this, the outgoing Articles of Confederation government declared March 4, 1789, as the beginning of the new government—and thus the beginning of the congressional and presidential terms.<sup>56</sup>

The Constitution did, however, specify that Congress should assemble at least once a year, on the first Monday in December unless a different day

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<sup>54</sup> See Neale, *supra* note 8, at 17. Cf. Tribe & Rollins, *supra* note 35, at 62 (quoting Thomas Jefferson for the notion that good policies can emerge more easily from resolving crises than from “years of prudent and conciliatory administration”).

<sup>55</sup> U.S. CONST. art. VII; David E. Kyvig, *Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution*, in *THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY* 356, 363 (Julian E. Zelizer ed., 2004).

<sup>56</sup> See 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 521–23 (Roscoe R. Hill ed., 1937) (resolving on September 13, 1788 that “the first Wednesday in March next” be the time for “commencing proceedings under the said constitution”); Josephson, *supra* note 4, at 609–10. It actually took until April 6 before enough representatives and senators appeared in the capital for there to be a quorum and for George Washington to be declared the winner of the presidential election. See 1 ANNALS OF CONG. 16–18, 100 (1789) (Joseph Gales ed., 1834). Washington was not inaugurated until April 30. See *id.* at 26–27. Congress later confirmed, however, that March 4 was the starting date for presidential terms. See Act of March 1, 1792, ch. 8, § 12, 1 Stat. 239, 241; Josephson, *supra* note 4, at 610.

was legislated.<sup>57</sup> Before the Twentieth Amendment, therefore, Congress was elected and convened on a peculiar schedule. Elections were held in November of even-numbered years.<sup>58</sup> The next month, the lame-duck Congress would convene for a session lasting up to four months until the end of the term on March 4. Thus, the new Congress did not convene until December of the odd-numbered year, thirteen months after it had been elected.<sup>59</sup>

These two features—the long lame-duck session and the long wait for the newly elected Congress to begin its service—prompted some grumbling over the decades, particularly after elections in which many incumbents were defeated or in which partisan control of one or both houses had changed.<sup>60</sup> In November 1922, after a tumultuous election, Senator Thaddeus Caraway introduced a resolution calling for members of Congress who had been defeated for re-election not to take part in consequential matters during lame-duck sessions.<sup>61</sup> Fatefully, Caraway asked that the resolution be referred to the Committee on Agriculture and Forestry because he did not expect that the Judiciary Committee (the more obvious place to refer it) would have taken any action on it.<sup>62</sup>

Senator George Norris, the earnest chairman of the Agriculture Committee, took the resolution seriously. He transformed it into a proposed constitutional amendment that started congressional terms in January instead of March, and that changed the default date for convening Congress from December (thirteen months after the election) to the January start of the term (two months after the election).<sup>63</sup>

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<sup>57</sup> U.S. CONST. art. I, § 4, cl. 2.

<sup>58</sup> It was actually not until the 1870s that Congress required congressional elections to occur on the first Tuesday after the first Monday in November. Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28, 28. Before that, some states did not elect their representatives quite so long before the first December session, though this could cause problems when they did not hold the elections until after the term began in March, if the president called an immediate special session. See Richard E. Berg-Andersson, *Dates of Biennial Federal Elections for Congress: From 1872 On*, THE GREEN PAPERS, <http://www.thegreenpapers.com/Hx/BiennialFederalElectionDates.phtml> [<https://perma.cc/4A38-AEDG>] (describing evolution toward a uniform congressional election day).

<sup>59</sup> See Kyvig, *supra* note 55, at 363. In years in which a new president's term would begin, the old president would call the new Senate into special session in March, at the very beginning of the new term, so that it could vote on the new president's key nominees. See Brian C. Kalt, *Keeping Tillman Adjournments in Their Place: A Rejoinder to Seth Barrett Tillman*, 101 NW. U.L. REV. COLLOQUY 108, 111–12 (2007).

<sup>60</sup> See Kyvig, *supra* note 55, at 363–64; see also GEORGE W. NORRIS, *FIGHTING LIBERAL: THE AUTOBIOGRAPHY OF GEORGE W. NORRIS* 332 (1945) (noting incentive of soon-to-be-unemployed lame ducks to slavishly follow a president's agenda in order to obtain an executive appointment).

<sup>61</sup> See 63 CONG. REC. 25–27 (1922) (introducing and discussing S. Con. Res. 29); NORRIS, *supra* note 60, at 328–29 (describing Caraway's inspiration).

<sup>62</sup> 63 CONG. REC. 26 (1922) (remarks of Sen. Caraway).

<sup>63</sup> S.J. RES. 253, 67th Cong. (as reported by S. Comm. on Agric. & Forestry, Dec. 5, 1922); see RICHARD LOWITT, *GEORGE W. NORRIS: THE PERSISTENCE OF A PROGRESSIVE, 1913–1933*, at 155–56 (1971) (describing Norris's proposal). Norris's proposal was probably influenced by the constitutional amendment Senator Henry Ashurst proposed in 1921 that, identically to Norris's proposal, moved the start of congressional terms and sessions to the first

Significantly, the proposal also decoupled presidential terms from congressional terms, starting presidential terms two weeks later.<sup>64</sup> This change was intended to improve the legitimacy of contingent elections. In contrast to the system under both the original Constitution and the Twelfth Amendment, in which the outgoing House or Senate conducted any contingent elections, Norris's proposal respected the fresh mandate from the voters by structuring things so that the new House or Senate would likely make the choice.<sup>65</sup>

This level of proactivity was commendable. There had not been a contingent election in the memory of anyone then serving in Congress, but Senator Norris and his like-minded colleagues wanted to be sure that if there ever was one, it would be more legitimate.

Norris's proposal passed the Senate by an overwhelming margin.<sup>66</sup> In the House, however, the resolution went nowhere, despite a favorable com-

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Monday in January, and the start of presidential terms to the third Monday in January. S.J. Res. 8, 67th Cong. (1921); 64 CONG. REC. 3495 (1923) (statement of Sen. Ashurst) (recalling his resolution and consideration of it). Ashurst, for his part, was drawing on earlier efforts. See 74 CONG. REC. 5877 (1931) (statement of Rep. Gifford) (describing numerous such attempts).

Norris's proposal also included material on electoral-college reform, but this was excised before his proposal passed the Senate. See S.J. Res. 253 (as passed by Senate, Feb. 13, 1923).

<sup>64</sup> See S.J. Res. 253 (as reported by S. Comm. on Agric. & Forestry, Dec. 5, 1922); Kyvig, *supra* note 55, at 365 (describing Norris's proposal); see also *supra* note 63 (describing similar earlier proposal by Senator Ashurst).

<sup>65</sup> There are many statements in the legislative history declaring that the amendment would shift contingent elections from the old Congress to the new one, and that this would be a good thing. See, e.g., S. REP. NO. 72-26, at 4 (1932) ("If the amendment we have proposed is adopted and becomes part of the Constitution . . . the new House of Representatives fresh from the people would be the one upon which would devolve the power to select the new President."); 74 CONG. REC. 5892 (1931) (statement of Rep. Johnson); 69 CONG. REC. 953 (1928) (statement of Sen. Norris); 64 CONG. REC. 3498 (1923) (statement of Sen. Ashurst) ("At the present time it is the old Congress that elects the President under such contingency, and thereby it becomes possible for a political party repudiated by the people to elect a President who was defeated at the election.").

However, there is nothing in the text of the Twentieth Amendment that would actually preclude legislation from moving the date for counting electoral votes back before the end of the term on January 3 and restoring power over contingent elections to the old Congress. See MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION 47 (1992). One can imagine a lame-duck Congress and president passing such legislation for good reasons (to settle the unresolved presidential election sooner and get the winner's transition moving) or bad ones (to prevent the new Congress from coming in and choosing a different winner than the one preferred by the old Congress and president). See Josephson, *supra* note 4, at 646 (exploring this possibility); Allan J. Mayer & Howard Fineman, *Electoral Roulette*, NEWSWEEK, May 26, 1980, at 35 (quoting Senate staffer as saying there is no legal reason why the old Congress could not pass such legislation, but adding that "if they tried it, we'd have shooting in the streets"). But such a move would contravene the intent and understanding of the Twentieth Amendment's framers cited above, especially if done in the middle of a hotly contested election. See Tribe & Rollins, *supra* note 35, at 58. See generally VINCENT A. DOYLE & ROBERT L. TIENKEN, LIBRARY OF CONG. LEGISLATIVE REFERENCE SERV., 434/107, CONTINGENT ELECTION OF THE PRESIDENT BY THE HOUSE OF REPRESENTATIVES – NEWLY ELECTED OR “LAME DUCK” HOUSE? (1968) (presenting both sides of the debate on lame-duck Congresses' ability to legislate themselves the power to hold a contingent election).

<sup>66</sup> See 64 CONG. REC. 3540–41 (1924) (recording 63–6 Senate vote).

mittee report.<sup>67</sup> The House leadership wanted nothing to do with it, notwithstanding support for the resolution among the rank and file.<sup>68</sup>

Norris tried again in 1924, in the next Congress, and again easily got his resolution through the Senate.<sup>69</sup> This time in the House, excellent work was done in committee—work that produced what became Section 4. Because the amendment opened up the topic of presidential transitions, the resolution presented an opportunity for the House Committee on Election of the President, Vice President, and Representatives in Congress to address an area of weakness in the constitutional structure: candidate deaths between Election Day and Inauguration Day. The House committee identified numerous points of vulnerability and added language to the resolution that addressed some of them.<sup>70</sup> Among them: What if the president-elect died?<sup>71</sup>

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<sup>67</sup> See H.R. REP. NO. 68-513 (1924); NORRIS, *supra* note 60, at 337 (recounting favorable House committee report).

<sup>68</sup> See 69 CONG. REC. 4358 (1928) (statement of Rep. Kvale) (stating that a majority in the House had supported the resolution); LOWITT, *supra* note 63, at 157 (describing opposition among House leadership); NORRIS, *supra* note 60, at 337–39. The House leadership's opposition was apparently in deference to the president, who opposed giving up the power with which the lame-duck session provided him. See LOWITT, *supra* note 63, at 156–57, 275–76.

<sup>69</sup> See 65 CONG. REC. 4418 (1924) (recording 63–7 Senate vote); NORRIS, *supra* note 60, at 337.

<sup>70</sup> See *Proposed Amendment to the Constitution of the United States Fixing the Commencement of the Terms of President and Vice President and Members of Congress, and Fixing the Time of the Assembling of Congress: Hearings on H.J. Res. 56, H.J. Res. 164, S.J. Res. 9 Before the H. Comm. on Election of President, Vice President, and Representatives in Congress*, 69th Cong. 25–26 (1926) [hereinafter *Hearings on H.J. Res. 56*] (statement of Rep. Ralph Lozier) (describing efforts of himself and Representatives White, Gifford, and Free in committee); H.R. REP. NO. 69-311, at 5–8 (1926) (discussing additions); 74 CONG. REC. 5877 (1931) (statement of Rep. Gifford) (“We found that the so-called lame-duck feature of the resolution was by no means the only thing deserving of consideration . . . .”); 75 CONG. REC. 3825–26 (1932) (statement of Rep. Gifford) (attributing impetus for these additional considerations to longtime House employee Tyler Page); see also *Proposed Constitutional Amendments Relating to the Fixing of the Time for the Commencement of the Terms of President, Vice President, and Members of Congress, and Fixing the Time of the Assembling of Congress; and to the Presidential Succession; and to the Electoral College System: Hearings on H.J. Res. 65, H.J. Res. 9, H.J. Res. 216, H.J. Res. 292 Before the H. Comm. on Election of President, Vice President, and Representatives in Congress*, 71st Cong. 1–3 (1930) [hereinafter *Hearings on H.J. Res. 65*] (statement of William Tyler Page, Clerk of the House of Reps.) (listing wide variety of contingencies that Page led the House to consider); 69 CONG. REC. 4208–09 (1928) (statement of Rep. Lozier) (running through implications of a candidate death at various points on the electoral timeline).

The House committee did not add any language to deal with candidate deaths before Election Day or between Election Day and the day on which the Electoral College votes because of political parties' existing ability to handle these situations. See H.R. REP. NO. 69-311, at 6.

<sup>71</sup> See H.R. REP. NO. 69-311, at 2, 5–7. The committee was fairly sure that even without its amendment (which became part of Section 3 of the Twentieth Amendment), the vice president-elect would take the oath as president in such an instance, but they thought that the path would be smoothed by adding express constitutional language to that effect. See U.S. CONST. amend. XX, § 3; H.R. REP. NO. 69-311, at 7. One can imagine that otherwise, the losing presidential candidate might call for a new election or, if the electoral votes had not yet been counted, for the dead president-elect's electoral votes not to be counted, throwing the election into the House.



What if the vice president-elect died too?<sup>72</sup> What if a contingent election was not resolved by the time the new term started?<sup>73</sup> And—most importantly for this Article’s purposes—what if a candidate in a contingent election died?<sup>74</sup> The committee was concerned that in such a situation the dead candidate’s supporters would effectively be disenfranchised.<sup>75</sup>

Unfortunately for posterity, the historical record offers no details on how the committee members worked through these hypothetical problems, or how they decided that it was politically worthwhile to push for solutions when there were no powerful constituencies agitating for such an effort. Most significantly for this Article, the historical record also offers no details on the fateful decision the committee made to “punt” with regard to what became Section 4; rather than specify in the amendment what to do if a candidate in a contingent election died, the committee opted instead to empower Congress to pass legislation to provide for such a situation.<sup>76</sup>

The House leadership still refused to let the lame-duck reforms advance, and so the committee’s improved resolution died.<sup>77</sup> For the next several years afterward, the pattern repeated: the Senate would pass Senator Norris’s simpler resolution; the House committee would report its improved version; but the House leadership would scheme to defeat it.<sup>78</sup>

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<sup>72</sup> See H.R. REP. NO. 69-311, at 2, 8. The committee added what became part of Section 3 of the Twentieth Amendment, authorizing Congress to provide for such a double death. See U.S. CONST. amend. XX, § 3. As with Section 4, Congress has not made any real attempt to pass legislation to deal with this situation. There is some cover—the same line of succession statute that puts the Speaker of the House next in line, followed by the President Pro Tempore of the Senate and then the cabinet, would also apply to a double vacancy on inauguration day. See 3 U.S.C. § 19 (2012). There are good reasons, however, to have a different line of succession at such times. I am contemplating writing an article that explores this problem.

<sup>73</sup> See H.R. REP. NO. 69-311, at 1, 5, 8. The committee added what became part of Section 3 of the Twentieth Amendment, clarifying that the vice president-elect would act as president until the House could choose a president. See U.S. CONST. amend. XX, § 3; *supra* note 29 (describing uncertainty in the Twelfth Amendment’s handling of this issue).

<sup>74</sup> See H.R. REP. NO. 69-311, at 2, 7.

<sup>75</sup> See *id.* at 7; 69 CONG. REC. 4206–07 (1928) (statement of Rep. Lozier) (recounting committee’s democratic motivations in adding Section 4).

<sup>76</sup> Interestingly, while the committee did not offer any suggestions for approaches that Section 4 legislation should take (it said, tepidly, that “[u]nder some circumstances . . . it might be advisable to provide for a substitution of a name”), it seemed certain that the dead candidate should not be able to receive votes. H.R. REP. NO. 69-311, at 7. The committee also raised the possibility of reconvening the Electoral College. *Id.* at 7. That possibility is briefly explored below. See *infra* Section III.C.4.

<sup>77</sup> See 69 CONG. REC. 952 (1928) (statement of Sen. Norris) (recounting treatment of his Senate-passed resolutions in previous terms of the House); *id.* at 4205–06 (statement of Rep. Lozier) (recounting and criticizing intransigence of the House’s leadership toward Norris’s efforts).

<sup>78</sup> See S.J. RES. 9, 69th Cong. (as introduced in Senate, Dec. 8, 1925); 67 CONG. REC. 3968–71 (1926) (discussing and passing the resolution, by a 73–2 vote, in the Senate); S.J. RES. 9 (as reported by H. Comm. on Election of President, Vice President, and Representatives in Congress, Feb. 24, 1926); 69 CONG. REC. 952 (1928) (statement of Sen. Norris) (recounting House treatment of his Senate-passed resolutions in the last few terms of the House).

In 1928, the House leadership finally allowed a vote on the resolution, but it was defeated after objectionable changes were added to it that would have ended the second session of each term on May 4, thus limiting it to about four months. See *id.* at 4430 (recording 209–157

Norris did not oppose the House committee's improvements—indeed, it appears that nobody did—but as a matter of legislative efficiency he figured that it was best to keep re-passing the same old resolution in the Senate. He could worry about the House committee's changes if and when the full House passed something and the two versions went to a conference committee.<sup>79</sup>

The logjam broke when the Democrats took over the House in December 1931.<sup>80</sup> After the House passed the committee's improved version of the Senate resolution it went to conference committee where the Senate negotiators readily accepted the House committee's improvements.<sup>81</sup> With that, Congress passed it and, after swift ratification by the states, Section 4 and the rest of the Twentieth Amendment became the law of the land.<sup>82</sup>

Congress did not attempt to use its new authority, though. The proactive impulse that motivated Section 4's creation in 1926 was sufficient to carry it through to the Twentieth Amendment's 1932 passage, but it was not sufficient to launch a new legislative effort after the amendment's ratification. Nor did it (or any other impulse) lead any subsequent Congresses to make a serious effort to implement Section 4. Senator Paul Simon introduced two Section 4 bills in the 1990s, but they made no impact in committee, let alone in the full Senate.<sup>83</sup> Those two fruitless efforts nevertheless

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House vote in favor of the resolution, short of the two-thirds needed for a constitutional amendment); 75 *id.* at 3834 (1932) (statement of Rep. Frear) (describing effects of objectionable changes); Kyvig, *supra* note 55, at 366 (describing 1928 House defeat).

In February 1931, the House (in its lame duck session, ironically) passed the same objectionable version in an effort to head off Norris's stronger version, but it was too close to the end of the term for any suitable agreement to emerge from a conference committee. *See* 74 CONG. REC. 5907–08 (1931) (recording 290–93 House vote); 75 CONG. REC. 1372 (1932) (statement of Sen. Norris) (describing timing of the resolution's death); *see also* NORRIS, *supra* note 60, at 340; Kyvig, *supra* note 55, at 366.

<sup>79</sup> *See* *Hearings on H.J. Res. 65*, *supra* note 70, at 13–14 (comments of Rep. Lozier) (recounting Senator Norris's explanation); 69 CONG. REC. 4365 (1928) (statement of Rep. Ramseyer) (stating that Section 4 was unopposed); *id.* at 4206 (statement of Rep. Lozier) (noting Norris's support for Section 4 despite his failure to include it in his resolutions); *id.* at 953 (statement of Sen. Norris) (explaining his reasons for not including the House's additions in his resolutions).

<sup>80</sup> *See* LOWITT, *supra* note 63, at 517 (describing effects of change in House leadership); NORRIS, *supra* note 60, at 341–42.

<sup>81</sup> *See* H.R. REP. NO. 72-633, at 3-4 (1932) (Conf. Rep.).

<sup>82</sup> *See* 75 CONG. REC. 5086 (1932) (recording 74–3 Senate vote); 75 CONG. REC. 5027 (1932) (recording House approval); Kyvig, *supra* note 55, at 367–68 (describing rapid ratification process).

<sup>83</sup> *See* Presidential Succession Clarification Act, S. 1997, 104th Cong. § 5 (1996) (legislative history showing the bill dying in committee is available at <https://www.congress.gov/bill/104th-congress/senate-bill/1997/all-actions> [<https://perma.cc/7G7V-CWWF>]); Presidential Succession Clarification Act, S. 2562, 103rd Cong. § 5 (1994) (legislative history showing the bill dying in committee is available at <https://www.congress.gov/bill/103rd-congress/senate-bill/2562/all-actions> [<https://perma.cc/26YU-KLR2>]). Another effort worth noting here is a 1992 resolution by then-Representative Pat Roberts calling for the establishment of a panel of constitutional experts to make recommendations to the House for its contingent-election processes. *See* H. Res. 478, 102d Cong. (1992) (legislative history showing the resolution dying in committee is available at <https://www.congress.gov/bill/102nd-congress/house-resolution/478/all-actions> [<https://perma.cc/NW6P-JLHP>]); Josephson, *supra* note 4, at 647–48

represent a high-water mark; lonely exceptions to more than eighty years of congressional indifference toward its Section 4 mandate.

### III. AN IDEAL SECTION 4 LAW

Notwithstanding the fact that Congress has never used its Section 4 power and (for reasons discussed in Part IV) is unlikely to do so any time soon, it is a good idea to think now about how best to design a Section 4 law. There are two main reasons why it is better to pass a law before it is needed than to wait until an actual candidate death in an actual contingent election.

The first reason is that while the combination of a contingent election and a candidate death is unlikely, it would be a high-stakes, highly politicized situation if it ever did happen. In such a moment, it would be very difficult for people to put aside the best interests of their factions and think instead about what would be best for the country.<sup>84</sup> The more analysis that takes place before such an event—behind a veil of ignorance that makes it easier to think in terms of principle rather than political expedience—the better the chances are that a good design will win out.<sup>85</sup>

The second reason, and the basis for the scenario that opened this Article, is that the lack of a candidate-replacement law adds an incentive for the sort of assassination that opened this Article.<sup>86</sup> There is no way to eliminate entirely the incentive to assassinate presidential candidates and presidents, but at other stages in the process the Constitution lowers the payoff substantially. The Twelfth Amendment's reform of electing a president and vice president together as a team ensures that killing a president means replacing him with someone aligned with him.<sup>87</sup> This feature is bolstered by the Twenty-Fifth Amendment's reform of allowing presidents to nominate a new vice president when there is a vice-presidential vacancy.<sup>88</sup> Section 3 of the

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(discussing Roberts's futile attempt, and a similarly fruitless one by Representative John Burton in 1980).

<sup>84</sup> See 140 CONG. REC. 29,547 (1994) (statement of Sen. Simon) (stating, while introducing legislation covering Section 4 and similar situations, "None of these scenarios, of course, is likely to occur during any election cycle. But any one of them could lead to confusion and uncertainty at a time when clarity and stability would be vital. Prudence dictates that we should act now, while we have the time for calm reflection, rather than wait for a possible crisis to catch us unprepared.").

<sup>85</sup> Cf. Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 227 (1995) (arguing for legislation behind a "veil of ignorance" in a related candidate-death situation).

<sup>86</sup> Cf. Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 421 n.567 (2010) (inviting suspicion of "legal rules that have the effect of incentivizing assassination").

<sup>87</sup> See *supra* text accompanying note 24 (discussing this reform).

<sup>88</sup> See U.S. CONST. amend. XXV, § 2. Ideally, the line of succession after the vice president would keep power within the president's circle. The current succession law, passed in 1947, fails this test because it features congressional leaders who may be (and usually have been) from the other party. See BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS* 99–100 (2012). The previous succession law included just the Cabinet, and so reduced the ability of an assassin to wreak regime change. See *id.* at 104.

Twentieth Amendment extends this to the post-election, pre-inaugural period by specifying that the vice president-elect swears in as president if the president-elect dies.<sup>89</sup> Before the election, the same principles apply, less formally but more flexibly. Candidates who die before Election Day can be replaced by their parties.<sup>90</sup> Even after Election Day, parties can coordinate a replacement for whom members of the Electoral College can vote in December.<sup>91</sup>

But in the absence of a candidate-replacement law, contingent elections present a unique difficulty. Because the Twelfth Amendment specifies and limits the candidate list in contingent elections, killing someone on the list arguably eliminates that person and his or her party from the running. Without a pre-existing Section 4 law—and without a sense that it would be easy to pass one on the fly if the need arose—there would thus be a greater incentive to assassinate a candidate here than at any other point in the presidential-selection process. Presidential assassination is enough of a worry when the perpetrators are deranged; it should give us great pause when our system's design encourages more calculating killers.

For these reasons, it is more prudent to design a law now. This part of the Article is devoted to that task. It first considers a tangent on timing. Next, it examines what would happen without a Section 4 law. It then performs a basic analysis of the principal options for replacing candidates in contingent elections. Then, after considering some complications and contingencies, it concludes with proposed legislation.

#### A. A Preliminary Tangent on Timing

Admittedly, the chances of a Section 4 scenario occurring are remote, given how rare contingent elections and candidate deaths are. Congress could greatly reduce even that risk, though, and it need not use its Section 4 power to do so.

By current statute, the Electoral College's members convene to cast their votes on the first Monday after the second Wednesday in December, which can fall anywhere from December 13 to December 19.<sup>92</sup> Congress does not count the electoral votes until January 6, soon after the new con-

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<sup>89</sup> U.S. CONST. amend. XX, § 3.

<sup>90</sup> See Fordham Clinic, *supra* note 51, at 16.

<sup>91</sup> See *id.*; *supra* note 53 and accompanying text; see also H.R. 6557, 111th Cong. § 3 (2010) (attempting to express the sense of Congress that presidential and vice-presidential candidates should indicate at their parties' conventions for whom electors should vote if the candidates die before the electors meet to cast their electoral votes).

<sup>92</sup> 3 U.S.C. § 7 (2012). The current date was set in 1934, shortly after the passage of the Twentieth Amendment. It had previously been set at the first Wednesday in January. See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 176 (1996).

gressional term begins.<sup>93</sup> If Congress were to make the Electoral College's meeting date much later—perhaps the day before Congress meets to count the votes, if more modern methods of transmission can be allowed<sup>94</sup>—it would greatly reduce the time during which a Section 4 scenario could even arise. If a candidate dies before the Electoral College has convened, the dead candidate's electors (presumably in consultation with their party) can coordinate their actions and vote for a different, living candidate without any need for congressional authorization through Section 4.<sup>95</sup>

To be sure, there are many other factors informing the Electoral College schedule besides avoiding Section 4 scenarios. Because contingent elections are rare, and because in an ordinary election the Electoral College is simply confirming the voters' choices expressed in early November, there is some reason to keep the Electoral College's meeting date where it is, or to make it even earlier, simply to get the formality over and done with. But there are other reasons for moving the meeting date later. Doing so would provide more time for resolving disputes like Florida's in the 2000 election.<sup>96</sup> It would also reduce other legal risks that populate the time between when the Electoral College's members vote and when Congress counts those votes.<sup>97</sup>

Moving back the Electoral College's meeting date would greatly reduce the risk, but it would not eliminate it. Even if Congress changed the law and had the Electoral College convene in early January, there would still be some risk of a candidate dying after the electoral votes were cast but before the contingent election was concluded.<sup>98</sup> Section 4 legislation would still be in order.

### B. *What Would Happen Without a Law*

Before designing an optimal law, it is worth considering the current baseline: what would happen without one? To be sure, it is impossible to

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<sup>93</sup> 3 U.S.C. § 15 (2012). The current counting date was set in 1934, shortly after the passage of the Twentieth Amendment. It had previously been set at the second Wednesday in February. See Josephson & Ross, *supra* note 92, at 176.

<sup>94</sup> Under current law, the electors' votes need to be sent by registered mail. 3 U.S.C. § 6 (2012).

<sup>95</sup> See *supra* note 53 and accompanying text; *supra* note 70 (discussing handling of candidate deaths before the Electoral College votes).

<sup>96</sup> See *supra* note 12.

<sup>97</sup> One such risk is presented by the unresolved question of whether the winning candidate becomes president-elect when the electoral votes are cast, or instead not until Congress counts those votes. See THE CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION 49 (2009) (recommending shortening the time "between the casting of electoral votes and their counting by Congress" for this reason); Amar, *supra* note 85, at 217–18 (exploring the ambiguity of the timing of becoming president-elect).

<sup>98</sup> It would similarly reduce the risk if the date on which Congress counted the votes were moved back to December. Having the lame-duck Congress count the votes would be problematic for other reasons, though. See *supra* note 65 and accompanying text.

predict any final outcomes, but we can posit where the battle lines would be drawn.

At first glance, it might appear that a candidate death in a contingent election would have been harder to settle before Section 4, because it would have been unclear not just what could be done but also who could do it. One claim might have been that, because each house has the constitutional power to make rules for its own proceedings, the House alone would decide how to handle a death in a contingent presidential election, and the Senate alone would decide how to handle a death in a contingent vice-presidential election.<sup>99</sup> But whichever side lost the fight over the rules would likely challenge that result in court, based on an alternative claim: that the Constitution required a particular handling of a death in a contingent election, leaving the individual houses with no power to alter that outcome. Of course, such litigation would need to resolve the issue of just what outcome the Constitution required.<sup>100</sup> In other words, there would be a lot of uncertainty at a very inopportune moment.

Section 4 demoted the one-house rule as an option by making legislation—with bicameralism and presentment to the president—the proper mechanism. Unfortunately, clarifying that legislation is the mechanism does not help much when no legislation has been enacted, because any time there is a death in a contingent election there can still be a dispute over what the constitutional default process is. For instance, the living candidates' supporters could claim that in the absence of any legislative authorization for a substitution process, the dead candidate's supporters would just be out of luck because candidates must be qualified to serve (i.e., be alive) in order to receive any votes.<sup>101</sup> For their part, the dead candidate's supporters could retort that they can vote for a dead person if they wish.<sup>102</sup> If their dead candidate wins, the office would simply be declared vacant, an outcome that might be acceptable to them in a number of different political scenarios.<sup>103</sup>

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<sup>99</sup> See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings”). There are other issues relating to contingent elections that each house might attempt to settle with its own rules even now; attempts to settle them through legislation might therefore be constitutionally controversial. See Josephson, *supra* note 4, at 653–57.

<sup>100</sup> One potential complication not yet discussed is that if there is a fourth-place finisher in the Electoral College, he or she might claim to be entitled to compete as one of the top three (living) vote-getters. Such a claim seems spurious, but it could add another potentially litigious party to the mix. See 69 CONG. REC. 4209 (1928) (statement of Rep. Lozier) (raising possibility of fourth-place finisher moving up).

<sup>101</sup> Cf. *supra* note 48 and accompanying text (discussing—and questioning—the Greeley precedent against allowing electors to vote for dead people).

<sup>102</sup> Those responsible for Section 4's creation apparently rejected this interpretation. See *supra* note 76.

<sup>103</sup> In a contingent presidential election, a vacancy would work just fine for the dead candidate's supporters if they had good prospects for winning the vice presidency—with the presidency vacant, the vice president would succeed to the presidency and all would be well. In a contingent vice-presidential election, a vacancy would work just fine if the dead candidate's supporters had good prospects for winning the presidency—with the vice presidency vacant, the president could appoint a new vice president. U.S. CONST. amend. XXV, § 2. This would

House members might even claim that a House rule is still an option in the absence of any Section 4 legislation.

While passing legislation would preempt such disputes, it would be difficult to pass legislation in the middle of a contingent election. Interested parties would have a strong sense of how the contingent election would play out under various scenarios and thus, would only support legislation that benefits their interests. It is not difficult to imagine one party benefiting from a dead candidate being out of the picture, another party preferring that the dead candidate be able to receive votes or to be replaced, and a third party profiting from a deadlock. It is hard enough to get legislation through Congress under normal conditions; under these conditions it would be much harder. Add to that the possibility that any legislation that passed would inevitably face a court challenge,<sup>104</sup> and we can see no clear picture in advance of what would transpire if a contingent-election candidate were to die.

Thus it appears that Section 4 has not improved the situation very much at all; a death in a contingent election would still be greeted by uncertainty and litigation. But this result makes a mockery of Section 4. The uncertainty and litigation before Section 4's ratification would have reflected the flawed design of the original Constitution. Uncertainty and litigation now, by contrast, would come despite the efforts of Section 4's drafters, and would reflect Congress's disregard for its assigned constitutional responsibilities.

Pessimism aside, it is at least possible that a spirit of goodwill and fair play would quickly prevail, or at least that the various factions would see more to gain from legislating than from litigating. It might even be an advantage to pass a Section 4 law only in the midst of an actual need for it, because that might make it possible to design a perfect process for an idiosyncratic situation rather than trying to legislate a one-size-fits-all solution in advance. But even if such a wonderful episode of good governance should come to pass, it is impossible to say what a law would look like that managed to get passed in the midst of a contingent election without knowing the prevailing political dynamics at the time. Thus, the rest of this part of the Article will present arguments for what an optimal law would look like from the standpoint of a Congress trying to legislate in advance of any actual contingent election.

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require majority support in the House and Senate, but it would still be better than letting a rival occupy the vice presidency. In the meantime, with the vice presidency vacant, the Speaker of the House would be next in line for the presidency, and it is fairly likely that any group with good prospects for controlling the presidency in this situation would control the speakership as well.

<sup>104</sup> To prevail in court, any challengers would not only need to convince the court that they were correct on the merits of the constitutional issue, they would also need to convince the court in the first instance that the issue did not constitute a non-justiciable "political question."

*C. Contingent Presidential Elections*

The most prominent reason that Section 4's sponsors had for providing for replacement candidates after a death in a contingent election was that without one, the supporters of the dead candidate would be disenfranchised. In a 1928 debate, Representative Ralph Lozier hearkened to the most recent election, in which there had been a strong third-party effort by Robert LaFollette, and then offered this analysis:

Suppose in the 1924 presidential election no candidate for President received a majority and the election in that event would have been thrown into the House of Representatives. . . . [I]f Calvin Coolidge had died . . . the Republican Party would have been disfranchised, because the present Constitution limits the choice of the House to the three persons receiving the highest number of votes in the Electoral College, and the death of Mr. Coolidge would have left no Republican in this list of three, and in that event the Republicans in the House would have been compelled to choose between John W. Davis and Robert M. La Follette.

. . . . On the other hand, if no candidate in 1924 had a majority in the Electoral College and John W. Davis had died . . . , under the present law the Democrats in the House could not have voted for any other Democrat . . . . So, gentlemen, we have been tolerating a condition here that is un-American and un-republican and undemocratic, and while this situation has never arisen we have no assurance that this condition will not arise some time in the future. Why not provide against such an intolerable situation?

In order to meet this condition the committee of which I am a member has added to the Norris resolution section 4, which takes care of a contingency of the kind I have described and provides remedies and methods by which the will of the people can be carried out under conditions such as I have mentioned. To give effect to the will of the people is the supreme object and purpose of all government.<sup>105</sup>

The inspiration for Section 4 was—and thus the essence of any optimal Section 4 law would be—to allow a dead candidate's supporters to be represented as fully as possible in a contingent election.

With that in mind, I offer three principal approaches to replacing a dead candidate in a contingent presidential election: (1) not replacing the candidate and instead allowing votes for the dead candidate to be valid, (2) automatically substituting the dead candidate's running mate, and (3) allowing the dead candidate's party (ideally working through the dead candidate's

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<sup>105</sup> 69 CONG. REC. 4206–07 (1928) (statement of Rep. Lozier); *accord Hearings on H.J. Res. 56*, *supra* note 70, at 24–25 (statement of Rep. Lozier); H.R. REP. NO. 69-311, at 7 (1926); 74 CONG. REC. 5877 (1931) (statement of Rep. Gifford); 69 CONG. REC. 4361 (1928) (statement of Rep. Lozier). Representative Lozier went further and suggested that such disenfranchisement could “perhaps precipitate sedition,” making Section 4 crucial. 75 CONG. REC. 3833 (1932) (statement of Rep. Lozier).



electors) to confer and name a replacement.<sup>106</sup> Each approach has distinct advantages and disadvantages. A fourth option—reconvening the Electoral College—merits brief consideration as well.

### 1. Option 1: No Replacement

Allowing votes for the dead candidate is the simplest approach. Not least because of the Greeley precedent,<sup>107</sup> it is unclear whether representatives could vote for a dead person in a contingent election without Section 4 legislation authorizing it.<sup>108</sup> Indeed, as just recounted, Section 4 was animated by the very notion that the representatives would not be allowed to vote for a dead person.<sup>109</sup> But Section 4 gives Congress a broad power to provide for the “case” of a contingent candidate’s death, and there is no reason that Congress could not choose Option 1 and authorize representatives to vote for the dead candidate.<sup>110</sup>

Under such a system, a vote for the dead candidate would be a vote for a vacancy; if the dead candidate won he or she would become a dead president-elect. The vice president-elect would take the oath of office as president.<sup>111</sup>

Besides its swift simplicity (there are none of the disruptions, discussed below, that the other methods of replacing a candidate would entail), a key advantage of Option 1 is that it tracks the conventional method of dealing with presidential death; being replaced by a vice president is exactly what happens when a winning candidate dies before inauguration, or dies or becomes disabled after inauguration.<sup>112</sup> It also tracks the conventional approach

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<sup>106</sup> Because Section 4 gives Congress the broad power to “provide for the case” of a death in a contingent election, Congress might have the constitutional power to pursue other, less sensible options, such as giving itself a plenary power to choose replacement candidates, or selecting certain congressional leaders as the automatic replacements. Even if such Section 4 laws were constitutional, though, it is difficult to imagine them passing muster politically. The Constitution does not forbid everything in the world that might be bad; it often relies instead on the political process it has constructed to filter out the inappropriate and the ill-advised.

<sup>107</sup> See *supra* note 48 and accompanying text (describing—and questioning—the Greeley precedent).

<sup>108</sup> Beyond the Greeley precedent, the Twelfth Amendment limits contingent presidential elections to “persons,” a designation that could be interpreted as excluding corpses. Cf. Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 Hous. L. Rev. 67, 76 (2010) (querying whether the Twelfth Amendment limits electoral votes to living “persons”). But that language is not repeated for contingent vice presidential elections, see *supra* note 32 and accompanying text, and in any case there is nothing to stop a majority of the House or Senate from simply repudiating the Greeley precedent in such a situation.

<sup>109</sup> See *supra* note 102 and accompanying text; see also H.R. REP. No. 69-311, at 7 (“It seems certain that votes cast for a dead man could not legally be counted.”).

<sup>110</sup> U.S. CONST. amend. XX, § 4.

<sup>111</sup> See *id.* § 3.

<sup>112</sup> See *id.*; *id.* amend. XXV, § 1. There is no direct provision in the Constitution for the case of a president-elect who becomes disabled—perhaps too disabled to take the oath of office—but does not die. Presumably, though, there would be no reason that the vice president-elect could not enter office and then act as president pursuant to Article II, § 1, cl. 6. Section 4 of the Twenty-Fifth Amendment might also be available after inauguration.

to the death of other sorts of candidates shortly before an election when it is too late to change the ballots.<sup>113</sup> While a contingent presidential election is distinguishable from other elections in important ways,<sup>114</sup> dead people have run in and won congressional elections with an understanding that their victory would simply create a vacancy.<sup>115</sup>

There are, however, serious disadvantages. First among them is that the real result here—having the vice president-elect become president—might not be congenial to the dead candidate's supporters. If there is a contingent election for president in the House, then there almost certainly would be a contingent election for vice president in the Senate, and there is no guarantee that the winning vice presidential candidate would be from the same ticket as the winning (dead) presidential candidate. Indeed, with three candidates in the presidential contest versus two in the vice-presidential one, there is no guarantee that the dead candidate's running mate would even *participate* in the vice presidential contest.

To be sure, that is a feature of double contingent elections anyway, without anyone dying; because they are chosen by two different bodies, there is always a chance that a contingently elected president and vice president will be from different parties.<sup>116</sup> If such a president ever died, the mis-

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<sup>113</sup> See, e.g., HAW. REV. STAT. ANN. § 11-118(c) (West 2014) (providing deadline after which dead candidate will appear on the ballot and, if victorious, for a vacancy to be declared); MO. REV. STAT. § 115.379(2) (2015) (same).

<sup>114</sup> Unlike the normal, state-centered presidential voting process, a contingent election in the House would face no real delay in printing and distributing updated ballots, or complications caused by early and absentee voting. See *infra* note 128 and accompanying text.

<sup>115</sup> The most recent notable examples are the 2000 U.S. Senate election in Missouri won by Mel Carnahan, and the 2002 U.S. House race in Hawaii won by Patsy Mink. Carnahan died in a plane crash shortly before the election, too late to be replaced on the ballot. After the governor said that he would appoint Carnahan's widow to fill the vacancy if Carnahan won, Missouri's voters handed Carnahan a victory. See Michael G. Adams, *Missouri Compromise: Did the Posthumous Senatorial Election of Mel Carnahan and Subsequent Appointment of Jean Carnahan Compromise Federal or State Law?*, 29 N. KY. L. REV. 433, 433–35 (2002); *infra* note 119. Mink died of pneumonia too late to be replaced on the ballot, but won the election, creating a vacancy that was filled later via a special election. See *Democrat Wins Last House Election*, CHI. TRIB., Jan. 6, 2003, [http://articles.chicagotribune.com/2003-01-06/news/0301060192\\_1\\_rep-patsy-mink-special-election-democrat-ed-case](http://articles.chicagotribune.com/2003-01-06/news/0301060192_1_rep-patsy-mink-special-election-democrat-ed-case) [https://perma.cc/JP7D-PBP7].

<sup>116</sup> Using the simplifying assumption that members of Congress would vote for the candidates of their parties, seven of the twenty presidential elections since the adoption of the Twentieth Amendment have yielded a Congress in which neither party commanded both a majority of state delegations in the House and a Senate majority. The elections in question were in 1952 and 2000 (Republican majority of delegations in the House, no majority in the Senate); 1956 and 1972 (no majority of delegations in the House, Democratic Senate); 1980 (no majority of delegations in the House, Republican Senate); 1984 (Democratic majority of delegations in the House, Republican Senate); and 2012 (Republican majority of delegations in the House, Democratic Senate).

That simplifying assumption might not hold. Members might vote against their own party's candidate if, for instance, a different candidate won the national popular vote, or won the popular vote in the member's state or district. They might also vote according to the results of political deal-making or even according to personal whim. See Lloyd N. Cutler, *Election 1992: The Plot Thickens*, WASH. POST, May 20, 1992, at A23 (discussing pressure on representatives to vote for the winner of their state or district, even if from another party); Tribe & Rollins,

matched vice president would take over. But such mismatches are best avoided if possible. Put another way, giving a dead candidate's supporters the ability to put another party's candidate in office does not really meet Section 4's anti-disenfranchisement goal.

The second, related disadvantage is that it handicaps a campaign when its standard bearer is dead. It is one thing to give a dead candidate's supporters representation. It is quite another to limit that representation to voting for a corpse who can never serve as president. While it is hard to say for sure given the thinness of the record, Section 4's framers seemingly had this notion in mind. Section 4 was motivated by the concern that representatives would be unable to vote for the dead candidate.<sup>117</sup> But the framers' complaint was not the technicality of being unable to vote for a dead candidate; if it had been, the amendment simply could have authorized that. Rather, the problem was the reality of being unable to vote for a *live* candidate; the key intention of Section 4 was to allow substitutions.<sup>118</sup> As a result, Option 1 does not get to the heart of what Section 4 was meant to accomplish.

On the other hand, the opposite problem is worth remembering, and it represents one important benefit of Option 1. While a campaign is handicapped by having a dead standard bearer, it gives a campaign something of an unfair advantage if it can introduce a shiny new candidate in the middle of a hard-fought contingent election. Particularly if the party can choose whomever it wants (Option 3), it can ride a wave of sympathy surrounding the dead candidate at the same time that it trots out a new candidate unsullied—and unvetted—by the preceding campaign.<sup>119</sup> While Section 4 is supposed to give a dead candidate's supporters some representation in a contingent election, it should not give them too much of an advantage.

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*supra* note 35, at 58–60 (outlining various possible bases for representatives' voting decisions in a contingent election). In 2000, multiple Democrats in districts that had supported Republican George W. Bush indicated that they would vote for Bush if the election were thrown into the House. See John Berlau and Sean Higgins, 'Go-For-It' Gore Backers In Congress Now Talk More About Exit Strategies, INVESTOR'S BUS. DAILY, Dec. 6, 2000, at A22.

<sup>117</sup> See *supra* note 102 and accompanying text.

<sup>118</sup> See, e.g., *Hearings on H.J. Res. 56*, *supra* note 70, at 25 (statement of Rep. Lozier) ("In an emergency such as I have indicated, the Representatives of the political party to which the deceased candidate belonged may cast their ballots for some living representative of that party.").

<sup>119</sup> The Missouri race for U.S. Senate in 2000 provides an analogy. Incumbent John Ashcroft held a small lead over his opponent Mel Carnahan in the polls. When Carnahan died in a plane crash, though, Ashcroft felt the need to step back from campaigning. The governor promised to appoint Carnahan's politically inexperienced widow Jean to fill the vacant seat if Carnahan (who remained on the ballot) won, which he did. When Jean Carnahan faced an actual campaign two years later, she was defeated (though admittedly, many other factors had changed between 2000 and 2002). See William Claiborne, *Carnahan Apparent Winner in Missouri*, WASH. POST, Nov. 8, 2000, at A37; Deirdre Shesgreen & Jo Mannies, *Talent Wins Nail-Biter*, ST. LOUIS POST-DISPATCH, Nov. 6, 2002, at A1.

## 2. Option 2: Automatic Replacement by the Running Mate

The second option is for a dead presidential candidate in a contingent election to be replaced automatically by his or her running mate. Senator Simon's proposed legislation chose this approach.<sup>120</sup>

This method answers both of the disadvantages of Option 1 discussed above: it avoids the possibility of a vice president piggybacking off of another party's victory, and it gives the dead candidate's supporters a more viable (in both senses of the word) object of their support.

The automatic-replacement method also respects—and promotes—the key role of the running mate as understudy. Using the running mate in this way tracks the standard method of replacing dead or disabled presidents<sup>121</sup> and dead presidents-elect.<sup>122</sup> As standard methods go it is a good one; it provides efficiency and certainty, and thus stability. Its automatic nature would also avoid delay, a helpful characteristic during a contingent election.

Option 2 also minimizes the opportunity for strategic behavior that would arise under Option 3 (if the dead candidate's party and electors were able to name anyone they liked as a replacement). With Option 3, the surviving candidates' parties could offer inducements to the dead candidate's party to name a particular replacement—either a weak one, or perhaps even one of the other two candidates. Such behavior would corrupt the election process.<sup>123</sup>

Critics might contend that it is inappropriate to let Congress open the door to new candidates, because the Constitution provides that contingent elections feature only the top electoral-vote recipients; the running mate typically would not have received any electoral votes for president. To these critics, only Option 1 properly respects the Electoral College and its votes. But this objection overlooks the core purpose of Section 4: to *amend* the

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<sup>120</sup> See *supra* note 83 and accompanying text.

<sup>121</sup> See U.S. CONST. art. II, § 1, cl. 6; *id.* amend. XXV.

<sup>122</sup> See *id.* amend. XX, § 3; *cf. supra* note 112 (discussing the Twentieth Amendment's lack of provision for disabled presidents-elect).

<sup>123</sup> See Tribe & Rollins, *supra* note 35, at 52, 56–57 (describing history of political bargaining and prospect of future such bargaining, to resolve deadlocked presidential elections). As the Tribe & Rollins article makes clear, bargaining is part of the political process, and the very design of contingent elections reflects a desire to have legislators—politicians—choose the president or vice president. In any case, depending on what sorts of arrangements are made, they might not be literally corrupt.

That said, the modern ideal of presidential elections is that they are rooted in democratic practice, not oligarchy. Even though contingent elections give members of Congress the power to choose the president and vice president, those members are ultimately accountable to the voters for their choices. In a related vein, consider the last contingent presidential election, in 1825. John Quincy Adams won with the support of fourth-place candidate and Speaker of the House Henry Clay, whom he then appointed Secretary of State. Defeated candidate Andrew Jackson denounced this as a “corrupt bargain,” and beat that drum constantly as his partisans took over the House in 1826 and as he defeated Adams for president in 1828. See Michael Daly Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1, 24–26, 34–35 (2000).

constitutional structure and allow substitutes for dead candidates.<sup>124</sup> And while it is problematic to allow too much noodling around with the candidate list, an automatic replacement by the running mate—who will have received electoral votes specifically to be the dead candidate’s understudy—is the least intrusive, least abusive way to do it.

A more practical disadvantage to letting the running mate fill in is that the running mate probably would also be running for vice president in a contingent election in the Senate. As mentioned already, it is highly likely that when there is no outright winner of the presidential election, there will be no outright winner of the vice-presidential election either. Unless the dead presidential candidate’s ticket finished in third place—in which case it would be represented in the contingent presidential election but not the contingent vice-presidential election—having the running mate fill in would mean either creating a vacancy in the Senate’s vice-presidential election or letting the running mate run in both contests.

Neither situation should be a deal-breaker, though. Filling a vacancy in the vice-presidential election (the next subject considered below) is a perfectly feasible task, and would be appropriate if the House concluded its contingent election first and the running mate won it. Running in both elections simultaneously is workable as well. If the running mate loses one or both of the contingent elections, then there is no real problem. If the running mate wins both elections, he or she would just become president-elect and there would be no vice president-elect until after inauguration, when he or she could appoint a vice president with Congress’s approval.<sup>125</sup> To be sure, the fact that running in both elections is technically possible does not prevent it from being awkward. But if it would be too awkward to countenance, the running mate simply could be replaced in the contingent vice-presidential election.

### 3. *Option 3: Party/Elector Selection of a Replacement*

The third option is to permit the dead candidate’s party<sup>126</sup> to name a replacement, ideally working through the members of the Electoral College

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<sup>124</sup> See *supra* notes 117–18 and accompanying text.

<sup>125</sup> See U.S. CONST. amend. XXV, § 2 (providing for filling vice-presidential vacancies). The president-elect could announce a vice-presidential nominee before being inaugurated so that Congress could begin its consideration of the nomination in advance, allowing a successful nominee to enter the job as soon as possible after inauguration day.

This raises another possible legislative design, suggested to me by Barbara Bean: if the House moves first and the running mate wins there, the Senate would cancel its contingent vice-presidential election and allow the new president to appoint a vice president. Because it would avoid the possibility of a vice president from a different party than the president, this might be a good design for all contingent elections. Unfortunately, such noodling around with the design of contingent elections is only possible when a candidate dies and Section 4’s broad grant of power to Congress kicks in.

<sup>126</sup> This section operates under the assumption that the dead candidate was running as the nominee of an established party, as opposed to running as an independent or with an upstart,

who had voted for the dead candidate. As with Option 2, this avoids the possibility of a victory handing power to another party's vice-presidential candidate, and it produces a truly viable candidate. Unlike Option 2, it potentially avoids the awkwardness of either causing a vacancy in the contingent vice-presidential election or requiring a candidate to run for both president and vice president at the same time.

Allowing the party to choose a replacement candidate is also consistent with what would happen if a presidential candidate died before the Electoral College met to vote. Both major parties provide that if a nominee dies (or withdraws), the national committee convenes to quickly name a replacement.<sup>127</sup> If this happens well before the election, and there is plenty of time to replace the dead candidate's name on the ballot, the process is relatively seamless. If the dead candidate is on the ballot—either because the death occurs too close to Election Day<sup>128</sup> or because it occurs after Election Day but before the Electoral College meets—things are a bit more complicated. But while state ballot laws can be intricate, there is nothing in the Constitution that precludes a party from coordinating replacements right up to the day that the Electoral College votes, and there are obvious and powerful incentives for the party to do so instead of just letting things fall apart. Given that the electors are chosen for their loyalty to the party, they can be expected to follow the party's choice.<sup>129</sup>

When the framers of the Twentieth Amendment contemplated the entire timeline of possible pitfalls stemming from candidate deaths, they decided that there was no reason for them to address pre-election situations, because they were content to leave those informally to whatever methods the parties chose for themselves.<sup>130</sup> The parties had no such power in the middle of a contingent election, though, because the Constitution specifically limits who the candidates there can be.<sup>131</sup> Section 4 gives Congress the ability to extend the parties' replacement power to contingent elections, if that is what Congress thinks is best.

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relatively unorganized party. The ramifications of the latter situations are explored in Section III.E.4, *infra*.

<sup>127</sup> See Fordham Clinic, *supra* note 51, at 48–49 (citing major party rules in force in 2012); see also VINCENT A. DOYLE & RITA ANN REIMER, CONG. RES. SERV., 76-211A, DEATH OF A PRESIDENTIAL CANDIDATE OR PRESIDENT-ELECT 2 & n.4 (1976) (quoting party rules as of 1976). Most recently, the Democratic National Committee scrambled to name Sargent Shriver as the Democratic vice-presidential nominee in 1972 after the first nominee, Thomas Eagleton, withdrew. See NEIL A. HAMILTON, THE 1970S, at 113 (2006).

<sup>128</sup> With the expansion of absentee voting and early voting, the deadlines for replacing candidates have become much earlier. See Barry C. Burden & Brian J. Gaines, *Presidential Commission on Election Administration: Absentee and Early Voting: Weighing the Costs of Convenience*, 14 ELECTION L.J. 32, 33 (2015).

<sup>129</sup> See, e.g., *supra* note 53 and accompanying text (describing handling of James Sherman's death in the Election of 1912); see also H.R. REP. NO. 69-311, at 6 (1926); note 91 and accompanying text.

<sup>130</sup> See H.R. REP. NO. 69-311, at 6; see also *supra* note 53 and accompanying text.

<sup>131</sup> See U.S. CONST. amend. XII.

The question remains, though, whether this actually *is* best. Is a death during a contingent election more like a death before Election Day (in which case party replacement is the recognized approach), or more like a death afterwards (in which case the running mate is supposed to step in)?<sup>132</sup> It might seem obvious that it is the former when the death occurs before the day of the contingent election. But contingent elections are not the same as regular elections; rather, they are a species of runoff election. The rules for substitution in a runoff could well be different because a runoff is a continuation of an election already held—held, in this case, before the dead candidate was dead. Given that fact, the running mate—part of the ticket that “won” the first round of voting in the sense that it advanced to the second round—is a more legitimate replacement than is some stranger to the election who has no such standing.

Of course, a primary advantage of letting the party choose a replacement is flexibility; in cases where running mates are the most logical replacements, the party would be free to choose them. If the party chooses anyone other than the running mate, it will have some serious explaining to do to the House—why are they declaring that the running mate is not good enough to contend for the presidency, given that they had previously deemed the running mate to be the best person to succeed to the presidency if the president died after inauguration?<sup>133</sup>

Another problem with Option 3 is that, as already discussed, it could be unfair and unwise to give the party a “do-over,” letting it select a candidate who would not have faced the same bruising campaign or the same vetting

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<sup>132</sup> Cf. Amar, *supra* note 85, at 223 (arguing that candidate deaths any time after Election Day should be handled with the same standards as deaths after Inauguration Day). Amar argues in favor of what this Article calls Option 1—allowing voting for the dead candidate and, if he or she wins, declaring the office vacant and having his or her running mate take over. *See id.* at 224. But Amar is not writing about contingent elections, in which the presidential winner and vice-presidential winner can be from different parties. *See supra* note 116 and accompanying text.

<sup>133</sup> There are all sorts of reasons why the running mate might not actually be the second-best person for the job in the party’s eyes. While “balancing the ticket” politically has not distorted tickets recently as much as it used to, it is still a factor. *See* Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 549 (1995) (“Increasingly, the Vice President has become, in theory and practice, an integral part of the executive branch, chosen by, compatible with, and working closely with the Chief Executive.”); Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 873 (2005) (“Rather than selecting a vice presidential nominee for her preparedness to assume the Presidency and her tested ability to wield the escalating power of the Vice Presidency, a presidential nominee is more likely to pick her running mate for strategic purposes of ticket balancing, which generally means selecting a vice presidential candidate whose background generally complements or supplements her own resume.”). Another political possibility is that the party believes that a particular person has a better chance at winning the contingent presidential election than the running mate would, even if the running mate was a better choice for the general election and even if the running mate would make a better president.

as the other two candidates.<sup>134</sup> Using the running mate as a substitute as in Option 2 avoids this problem.<sup>135</sup>

Also as already discussed, it might be seen as disrespectful to the Electoral College, or perhaps even illegitimate, to open the door to new candidates who were not among the top presidential electoral-vote recipients.<sup>136</sup> The same response works here: Section 4 was meant to amend the constitutional structure to allow substitutions.<sup>137</sup> Nevertheless, it would add constitutional legitimacy to the process for the electors who had voted for the dead candidate to make the formal choice here rather than the party (an entity that, unlike the Electoral College, is not clearly recognized by the Constitution). Presumably, the party would still take the lead in coordinating the choice; again, the electors are chosen for their party loyalty, and so would typically follow along.<sup>138</sup>

Option 3's flexibility has other drawbacks compared to Option 2. One is that it sacrifices the swiftness and certainty that Option 2's automaticity would offer. Swiftness and certainty are hallmarks of sensible succession planning.<sup>139</sup> Granted, it is not as important to have swift, certain succession for presidential candidates as it is for presidents. But with Congress given only two weeks to select a president before the term begins,<sup>140</sup> time would be at a premium, and giving parties and electors even a few days to make their choices could be costly.

Moreover, there are good reasons to minimize uncertainty even for candidates. One is that certainty may dampen the incentive to assassinate a candidate.<sup>141</sup> Another is that automatic replacement reduces the opportunities for backroom wheeling and dealing that the party-selection method would entail.<sup>142</sup> The undemocratic "smoke-filled room" method of selecting candidates has long since been replaced by our more-accountable system of presidential primaries. To be sure, running mates are not selected through a similarly accountable system; there is no vice-presidential primary. But Option 2 recognizes that the running mate represents the party's (and the candi-

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<sup>134</sup> See *supra* note 119 and accompanying text.

<sup>135</sup> See *supra* Section III.C.2.

<sup>136</sup> See *supra* text accompanying note 124.

<sup>137</sup> See *supra* notes 117–18 and accompanying text.

<sup>138</sup> It would make sense to require only a majority of the electors to make a choice of substitutes. This would allow the process to work more quickly and to avoid being tripped up by the unavailability of some small number of electors. It also would help work through situations in which the dead candidate had no party or a disorganized one. See *infra* text accompanying notes 167–68.

<sup>139</sup> Cf. Kalt, *supra* note 88, at 62–63.

<sup>140</sup> Under current law, Congress counts the electoral votes on January 6, two weeks before the constitutionally mandated start of the presidential term on January 20. U.S. CONST. amend. XX, § 1; 3 U.S.C. § 15 (2012). Congress could, if it wanted, legislate an earlier counting day. See *supra* note 65 and accompanying text.

<sup>141</sup> See *supra* notes 87–91 and accompanying text (discussing disincentivizing assassination).

<sup>142</sup> See *supra* note 123 and accompanying text.



date's) choice for the specific role of understudy, and the running mate will at least have been anointed by the party convention, voters, and members of the Electoral College.

On a final note, because the major parties are led by committees comprising many members, and because time would be of the essence, it would be helpful for the party to have spelled out a candidate-replacement process in advance.

#### 4. *Reconvening the Electoral College*

Another option is possible besides replacing candidates: reconvening the entire Electoral College and having a completely new vote. Section 4's framers apparently considered this possibility.<sup>143</sup> This route might be particularly attractive to those concerned about the other options' detour around the Electoral College.<sup>144</sup> It also is a good choice for those who would want to give every candidate's supporters a chance to do things differently in the wake of one candidate's death.

In most cases, the results of this option would be the same as Option 3, only with more delay and inconvenience.<sup>145</sup> When the electors reconvened, one would expect the living candidates' electors to vote the same way, and for the dead candidate's electors to vote for the person that the party had coordinated as the designated replacement. That would put the House in the same place as Option 3, except that all of the electors (not just the dead candidates' ones) would have to have gotten involved, and there would be more opportunities for intrigue.

The result could be different, though. First, if enough of the dead candidate's electors were to vote for one of the living candidates, someone might win a majority and the contingent election could be avoided. Alternatively, enough electors could vote for a candidate who previously had finished outside of the top three, thereby prompting a new contingent election with a different party lineup. (The living candidates would have a chance to change their votes too, and similarly could cause someone to win a majority or someone new to move into the top three.) To be sure, under Option 3 the dead candidates' party could choose one of the other, living candidates as their preferred replacement, and this might expedite that living candidate's

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<sup>143</sup> See *supra* note 76. Some people, in a Section 4 scenario, might like to take the opportunity just to jettison the Electoral College and contingent elections. Since Section 4 gives Congress a blank check to provide a new process at that point, such people might argue, why not mandate a national popular vote for president? This Article starts from a different preference—that Section 4 legislation should try to work within the current system—and from an assumption that Congress would share that preference. In any case, the rare, harrowing situation of a contingent election and a candidate death does not present much of an opportunity for real reform of the overall electoral process.

<sup>144</sup> See *supra* text accompanying notes 124, 136–38.

<sup>145</sup> The desire to mitigate that delay might spur reconsideration of the current, slow system for electors to vote and have their choices transmitted to Congress. See *supra* note 97 and accompanying text.

victory, but it would not necessarily play out the same way a total revote would.

In a second potential difference from Option 3, the dead candidates' electors might split between two or more replacement candidates. Such a splintering could have several different unfortunate effects on the resulting new contingent election. If the party chose a replacement candidate via a splintered vote, the replacement might have only plurality support, which seems undesirable.<sup>146</sup> Also undesirable would be if the splintering elevated a fourth-place candidate into third place and thereby eliminated the dead candidate's party from contention; that would contravene Section 4's goal of preserving the dead candidate's representation. Perhaps the worst result of splintering would be if the dead candidate had won enough electoral votes that the resulting splinters were large enough to eliminate one or even both of the living candidates from the new contingent election.<sup>147</sup> Section 4 is supposed to protect a party from being eliminated when its candidate dies; eliminating *another* party's candidate instead—perhaps intentionally—surely would be inconsistent with that purpose.

#### *D. Contingent Vice-Presidential Elections*

The landscape of potential solutions is simpler when it comes to replacing a dead vice-presidential candidate in a contingent election. There are no formally designated understudies for vice-presidential candidates, so the options are reduced to two: Option 1, allowing votes for the dead candidate and declaring a vacancy if he or she wins; or Option 3, allowing the party (ideally with the approval of the dead candidate's electors) to name a replacement candidate.

Option 1, the no-replacement method, again enjoys the advantages of simplicity and directness. But the disadvantages are even greater here than for contingent presidential elections. While it is always important for there to be a vice president, it has special importance in the context of a contingent election. If the winner of the contingent vice-presidential election is dead, there will not be a vice president-elect; and there will not be a vice president until a new president is sworn in, nominates a vice president, and has that nominee confirmed by the House and Senate. This gap is of course problematic because of the possibility that the president-elect/President will die in

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<sup>146</sup> See *supra* note 138 (discussing a majority requirement under Option 3).

<sup>147</sup> To eliminate one of the living candidates, the dead candidate's party would need to yield two splinters with more electoral votes than the (previous) third-place candidate. Eliminating both living candidates would require a more fractured result. Using the size of the current Electoral College (538 electoral votes) as an example, a contingent-election candidate could have won a maximum of 269 electoral votes. Splitting that into three splinters that finish in first, second, and third place, the largest the third splinter could be is 89 electoral votes. If the (previous) second-place candidate had fewer than 89 electoral votes, there would need to have been at least five candidates who won electoral votes—something that has never happened in the post-Twelfth Amendment era.

the meantime.<sup>148</sup> But it is even more problematic because of the crucial role that the vice president-elect plays in contingent-election scenarios. As discussed above, the Senate's vice-presidential election provides a crucial backstop in case the House deadlocks and cannot choose a president before the term begins.<sup>149</sup> In a sense the system relies on the Senate's contingent election to produce a living winner, and Option 1 compromises that goal. Option 3 is preferable.<sup>150</sup>

As with the presidential case, it would add constitutional legitimacy to the process to have the dead candidate's electors make the official substitution,<sup>151</sup> even though the party presumably would be coordinating the choice along with the party's presidential candidate. (On that note, the law could give the presidential candidate the sole power to name a replacement candidate, rather than running the process through his or her party.) Reconvening the Electoral College remains as a possibility as well, subject to the same issues discussed previously.<sup>152</sup>

#### *E. Special Cases and Other Issues*

Before choosing from among the methods discussed above, there are additional factors and contingencies to consider.

##### *1. Multiple Deaths*

It might happen that both a party's contingent presidential and contingent vice-presidential candidates die. In such a case, there would be no way for the presidential candidate to be replaced automatically by his or her running mate; Option 2 is out. Option 1 would be undesirable as well. If the dead candidates' party was able to win in both the contingent presidential and vice-presidential elections, there would be a double vacancy and the next president would be drawn from further down the line of succession: the Speaker of the House.<sup>153</sup> Speaker succession is problematic from the standpoints of both constitutional law and public policy.<sup>154</sup> Option 3—allowing the naming of some other substitute—is thus preferable when both halves of the ticket are dead.

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<sup>148</sup> See *supra* note 72 and accompanying text; *infra* note 154 and accompanying text.

<sup>149</sup> See *supra* text accompanying notes 29–35. If the House chooses a president first this presents the possibility of a third alternative here: canceling the Senate's contingent vice-presidential election altogether. See *supra* note 125.

<sup>150</sup> Senator Simon's proposed Section 4 legislation took this approach. See *supra* note 83 and accompanying text.

<sup>151</sup> See *supra* notes 136–38 and accompanying text.

<sup>152</sup> See *supra* Section III.C.4.

<sup>153</sup> See 3 U.S.C. § 19 (2012) (providing presidential line of succession); see also *supra* note 72 and accompanying text.

<sup>154</sup> See *supra* note 72; see also Kalt, *supra* note 88, at 83–105.

Another complicated possibility is for there to be deaths on more than one ticket. If both vice-presidential candidates die, there would be no candidates at all unless there was some way for the parties to make substitutions. This would mean no vice president-elect, which is obviously problematic.<sup>155</sup>

If multiple presidential candidates in a contingent election die, this would present a complication mainly just under Option 1. Under Option 1, if a dead presidential candidate wins a contingent election there is a vacancy and the winning vice-presidential candidate becomes president on inauguration day. But if there is more than one dead presidential candidate, the election could be deadlocked even if a solid majority of state delegations prefer the same result. Imagine that ten states' delegations vote for Dead Candidate 1, ten more vote for Dead Candidate 2, and another ten are deadlocked but have a majority voting for either Dead Candidate 1 or 2. In such a case, thirty states' delegations would have a majority in favor of having the vice-presidential winner become president. Instead of actually reaching that result, however, the presidential election would remain deadlocked unless the two factions could unite sufficiently behind one of their dead candidates.

Of course, if such a deadlock were to persist up to inauguration day, the vice president-elect *would* act as president, a result that might seem to give the majority what it wanted. But the fact that the contingent presidential election would continue could make a very real difference. The Acting President would, for the entirety of the term, face the possibility of the House breaking the deadlock by voting for the remaining (living) candidate. The living candidate would have an incentive to maintain a constant campaign against the Acting President, who would have to execute his powers with the knowledge that the House could, with a single vote at any moment, remove him from office in favor of the living candidate.<sup>156</sup> While one would hope that the dead candidates' factions would just coordinate their votes and avoid this possibility, Options 2 and 3 would just eliminate the risk altogether.

## 2. *Timing and Combination Options*

Section 4 could apply any time a candidate died between the day the Electoral College members cast their votes (with no one winning a majority) and the conclusion of the contingent election or elections (with someone winning the presidency and/or vice presidency).<sup>157</sup> Currently, the Electoral

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<sup>155</sup> See *supra* text accompanying notes 29–35.

<sup>156</sup> See Tribe & Rollins, *supra* note 35, at 60–61 (discussing the prospect of an unsettled contingent election holding the acting president's agenda hostage at least until the midterm elections). A vice president only acting as president also would be unable to nominate a vice president to back him or her up. See U.S. CONST. amend. XXV, § 2 (allowing nominations of vice presidents only when the vice presidency is vacant).

<sup>157</sup> It could conceivably kick in earlier if electors vote for someone who is already dead, and if Congress counts those votes despite the Greeley precedent. See *supra* note 48 and accompanying text (describing—and questioning—the Greeley precedent); see also Amar, *supra* note 85, at 222, 228–29, 229 n.20 (noting the Twentieth Amendment's failure to explicitly

College votes between December 13 and December 19.<sup>158</sup> On the other end, there is no outside limit for a contingent election. Ideally, it would be concluded before the presidential term starts on January 20, but the Twentieth Amendment recognizes that a serious deadlock might mean that a choice is not made until later, if at all.<sup>159</sup>

Different options for replacing a dead candidate might make more or less sense at different times in the process. The main question is urgency. The earlier in the process that candidates die, the more time there is to replace them; this makes Option 3 more attractive in December than it is in January. The later in the process a death occurs—after the contingent election begins, and especially as inauguration day draws near—the more important it is to avoid delay. Option 2's automaticity is thus particularly attractive later in the game, as is Option 1's lack of change. Option 3's potential for delay, on the other hand, becomes increasingly problematic. The same is true, even more so, for reconvening the Electoral College.

But Option 3's weakness here is not an unsolvable problem. Section 4 legislation that enacts Option 3 could easily provide a time limit for a party and its electors to make their choice. (Eliminating the electors' participation would speed things up too, but would be undesirable for other reasons.<sup>160</sup>) Option 3 could also provide a backup provision for when the party and its electors do not make a choice in time. For instance, the legislation could say that once the contingent-election process has begun, the electors have no more than 72 hours to designate a replacement for a dead candidate. For contingent presidential elections, the legislation could mandate either Option 1 or Option 2 when a party and its electors do not make a choice in time. For vice-presidential elections, it could mandate Option 1 when too much time has passed. In the alternative, in either case, the legislation could be even tougher and say that when a party and its electors fail to make a timely substitution, they simply lose their spot in the election.

### 3. End of Life Issues

A thornier issue is posed by Section 4's lack of provision for candidates who are somehow incapacitated—in a coma or a vegetative state, perhaps—

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repudiate the Greeley precedent). Amar advocates legislation to formally reject the Greeley precedent. *Id.* at 222.

It also might kick in only later, if Congress were to extend the Greeley precedent by refusing to count votes cast for a candidate who died after the Electoral College cast its votes but before Congress counted them. There is no reason for Congress to do that, though, given that the votes would have been valid when cast.

<sup>158</sup> See *supra* note 92 and accompanying text.

<sup>159</sup> See U.S. CONST. amend. XX, § 3 (providing for the House's failure to choose a president by the beginning of the term); *cf.* Tribe & Rollins, *supra* note 35, at 52 (discussing last-minute resolution of the disputed Election of 1876).

<sup>160</sup> See *supra* notes 136–38 and accompanying text.

rather than dead. Because Section 4 only allows legislation in the case of a death, these marginal cases raise difficult issues.

If a presidential candidate is incapacitated but not dead, and thus Section 4 cannot apply to allow a replacement, then things would proceed in a manner similar to Option 1. Incapacitated candidates would stay on the ballot and, if they won, pass power to the vice-presidential winner. But as already discussed, Option 1 is problematic because the vice-presidential winner might be from another party, and because it does not allow for as vigorous a campaign by as viable a candidate. This would put parties in an awkward position in which, if Option 2 or 3 were enacted, they would be much better off if the candidate died. If there were end-of-life decisions to be made, there would thus be a heightened incentive for the candidate's family to "pull the plug," and to do so quickly. This is unfortunate and unseemly, but because Section 4 only applies to deaths, there is no way around it when Options 2 or 3 apply instead of Option 1.

Incapacitated vice-presidential candidates pose a different problem that does not resemble Option 1 as much. Once again, Section 4 would offer no possibility of replacing a candidate who is incapacitated but still alive. But if an incapacitated vice-presidential candidate were to win, he or she would be the vice president-elect; there would not be a vacancy to be filled as with a victorious-but-dead candidate under Option 1. From a crass political perspective, there would be a significant benefit from the candidate's death and significant detriment associated with the candidate's survival into office.

For both presidential and vice-presidential candidates, there is also the potential for disputes over whether a candidate actually is dead. If a candidate is missing but not all hope of rescue has been lost, or if a candidate is arguably but not certainly brain dead, there could be a fight between supporters who wish to replace the candidate with a more viable and promising stand-in (these supporters, not coincidentally, would find themselves suddenly advocating more liberal definitions of "death") and opponents who would want to keep the candidate on the ballot (these supporters, not coincidentally, would find themselves suddenly sympathetic to very restrictive or conservative definitions of "death"). It might be useful for Section 4 legislation to provide a process for answering these questions—perhaps by designating a particular court that could issue a declaratory judgment when such questions arose—to provide some clarity and certainty as swiftly as possible. In the absence of any such provisions, though, it would certainly make sense to require an official declaration of death by the applicable local authorities.

#### 4. *Weak Party Structure*

So far, this discussion has assumed that the election in question would reflect the usual partisan structure: national political parties nominating a ticket with a presidential candidate and a vice-presidential candidate. It

would be imprudent, however, to assume that this would necessarily be the case. This is especially so given that some of the more likely scenarios spawning a contingent election would involve a breakdown of the usual party dynamics.<sup>161</sup>

Though the Election of 1992 ended with a decisive Electoral College majority for Bill Clinton, it appeared at times during the campaign that there might be no outright winner because of the strong independent candidacy of Ross Perot.<sup>162</sup> As late as June, Perot led in the polls and it was easy to imagine him throwing the election into the House if not winning outright.<sup>163</sup> After running a campaign that could be charitably described as quirky, Perot finished with 19% of the popular vote (the most for a third-party candidate since 1912) but no electoral votes.<sup>164</sup>

But what if Perot had won some electoral votes—enough to deprive Clinton of an Electoral College majority and throw the election into the House of Representatives—and had then died? With no Section 4 legislation on the books, it is hard to say for sure what would have happened. Given that there were hundreds of Democrats and Republicans in Congress and zero professed Perot supporters, it is questionable whether anyone within Congress would have wanted to push hard for Section 4 legislation that would have kept Perot's ticket in the running. That said, the sizable chunk of the electorate that had voted for this hypothetical Perot (along with any part of the remainder who were deeply concerned about fair play) might have pushed hard for some sort of accommodation.<sup>165</sup>

Even if Perot's supporters could have gotten legislation through, however, their options would have been constrained, because Perot had no formal party organization. Option 3, therefore, would not have been feasible. There was no party apparatus that could have convened to select a replacement candidate because the party apparatus was basically Perot himself.<sup>166</sup>

This provides an additional reason to make sure that if Option 3 is used, it is run through the dead candidate's electors. While the discussion of Option 3 assumed that the party would coordinate a choice and its members of

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<sup>161</sup> See *supra* note 10.

<sup>162</sup> See, e.g., Martin Tolchin, *And If Perot Produces a Deadlock? The House Will Decide*, N.Y. TIMES, May 10, 1992, at A18; *supra* note 83 (discussing 1992 introduction of a House resolution to convene an expert panel to consider procedures for a contingent election).

<sup>163</sup> See, e.g., *Poll Gives Perot a Clear Lead*, N.Y. TIMES, June 11, 1992, at A18 (reporting poll showing Perot at 39%, Bush at 31%, and Clinton at 25%).

<sup>164</sup> See GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH 354–55 (Michael Nelson ed., 5th ed. 2013) (describing Perot campaign); *1992 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1992> [<https://perma.cc/H4QF-UT2E>].

<sup>165</sup> Cf. *supra* note 116 (discussing different possible bases for representatives' voting decisions in a contingent presidential election).

<sup>166</sup> See Thomas V. DiBacco, *In Defense of Party Politics*, ORLANDO SENTINEL, June 7, 1992, at G1 (describing, and criticizing, Perot's lack of a formal party organization). Perot formed the Reform Party in 1995 and ran as its nominee in 1996. See GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH, *supra* note 164, at 355.

the Electoral College would follow along,<sup>167</sup> using the electors would allow for substitutions even when there is no central party authority—assuming that the electors could reach consensus quickly enough. In a similar vein, making use of the electors also helps resolve situations in which a candidate is running under the banner of multiple political parties. Rather than attempt to define the candidate's one true party, we could just advert to the electors.<sup>168</sup>

Relatedly, the lack of a party structure makes the option of reconvening the Electoral College somewhat more attractive. Recall the problem with a revote that the dead candidate's electors might support another candidate, or splinter and let a fourth-place finisher sneak into the mix.<sup>169</sup> That is a problem to the extent that the point of Section 4 is to prevent a dead candidate's supporters from being disenfranchised in a contingent election. But to the extent that dead candidate's movement is not cohesive enough to make a clear choice, the fact that a revote might promote a candidate outside the movement could actually be a good thing.

Option 2—substituting Perot's running mate, James Stockdale—would still have been possible in 1992, but for similar reasons there would have been no party apparatus to coordinate the electors' choice to replace Stockdale in the contingent vice-presidential election in the Senate if that were necessary.

This, along with other examples of strong third-candidate presidential runs that lacked formal party organization,<sup>170</sup> shows that Section 4 legislation should not assume that the dead candidate necessarily has a "party." This does not take Option 3 off the table, but it underscores the importance of

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<sup>167</sup> See *supra* note 138 and accompanying text.

<sup>168</sup> On a tangential note, a multiple-party run might cloud the question under Option 2 of who a dead candidate's running mate is. In 1896, William Jennings Bryan ran with Arthur Sewall (who won 149 electoral votes) on the Democratic ticket, but with Thomas Watson (who won 27 electoral votes) on the People's Party or Populist ticket. See STEPHEN W. STATHIS, *LANDMARK LEGISLATION, 1774–2002*, at 142 (2003). If a similar election were thrown into the House and the Bryan-type candidate died, and if Option 2 were used, there would need to be a way to define who the "running mate" was. The running mate who received the most electoral votes from the dead candidate's electors (in 1896, Sewall) seems like the most obvious choice (perhaps with a tiebreaker, if needed, based on the number of associated popular votes).

<sup>169</sup> See *supra* Section III.C.4.

<sup>170</sup> See *GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH*, *supra* note 164, at 354–55 (noting deficiency of party organization surrounding independent presidential campaigns in 1968, 1976, and 1980). One notable example is 1960, in which Harry Byrd received fifteen electoral votes without having run for president. Fourteen of Byrd's votes came from Democratic "unpledged electors": people who ran successfully for the office of elector in Alabama and Mississippi without committing to vote for John F. Kennedy. Byrd's fifteenth vote came from a faithless Oklahoma elector pledged to Richard Nixon. *1960 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1960> [<https://perma.cc/J4NH-4WZT>]. The election was close; a national shift in the popular vote of 0.53% toward Nixon would have cost Kennedy his electoral-college majority, but with Byrd's fifteen votes Nixon would not have had a majority either. If Byrd had died during the contingent election, there would have been no appropriate party to nominate a replacement; although Byrd was a Democrat, the unpledged electors' whole point was to buck the Democratic party line.



having the electors make the formal choice of a substitute. The electors would have to be able to make an appropriate and swift choice without any central coordinating authority, so any Option 3 legislation should include a backup rule for cases in which the electors cannot reach a timely consensus.

### 5. A Hybrid Approach

As several of the above “complications” have suggested, the best Section 4 legislation might combine two or more of the three main options. For instance, Option 1 might be useful as a last-resort backup plan for those situations in which neither Option 2 nor 3 can be executed. Option 2 works when there is a running mate, but a good law should provide for situations when there is not one. Option 3 works best when the dead candidate represents a well-organized party, but that might not always be the case, and other options can cover such a situation.

Swiftness and certainty would be among the most important characteristics of an optimal contingent-election system. In a contingent-election scenario, the nation would already be faced with a truncated transition period for the new administration, with all the ill effects that entails.<sup>171</sup> Compressing the transition period by ten weeks (or more) is bad, but filling those ten weeks with wrenching uncertainty would be damaging and potentially dangerous for the country. A contingent election would present enough uncertainty as it is. Adding a candidate death would be even more challenging, and having an unclear replacement process would be still worse. The option of having the Electoral College reconvene scores poorly on these criteria as well.

Swiftness is easier to provide than certainty. Options 1 and 2 take no time at all. Option 3 would take time, but Section 4 legislation using Option 3 could place an outer time limit on it and specify a backup rule when that time limit is missed. Reconvening the Electoral College would take the longest of all.

Certainty is a trickier proposition, because it requires that the Section 4 law cover whatever circumstances have arisen. This requires some planning; certainty would bring some level of complexity with it, but complexity would be a price worth paying. It is impossible for Congress to think of every possible wrinkle in advance, let alone to cram perfect solutions for all of them into a single piece of legislation. Still, Congress should do the best that it can and should not be afraid of cramming in solutions for at least some of the problems that it considers likeliest to occur.<sup>172</sup>

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<sup>171</sup> See generally Tevi Troy, *Measuring the Drapes*, NAT'L AFF., Spring 2013, at 86 (discussing problems with too-short presidential transitions, and recent reforms adopted to address those problems).

<sup>172</sup> Cf. Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 1003–05 (2010) (noting crucially helpful decision of Twenty-Fifth Amendment's proponents not to try to provide for every eventuality).

*F. Proposed Legislation*

Taking into account all of the considerations discussed above, this Section proposes specific language for a Section 4 law. It does not contain the legislative language associated with codification, but presumably the bill would be codified in Title 3, Chapter 1 of the U.S. Code.<sup>173</sup>

Section 2 of the bill chooses Option 2 as the first choice for contingent presidential elections, with Option 3 and Option 1 as backstops when there is no running mate. As discussed above, Option 2 takes the role of running mate more seriously than Option 3 does, and it provides a much faster (indeed, instantaneous) and more certain result. It also avoids the problems that reconvening the Electoral College would entail.<sup>174</sup>

For contingent vice-presidential elections, Section 3 of the bill chooses Option 3, with Option 1 as a backstop, for the reasons discussed above.<sup>175</sup> Section 3 also gives electors a choice, when a running mate steps into the contingent presidential election, of how to handle the running mate's candidacy in the contingent vice-presidential election. If the electors choose, they can replace such a vice-presidential candidate with a new one.

Under Section 4 of the bill, when electors have a choice, they would have a 72-hour time limit to make it, though that clock would not start ticking until 72 hours before Congress is scheduled to convene to count the electoral votes. Section 4 also specifies that the electors' choice requires only a majority and it provides for rapid transmission of their choices to the Capitol.

Section 5 of the bill defines some terms. In doing so, it requires a legal declaration of death before a candidate is considered "deceased." It also eliminates absent electors from the denominator, and it clarifies what to do when a candidate has multiple running mates.

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**A BILL**

To provide for the case of a candidate's death in a contingent presidential or vice-presidential election.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE**

This Act may be cited as the "Twentieth Amendment Section Four Implementation Act".

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<sup>173</sup> See 3 U.S.C. §§ 1–21 (2012) (covering presidential elections and vacancies).

<sup>174</sup> See *supra* Sections III.C.2–4.

<sup>175</sup> See *supra* Section III.D.

**SEC. 2. REPLACEMENT OF A CONTINGENT PRESIDENTIAL CANDIDATE**

(a) In the case of the death of any of the persons from whom the House of Representatives may choose in a contingent presidential election, the House of Representatives shall consider the deceased candidate's running mate to be the deceased candidate's replacement as an eligible candidate for purposes of choosing a President.

(b) If the deceased candidate's running mate is also deceased, or if the deceased candidate has no running mate, the House of Representatives shall consider a candidate designated by the deceased candidate's electors to be the deceased candidate's replacement as an eligible candidate for purposes of choosing a President, provided that the designation has complied with Section 4 of this Act.

(c) If a replacement candidate is not named as provided in Subsection (a) or Subsection (b), the House of Representatives shall consider the deceased candidate to be an eligible candidate in the contingent presidential election. If the deceased candidate wins the contingent presidential election, he or she shall be considered as a President-elect who has died.

**SEC. 3. REPLACEMENT OF A CONTINGENT VICE-PRESIDENTIAL CANDIDATE**

(a) In the case of the death of any of the persons from whom the Senate may choose in a contingent vice-presidential election, the Senate shall consider a candidate designated by the deceased candidate's electors to be the candidate's replacement as an eligible candidate for purposes of choosing a Vice President, provided that the designation has complied with Section 4 of this Act.

(b) If a replacement candidate is not named as provided in Subsection (a), the Senate shall treat the deceased candidate to be an eligible candidate in the contingent vice-presidential election. If the deceased candidate wins the contingent vice-presidential election, he or she shall be considered as a Vice-President-elect who has died.

(c) In the case of the replacement of a deceased presidential candidate by his or her running mate as provided in Section 2 of this Act, if the running mate is simultaneously a candidate in a contingent vice-presidential election, the vice-presidential candidate's electors may choose to designate a candidate to replace the running mate in the contingent vice-presidential election. The Senate shall consider any candidate so designated to be the running mate's replacement as an eligible candidate for purposes of choosing a Vice President, provided that the designation has complied with Section 4 of this Act.

**SEC. 4. PROCESS FOR REPLACEMENT OF CANDIDATES BY ELECTORS**

(a) For a deceased candidate's electors to designate a replacement candidate in a contingent presidential election or contingent vice-presidential election under this Act, the designation must—

(1) be made either within 72 hours after the deceased candidate's death, or by the day and time prescribed by law for Congress to count the electoral votes, whichever time is later; and

(2) represent the choice of at least a simple majority of the deceased candidate's electors.

(b) The deceased candidate's electors shall register their individual choices in the form "My choice to replace [deceased candidate] is [replacement candidate]" and send them via electronic mail, facsimile, or United States Postal Service, to the Clerk of the House of Representatives (for contingent presidential elections) or Secretary of the Senate (for contingent vice-presidential elections). For purposes of Subsection (a), an elector's designation will be considered to have been made at the time it is received by the designated officer.

**SEC. 5. DEFINITIONS**

When used in this Act:

(a) The term "contingent presidential election" means the process in the House of Representatives for choosing a President after the right of choice has devolved upon the House of Representatives as provided in the twelfth article of amendment to the Constitution of the United States.

(b) The term "contingent vice-presidential election" means the process in the Senate for choosing a Vice President after the right of choice has devolved upon the Senate as provided in the twelfth article of amendment to the Constitution of the United States.

(c) The term "deceased candidate" means a person who:

(1) has received enough electoral votes to be a candidate in either a contingent presidential election or contingent vice-presidential election; and

(2) has been declared dead by a legally qualified authority.

(d) The term "deceased candidate's elector" means a person who:

(1) cast an electoral vote for the deceased candidate in the current election; and

(2) remains competent to communicate his or her choice of a replacement candidate.

(e) (1) The term "running mate" means the person who receives votes for the office of Vice President from the same electors as the candidate for the office of President whose running mate he or she is.

(2) If a presidential candidate has more than one running mate under this definition, then the one with the highest number of electoral votes from the presidential candidate's electors shall be considered the presidential candidate's running mate.

(3) If a presidential candidate has more than one running mate under the definition in subsection (2), then the one who received the highest total number of popular votes in the current election on the presidential candidate's ticket, in those states in which the presidential candidate received any electoral votes, shall be considered the presidential candidate's running mate.

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#### IV. EXPLAINING CONGRESS'S FECKLESSNESS

Throughout the preceding discussion, a question has lurked in the background: why has Congress never passed a Section 4 law, or even really tried? This part of the Article will briefly address that question.

It is no secret that Congress is not known for passing proactive legislation in response to remote, potential problems, especially when there are no powerful constituencies pushing for it, or elections to be won by passing it.<sup>176</sup> Section 4's lack of legislation certainly represents a fine example of this phenomenon. Without any sort of precipitating event to bring candidate deaths and contingent elections to the forefront of American political consciousness, Section 4 has never been able to rise to the top of the agenda above countless other, more immediate issues.

The Twentieth Amendment passed Congress in March 1932, and was ratified by the requisite number of states in January 1933.<sup>177</sup> But Section 4 had emerged from a House committee several years earlier, in 1926; the energy that generated it had dissipated by the time the amendment passed. The House did not pass a version of the amendment until 1931, and while the Senate passed a version of the amendment every session from 1923 to 1932, it was only in 1932, with final passage after a conference committee, that it considered a version with anything like Section 4 in it.<sup>178</sup>

In 1926, moreover, there was more reason to think about contingent elections than there was afterward. Senator Robert La Follette had run a relatively strong third-party campaign against President Coolidge and Democratic nominee John W. Davis in 1924, winning 17% of the popular vote and 13 electoral votes.<sup>179</sup> The election itself was not close; President Coolidge was elected by a landslide, and would have won even if all of La Follette's

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<sup>176</sup> Cf. Goldstein, *supra* note 172, at 998–1013 (exploring factors that led to the Twenty-Fifth Amendment's successful passage through Congress); Tribe & Rollins, *supra* note 35, at 61 (“[E]xperience counsels caution in changing the Constitution's fundamental design, moved by what are at worst hypothetical fears and contingent anxieties.”).

<sup>177</sup> See *supra* note 82 and accompanying text.

<sup>178</sup> See *supra* Section II.C.

<sup>179</sup> See *1924 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1924> [<https://perma.cc/B9KT-D5ZE>]; *Hearings on H.J. Res. 65*, *supra* note 70, at 1–2 (statement of William Tyler Page, Clerk of the House of Reps.) (describing inspiration provided by the Election of 1924 for addressing constitutional deficiencies in the contingent-election process).

and Davis's votes had been combined under one candidate.<sup>180</sup> But the fact that a third-party candidate had attracted even that much support raised the specter of a presidential election being thrown into the House in a way that the Elections of 1928 and 1932 did not. In the few discussions of Section 4 in the legislative history, La Follette (who was ill in 1924 and died in June 1925) and his candidacy feature prominently.<sup>181</sup> Similarly, the three-way Election of 1912 was a more recent memory in 1926 than in 1932.<sup>182</sup> By 1932, the two-party system was back in full swing.<sup>183</sup> The prospect of a contingent election, never prominent, had faded further away.

In addition, Section 4 was always a peripheral part of the Twentieth Amendment, whose main focus is reflected in its popular name: the "Lame Duck Amendment."<sup>184</sup> As the amendment was debated, the lame-duck provisions received the most attention by far.<sup>185</sup> When Section 4 came up for actual discussion, the comments about it were generally favorable—sometimes very much so—but they were few and very far between.<sup>186</sup>

When the amendment was finally ratified, it was in the midst of one of the best arguments in American history for a lame-duck amendment. After Franklin Roosevelt was elected President in November 1932, the long transition period was filled with panic and chaos before Roosevelt and the new

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<sup>180</sup> See *1924 Presidential General Election Data—National*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/data.php?year=1924&datatype=national&def=1> [<https://perma.cc/AAR3-SG8X>].

<sup>181</sup> See *supra* note 105 and accompanying text.

<sup>182</sup> See *supra* note 52 and accompanying text.

<sup>183</sup> There were no significant third-party candidacies in 1928 or 1932. They occurred only sporadically after that, in 1948 (when Strom Thurmond won 39 electoral votes in the South), 1968 (when George Wallace won 46 electoral votes in the South), and 1992 and 1996 (when Ross Perot won 19% and 8% of the popular vote, respectively). See *1948 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1948> [<https://perma.cc/S5QA-LMEV>]; *1968 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1968> [<https://perma.cc/532W-WG94>]; *1992 Presidential General Election Results*, *supra* note 164; *1996 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1996> [<https://perma.cc/XRE8-DG63>]. In 1960, non-candidate Harry Byrd won fifteen electoral votes. See *1960 Presidential General Election Results*, *supra* note 170.

<sup>184</sup> See, e.g., JOHN R. VILE, *A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS* 213 (2015); AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 428–30 (2005).

<sup>185</sup> This is a characterization of the content of the thorough legislative history compiled by *ProQuest Legislative Insight*.

<sup>186</sup> See, e.g., 69 CONG. REC. 4418 (statement of Rep. Vinson) (noting lack of opposition to Section 4); *id.* at 4206 (statement of Rep. Lozier) (referring to Section 4 as "exceedingly wholesome"). Several statements even suggested, perhaps hyperbolically, that the non-lame-duck portions of the amendment were more valuable than the lame-duck portions. See, e.g., 74 CONG. REC. 5887 (1931) (statement of Rep. Lozier); *id.* at 4370 (statement of Rep. Chindblom); *id.* at 4220 (statement of Rep. Mapes). For examples of the more typical statements about the amendment that accord Section 4 its usual low priority, see 75 CONG. REC. 5085 (statement of Sen. Norris); *id.* at 3880–81 (1932) (statement of Rep. Gibson).

Congress came to power in March 1933.<sup>187</sup> Had the amendment been ratified a year earlier, the wait would have been only until January, and Roosevelt would not have needed to call a special session of Congress. It is perhaps no coincidence that most of the states that ratified the Twentieth Amendment did so between Roosevelt's election and his inauguration.<sup>188</sup>

To the extent that the amendment excited the popular imagination and its political representation in Congress, it was in favor of the notion of swifter, more responsive government. With the New Deal Congress producing a flurry of legislation to deal with the Great Depression, contingent-election arcana could not have been much further out of mind.<sup>189</sup> The Great Depression continued its hold on the national agenda for many years, and then was replaced by the similarly absorbing World War II and Cold War. The energy that motivated the House committee to write Section 4 in 1926 faded still further into the background, never to be recaptured.

Significantly, this failure influenced Congress the next time it turned to consider a proactive constitutional amendment concerning the presidency. When the Twenty-Fifth Amendment's presidential disability provisions were being debated, there were multiple theories of the best way to proceed. Some people proposed that, rather than try to agree on a specific procedure, the amendment should just empower Congress to pass legislation to do so. The amendment's sponsor, Birch Bayh, rejected this idea, noting that the Twentieth Amendment had tried such an approach, and no legislation had ever passed. Better, he said, to write in specifics rather than put the task off to some later time, by which point "interest may have waned."<sup>190</sup>

Another characteristic of Section 4 legislation cuts both ways. Because Section 4 legislation offers no payoff for any particular political players or interest groups, there is necessarily a shortage of legislative leaders moti-

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<sup>187</sup> See Kyvig, *supra* note 55, at 368 (noting juxtaposition of ratification and awful 1933 lame-duck period).

<sup>188</sup> See *id.* at 367 (describing timing of states' ratification). Seventeen states ratified the amendment before the Election of 1932. The remaining nineteen needed for ratification did so between the election and the inauguration (along with ten more states that ratified the amendment after that, for good measure). Two more ratified the amendment after Roosevelt's inauguration. To be sure, it surely also mattered that many state legislatures did not convene until early January, and thus between the election and presidential inauguration.

Interestingly, President-elect Roosevelt was nearly assassinated during that period; Section 3 of the Twentieth Amendment, ratified just twenty-three days earlier, would have provided for the smooth elevation of Vice President-elect John Nance Garner, and would not have required any legislative action to do so.

<sup>189</sup> Indeed, there were those who objected to passing the Twentieth Amendment at all given the pressing matter of the Great Depression. As one intemperate (if colorful) representative put it: "Why, the Congress of the United States, with 8,000,000 of our citizens unemployed and hungry, should devote two whole days—and maybe more—of its time to considering this particular constitutional amendment is beyond my conception . . . We should not waste our valuable time with a measure such as this—conceived by crackaloes, propagated by crackpots, and supported by thoughtless demagogues." 75 CONG. REC. 3827 (1932) (statement of Rep. O'Connor).

<sup>190</sup> 111 CONG. REC. 3271 (1965) (statement of Sen. Bayh).

vated to pick up the Section 4 banner and run with it. But if and when some precipitating event piques enough interest in Section 4 to spur the introduction of legislation, the fact that it would not face any particular partisan opposition, or disturb any interbranch sensitivities—no one would have any particular axe to grind against it, in other words—would help proposals move through the legislative process more easily.

A final characteristic of Section 4 would make legislation more difficult to pass, and consequently less likely to be introduced in the first place. As Part II of this Article should have demonstrated, there is no single obvious, universally appealing design for Section 4 legislation. Indeed, if there were, it would make more sense for Congress to conserve its energy and wait to pass such easy legislation only if and when a candidate in a contingent election died. All other things being equal, the more competing legislative solutions there are to a problem, the harder it will be to build consensus. The harder it will be to build consensus, the less incentive Congress has to expend its limited resources on the exercise.

#### V. CONCLUSION

It would be naïve simply to recommend that, because it would be sensible to debate and pass Section 4 legislation before it is needed, Congress should do so promptly. Perhaps there will come a day, though, when the country's attention is drawn to contingent elections or candidate deaths—ideally because of a near miss rather than an actual disaster like the one that opened this Article. Alternatively, in the midst of an election season in which deadlock and contingent elections look like a real possibility, but before the results are set in November, Congress could finally notice the problem here. It might then be moved to protect the Republic from the awful consequences that would be wrought by a candidate's death—let alone by a candidate's assassination.

If the nation's interest is piqued in any of these ways, Congress might respond with a sensible piece of Section 4 legislation, hopefully guided by the arguments presented here. Lightning struck in 1926 when Section 4 was conceived; maybe it will strike again.