

PRESIDENTIAL ELECTIONS AND CONSTITUTIONAL STUPIDITIES

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Amendment XII: The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote. . . .; and a majority of all the states shall be necessary to a choice. . . . The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President. . . .

Amendment XX: The terms of the President and Vice-President shall end at noon on the 20th day of January. . . .

On November 4, 1980, Ronald Reagan decisively defeated Jimmy Carter, the incumbent President (who had himself defeated an incumbent President four years before). Perhaps more to the point, in the 1980 election the electorate “repudiated” much of the legacy of the Democratic Party and declared its preference for leadership in a significantly different direction.¹ Ronald Reagan did not, however, take office until January 20, 1981. On November 8, 1992, the incumbent, George Bush, garnered less than 40% of the popular vote; Bill Clinton was elected with 43% of the popular vote, while Ross Perot got 19%. Again, a desire for “change” was widely viewed as one of the meanings of

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1. I borrow the term “repudiation” from Stephen Skowronek’s important book *The Politics Presidents Make: Leadership from John Adams to George Bush* 36 (Belknap Press, 1993).

the election. Clinton, of course, did not take office until January 20, 1992.

On November 5, 1996, almost anything is thinkable, given the current state of American politics: Perhaps Phil Gramm will indeed be elected on a platform of full-scale destruction of what will still remain of the 20th-century regulatory- and welfare-state. He would, presumably, have to wait until January 20, 1997, to begin the final dismantling. Or perhaps disaffected Democrats on the left and either pro- or anti-choice Republicans will choose to bolt from their respective parties and run insurgent candidates that capture enough of the electoral vote to throw the election into the Congress. Any result other than Bill Clinton's reelection will highlight what I deem the most mischievous feature(s) of the current Constitution.

Consider first the easier (and far more common) case—the defeat of a sitting President followed by a ten-week hiatus in which the repudiated incumbent continues to possess the full legal powers of the modern American presidency, including, as illustrated by the Bush interregnum, the power to send troops abroad (to Somalia) and to pardon criminals (Elliot Abrams) or possible collaborators in arguably illegal conduct (e.g., Caspar Weinberger).

This is not, in fact, constitutionally required: It is the result of the contingency that we vote for presidential electors on the first Tuesday after the first Monday, thanks to Congress's exercise of its authority, given by Article II, § 1, cl. 4, to set a nationally uniform election day.² So, as a technical matter, my concerns about the gap between election and inauguration do *not* require changing our Constitution at all; Congress need only set the election on, say, the first Sunday following the New Year in January, with the electors to meet the following Wednesday³ and Congress in turn to receive the electoral-vote count on the next Monday. Inauguration could then occur unproblematically on January 20, unless, of course, no candidate had received a majority of electoral votes (to which I shall return presently).

What is wrong with the present way of doing things? First, there is something profoundly troubling, to a democrat, in allowing repudiated Presidents to continue to exercise the perogatives of what is usually called the “most powerful political office

2. 3 U.S.C.A. § 1 (1985) (codifying 62 Stat. 672, June 25, 1948).

3. It should be clear that I am not discussing the merits of the electoral college as such.

in the world.”⁴ But theoretical troublesomeness is scarcely the worst consequence. The response to the Great Depression was scarcely helped by the open discord between Herbert Hoover and Franklin Roosevelt between November, 1932 and the then-Inauguration Day of March 4, 1933. Indeed, one motive for the 20th Amendment was precisely to overcome this four-month hiatus and its perceived disadvantages. Those who framed the 20th Amendment were on to something important; they simply didn’t go far enough. The best test of this proposition is a simple question: Would anyone reading this essay seriously recommend to any foreign country that it adopt an election-inauguration structure like our own?⁵

The consequences go beyond the mischief that can be done by a tired, perhaps bitter, repudiated incumbent. Our current structure directly contributes to the pernicious practice of candidates feeling no need whatsoever to identify anyone who would occupy high positions in their administrations. Were there only, say, 10 days between election and inauguration, a candidate would *have* to identify such occupants, and voters would therefore have a far greater sense of what sort of administration they were actually likely to get. My colleague Scot Powe chides me for believing that voters care about the future Secretary of Housing and Urban Development. Fair enough, but do *no* voters care about the likely identity of the Secretaries of State and Defense and the Attorney General (for starters)? Are we content to keep reposing blind faith in elected quasi-kings (or, in the future, queens) to choose “the best and the brightest” to exercise power over our national destiny and personal security?

But maybe we need the extra time so that Congress can choose the President and Vice-President when no candidate gets a majority of the electoral votes. If so, would any sane person choose, in 1995, the system bequeathed us by the framers? Why in the world should the House of Representatives vote by state

4. The same might be said, incidentally, in regard to “lame-duck” or, even worse, out-and-out defeated members of Congress. Any true democrat should, at the very least, be troubled by the ratification of GATT by the lame-duck Congress in December 1994 instead of the newly elected Republican Congress that, for better or worse, represented an even sharper repudiation of the prior Democratic majority than did Clinton’s election of the Bush Administration. It is not clear to me why the country benefits from the eight-week gap between legislative elections and installation in office, but that is the subject for another essay.

5. This question assumes that the country has in fact chosen to have a strong President elected separately from its legislature. As Mark Tushnet notes, almost no other countries have in fact opted for our distinctive political structure, and several of the contributors to this Symposium suggest that it might be we, rather than they, who have made the fundamental mistake.

instead of by member? Even if one rejects Suzanna Sherry's and Bill Eskridge's denunciations of the Senate's malapportionment, it seems inexplicable that anyone would accept, let alone glory in, the possibility that a majority of state delegations in the House of Representatives, representing far less than a majority of the national population, would inflict their choice upon the rest of the country. And even if one can explain why the Senate gets to choose the Vice President, why restrict the list to two, unless we simply want to assure that there *will* be a Vice President, who can thereupon assume the office of the Presidency should the House continue to be deadlocked among the three candidates from whom it picks?

In any event, I believe that only the most blind ancestor worship can generate any affection at all for our present scheme of electing and then installing in office our Chief Executive. We now regularly live with the mischief of the election-inauguration gap; it is at least thinkable that we will experience the full meaning of the Twelfth Amendment in January of 1997. The Constitution *is* broke; we should fix it.