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1825 to 2025 -- A Modern Update to the House Rules on Contingent Elections By Vincent Gritzuk¹

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INTRODUCTION

US presidential elections have grown more contentious and continue to depend on slimmer margins of victory.² The possibility of a viable third-party candidate makes it ever more likely that the two major party candidates will fail to win a majority in the Electoral College. If no candidate reaches the necessary 270 elector majority, the Twelfth Amendment to the United States Constitution provides broad guidelines to elect the President through a process known as a “contingent election”.³ However, the Twelfth Amendment, supplemented by the Twentieth Amendment, leaves many procedural elements of a contingent election to the discretion of Congress, which could change the outcome of the election.⁴ Given the current tension in American politics, it is essential that the House base these procedures on historical and current practices to satisfy the untrusting eye of the American public. This paper seeks to analyze the history of contingent elections in the House, alongside modern practices, to support our proposed rules for a modern contingent election.

To understand the process and relevant questions, it is important to outline the current situation that is making a contingent election more likely, what framework the Twelfth and Twentieth Amendments to the United States Constitution provide, the guidance from the last contingent election in 1825, and the current House procedures to finally address our proposed rules that are adapted to the modern era.

² Although President Biden won the popular vote by nearly 7 million votes in 2020, his margin of victory within the states was much closer. For instance, there were only 42,918 votes that prevented each candidate from receiving 269 electors. President Biden only won Arizona with its 11 electors by 10,457 votes, Georgia with its 16 electors by 11,779, and Wisconsin with its 10 electors by 20,682. If this narrow margin were flipped, the House would have been tasked with choosing the President in 2020. See *Presidential Election Results: Biden Wins*, THE NEW YORK TIMES (Nov. 2020), <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html>.

³ See U.S. CONST. amend. XII.

⁴ See *id.*; U.S. CONST. amend. XX, § 1.

THE CURRENT STATE OF AMERICAN POLITICS

The 2020 presidential election was undeniably close in many aspects.⁵ The 2024 election may be similarly close with an increased chance of a third presidential candidate siphoning votes from the two major party candidates.⁶ If it falls to the House of Representatives to decide the presidential election, any candidate may confront a complicated path to victory.

The 118th Congress will likely not be the Congress to decide a contingent election if one were to occur in 2025⁷, but it is a helpful starting point to understand the even divide between the political parties. In a contingent election, each state delegation has one vote, making the total majority in the House less important than the number of states each party has a majority in. Conceivably, this means that a party could hold a strong majority of seats in the House but not control the majority of states if their dominance is concentrated in few states. Republicans hold the majority of seats in 26 states in the 118th Congress, and Democrats hold the majority of seats in 22 states, with North Carolina and Minnesota evenly split.⁸ There are also several states where either party holds less than a three-seat majority, including major swing states like Pennsylvania.⁹ Thus, Republicans would need to hold strong in every state they control, or

⁵ See *Presidential Election Results: Biden Wins* (2020).

⁶ See e.g., Harry Enten, *How RFK Jr. Could Change the Outcome of the 2024 Election*, CNN, (Nov. 11, 2023), <https://www.cnn.com/2023/11/11/politics/robert-kennedy-rfk-2024-election-outcome/index.html>.

⁷ There is potential for the lame duck Congress to conduct a contingent election. In 1825, the lame duck Congress conducted the contingent election, but the 20th Amendment moved the start of the new Congress to January 3rd, and the Electoral Court Act made certification on January 6th. Therefore, a contingent election would occur after the election was certified according to the statute. Since this schedule is merely established by statute, Congress and the president could enact a law that would move certification into the lame duck Congress's term, giving it the power to conduct the contingent election. However, this is unlikely unless the party to gain from this proceeding occupied both houses of Congress and the presidency.

⁸ See [Appendix Chart 1](#)

⁹ See [id.](#)

Democrats would need to flip three states for their candidate to win a contingent election in the current House on a party line vote.¹⁰

Of course, unified parties are no guarantee in 2025. The recent ouster of Kevin McCarthy as Speaker, and the extended selection process that ensued where Republicans demonstrated the current division within the Party, is a relevant backdrop to the presidential election.¹¹ These several factors culminate into a risk of substantial division within and between the parties in the House of Representatives if they are called upon to elect the next President of the United States. Therefore, the dearth of laws governing contingent elections creates several procedural issues that must be addressed to avoid compromising the legitimacy of a contingent election.

Unlike the situation that led to *Bush v. Gore* in the 2000 presidential election, the procedural issues in a contingent election cannot be resolved by the Supreme Court.¹² The Constitution provides that each House shall create its own procedures, thus the other branches cannot provide answers to the procedural questions that the House must address before a contingent election.¹³ If an issue arises where the House fails to follow its own procedures during a contingent election, the Court may then have the ability to intervene.¹⁴ Even then, the political nature of this process may require the Court to act with exceptional caution before intervening.

¹⁰ See *id.*

¹¹ See e.g., Lisa Mascaro and Farnoush Amiri, *Kevin McCarthy Ousted as House Speaker in Dramatic Vote*, PBS, (Oct. 3, 2023), <https://www.pbs.org/newshour/politics/kevin-mccarthy-ousted-as-house-speaker-in-dramatic-vote>.

¹² 531 U.S. 98 (2000).

¹³ Art. 1 Section 5 I believe for each House making its procedures

¹⁴ See e.g., *United States v. Smith*, 286 U.S. 6 (1932); *Christoffel v. United States*, 338 U.S. 84, 87 (1949).

CONTROLLING CONSTITUTIONAL LAW

The Constitution broadly establishes guidelines for a contingent election in the Twelfth Amendment, which was later supplemented by the Twentieth Amendment. These Amendments combine to establish a broad framework for the procedures that must be followed and when the election should occur.

a. The Twelfth Amendment to the US Constitution

If the Electoral College fails to elect a President and Vice President, the Twelfth Amendment creates broad provisions for the House to choose a President, with more succinct provisions for the Senate to choose a Vice President.¹⁵ The relevant text of the Amendment for the Senate states,

if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.¹⁶

The only open question in the Twelfth Amendment regarding Senate procedure is how Senators should cast their votes. Since the Amendment requires that the House vote via “ballot” and does not specify the same for the Senate, this has historically been interpreted to allow for a voice

¹⁵ See U.S. CONST. amend. XII. See also Martin Frost, *Martin Frost's Memorandum on the Election of the President in the House of Representatives*, CONGRESSIONAL RECORDS, 15,690, vol. 138 (June 22, 1992), <https://www.congress.gov/bound-congressional-record/1992/06/22/house-section>.

¹⁶ See U.S. CONST. amend. XII.

vote.¹⁷ The Senate employed a voice vote in 1801 and 1825, suggesting that the same will occur in a future contingent election.¹⁸

By contrast, the Twelfth Amendment is less clear regarding procedures the House must follow in selecting a President, stating,

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; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.¹⁹

The Amendment clearly requires that the House begin voting immediately, with members from at least two-thirds of the states present, choose from the top three candidates, vote by ballot with each state having one vote, and to win, a candidate must receive votes from the majority of the states.²⁰ Outside of these requirements, there are several procedural issues that the House must address by adopting rules to govern the contingent election.²¹

In 1825, the House adopted rules to answer these questions, and while these procedures are instructive, they are not binding on a future House.²² The Twentieth Amendment was ratified

¹⁷ See William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. P.A. J. CONST. L. 597 (2009).

¹⁸ See THOMAS NEALE, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS, (Congressional Research Services 2020) <https://crsreports.congress.gov/product/pdf/R/R40504/7>.

¹⁹ See U.S. CONST. amend. XII.

²⁰ See *id.*

²¹ See Frost, *supra*.

²² See *id.*; U.S. CONST. art. I § 6, cl. 2.

more than a century after the 1825 election, creating additional guidance for Congress in a contingent election.²³

b. The Twentieth Amendment to the US Constitution

The Twentieth Amendment establishes the dates that presidential and congressional terms begin, along with the line of succession. The Amendment sets January 3rd at noon as the start of the new Congress.²⁴ The terms of the President and Vice President are set to begin at noon on January 20th.²⁵ The Electoral Count Act also provides that Congress shall certify the elector votes on January 6th.²⁶ Thus, the new Congress would count the electoral votes on January 6th in a joint session, and upon completion, would return to each house and begin the process of selecting the President and Vice President in the event no candidate earns a majority of the Electoral College.

In the case that the House fails to choose a President by January 20th, the day that the Twentieth Amendment set for inaugurating the President, then the line of succession temporarily begins, following the framework of this Amendment.²⁷ The Presidential Succession Act provides specific guidelines for the line of succession, which would place the newly elected Vice President as the Acting President, and the Speaker of the House would be removed from presiding over the contingent election in the House to become the Acting Vice President.²⁸ If the Speaker is the presiding officer over the election in the House, a new question arises about who should replace them as presiding officer over the contingent election if they become Acting Vice

²³ See U.S. CONST. amend. XX, § 1.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See 3 U.S.C. § 15.

²⁷ See 3 USC § 19; U.S. CONST. amend. XX, § 1.

²⁸ See 3 USC § 19.

President. Though no answer to this question was provided in 1825, this 200-year-old guidance provides a useful outline to the process and will help guide new procedural rules.²⁹

PAST CONTINGENT ELECTION GUIDANCE

The only other time the House selected the President after the passage of the Twelfth Amendment was in 1825 when it elected President John Quincy Adams.³⁰ Of course, the House is free to create its own rules in every new Congress, but this past guidance is helpful precedent in structuring new procedures.³¹ The 1825 House contingent election rules are 200 years old, so there are undoubtedly changes to the political norms in American society which require changes to the procedures. In 1980, Representative Martin Frost authored a report for the House Committee on Rules outlining several areas of the 1825 contingent election that should be reviewed in the modern era.³² Though this major report described deficiencies that may be of concern in a contingent election, the House has not addressed any.³³ The report reviewed several questions, including: which committee should have jurisdiction over the creation of the rules, who should preside, whether the proceedings should be open to the public, when a quorum is established, if the ballots must be secret, and finally is plurality voting permissible at any stage or is majority voting the only option?³⁴

²⁹ See H.R., RULES TO BE OBSERVED BY THE HOUSE OF REPRESENTATIVES IN THE CHOICE OF PRESIDENT OF THE UNITED STATES (1825).

³⁰ See Margaret Hogan, *John Quincy Adams: Campaigns and Elections*, UVA MILLER CENTER, <https://millercenter.org/president/jqadams/campaigns-and-elections>.

³¹ See U.S. CONST. art. I § 6, cl. 2.

³² See Frost, *supra*.

³³ See generally, Josephson, *supra*.

³⁴ See Frost, *supra*.

a. *The procedural answers in 1825.*

Each of the concerns raised by Congressman Frost, in what has become known as the Frost Memo, were addressed in 1825.³⁵ However, changes in American political norms and governance may require changes to some of these procedures.³⁶ The first issue that the House must address in a contingent election is which committee has jurisdiction to draft and sponsor the rules governing the contingent election.

In 1825, an *ad hoc* Committee was appointed by the Speaker to create the procedures for the election.³⁷ The committee included a Representative from each state, but there is no recoverable information to suggest why each was chosen. The modern two-party system did not exist in 1825, and all candidates for President were members of the Democratic-Republican Party, so political party balance on the committee may not have been a major concern.³⁸

Once the committee was established, there is no clear record regarding the drafting process for the contingent election rules, although many of the rules from the 1801 contingent election were readopted.³⁹ The committee report that followed gave little insight into this process and did not explain any changes to the 1801 rules now that the Twelfth Amendment applied.⁴⁰

Frost doubted that a similar *ad hoc* committee could be established in the modern era, especially in view of the currently existing House committees.⁴¹ He suggested that there will likely be several committees claiming jurisdiction over this matter, which would make it likely

³⁵ See Frost, *supra*; H.R. 1825, *supra*.

³⁶ See Frost, *supra*.

³⁷ See Josephson, *supra* at 625.

³⁸ See Hogan, *supra*.

³⁹ See Neale, *supra*.

⁴⁰ See H.R. RULES 1825.

⁴¹ See Frost, *supra* at 15,691.

that one of these committees would draft the rules.⁴² With a committee established to create the rules, the next question is whether the proceedings should be open to the public.

In 1825 the procedural rules stated that “[t]he doors of the Hall shall be closed during the balloting.”⁴³ The Representatives at the time were very concerned with public scrutiny potentially influencing the election, and therefore required the upmost secrecy throughout the process.⁴⁴ The Frost Memo highlights potential public concerns with such a secretive process in the modern era.⁴⁵

The 1825 House debated extensively over the issue of closing the galleries.⁴⁶ Many Representatives were concerned with the public having a prejudicial impact on the Representatives and therefore, the outcome of the election.⁴⁷ On the other hand, some debated whether closing the galleries will lead to more corrupt back door dealings.⁴⁸ Although the House decided to close the galleries, some Representatives were concerned that doing so may lead to future “corruption in the vote.”⁴⁹ Of course, the events of January 6, 2021 may cause the incoming House to opt for security over optics in 2025.

The Frost Memo highlights the current open access that the public enjoys in the legislative process, unlike in 1825.⁵⁰ In 1825 there was not mass communication or social media that would allow the general public to immediately be aware of the proceedings, unlike the

⁴² See Frost, *supra* at 15,690.

⁴³ See H.R. 1825, *supra*.

⁴⁴ See Frost, *supra* at 15,691.

⁴⁵ See *id.*

⁴⁶ See ASHER HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 293, vol. 3 (1907).

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See Frost, *supra*.

modern day. Therefore, the possibility of individuals in the gallery pressuring the votes of Representatives may be less likely now that it would be caught on camera.⁵¹ While this issue was extensively debated, the modern partisan state creates new questions that were not raised in 1825.

At the outset of the proceedings, the rules will likely need to establish a presiding officer for the election. This may not need to be a formal position for a single Representative, but House rules will certainly require someone to preside over this session.⁵² This officer will have a limited role of organizing aspects of the vote, acknowledging questions that may arise, commencing and adjourning the proceedings, and ensuring that the rules are followed.⁵³ In 1825, the person to hold this position was undoubtedly the Speaker.

Congressional records from the 1825 election do not highlight a debate over this question which likely seemed resolved before the proceedings began.⁵⁴ In fact, the Speaker began the proceedings by establishing an *ad hoc* committee to create the election procedures without any apparent guidance from the rest of the House.⁵⁵ Generally, the Speaker was the accepted leader of the entire House and there was not much question to his authority.⁵⁶ Though the Speaker continues to have similar authority in the modern era, the partisan tension surrounding a contingent election may make it less favorable to have a partisan Speaker presiding over the election.

⁵¹ See Hinds, *supra*.

⁵² See H.R. RULES 17, cl. 10 (2021).

⁵³ See *id.* See also Neale, *supra* at 8.

⁵⁴ See Hinds, *supra*.

⁵⁵ See Neale, *supra* at 6.

⁵⁶ See *id.*

The recent removal of Speaker McCarthy and repeated balloting for his successor displays the challenge confronting the newly elected House.⁵⁷ The Speaker in the modern era may not even be considered the true leader of their own party, and they are certainly not viewed as a leader of the minority party. This raises two problems for the Speaker as the presiding officer over the House during a contingent election. The first is actually electing the Speaker, and the second is the authority that the Speaker will wield.

First, there is no historical precedent for the issue of electing a Speaker before a contingent election in the House.⁵⁸ The Twentieth Amendment did not exist when the 1825 election occurred.⁵⁹ Therefore, the lame duck Congress, with a sitting Speaker, elected John Quincy Adams, where the new Congress would pick the President in 2025.⁶⁰ In 1825, votes for the President were cast in November, but the President did not take office until March 4th, the same day as the new Congress.⁶¹ Therefore, when John Quincy Adams was elected by the House in February 1825, it was the lame duck House that conducted the contingent election.⁶² Since the Twentieth Amendment moved the start and end of Congressional terms to January 3rd, three days before the certification of electors, the new House would conduct the contingent election in the modern era, possibly before a Speaker is elected by the majority party.⁶³

The shift of authority to hold a contingent election from the lame duck House to the newly elected House means that the new House may not have a Speaker until one is elected after

⁵⁷ See Mascaro, *supra*.

⁵⁸ See Neale, *supra* at 5.

⁵⁹ See Brian Smentkowski, *Twentieth Amendment*, BRITANNICA, <https://www.britannica.com/topic/Twentieth-Amendment>.

⁶⁰ See Mascaro, *supra*.

⁶¹ See Hogan, *supra*.

⁶² See *id.*

⁶³ See U.S. CONST. amend. XX, § 1; 3 USC § 15.

January 3rd. Therefore, the House will have two and a half days before certification and the contingent election to elect a Speaker. Given the delays in the election of Speaker Johnson following the ouster of Speaker McCarthy, it may be unlikely that the House has a Speaker by January 6th.⁶⁴ If there is a delay in the election of a Speaker, the House must determine the meaning of “immediately” in the Twelfth Amendment and decide if it should continue the process of choosing a Speaker following certification or begin the contingent election.⁶⁵ Once the contingent election begins, the House must not stop voting until a President is elected.⁶⁶ Therefore, in this scenario, once the House decides to elect or not elect a Speaker before the contingent election, there will be no turning back. If the House chooses to continue attempting to elect a Speaker, the delayed start of the contingent election could result in a failure to pick the President by Inauguration Day on January 20th.⁶⁷ In this situation, the Speaker would become the Acting Vice President, creating a vacancy in the speakership during a contingent election.⁶⁸ Once again, this will launch the House into the constitutional question of pausing the Presidential election to elect a new Speaker, which was not considered in 1825.

If the Speaker is elected and remains in power for the entire contingent election, there is also a question of their authority in the proceedings. In 1825, the Speaker had substantial authority to act unilaterally. At the outset, the Speaker used this authority to choose members for the special committee and took authority to preside over any questions that could arise in the

⁶⁴ See Alexandra Hutzler et al., *New Speaker Mike Johnson Projects Unity After 3 Weeks of Chaos, Expects 'Aggressive' House Schedule*, ABC NEWS (Oct. 25, 2023) <https://abcnews.go.com/Politics/live-updates/House-speaker-vote-live-updates/?id=104039543>.

⁶⁵ See U.S. CONST. amend. XII.

⁶⁶ See *id.*; H.R. 1825, *supra*.

⁶⁷ Though the election of President John Quincy Adams in 1825 only required one ballot, a situation where the House is too divided to elect a Speaker may logically be too contentious to quickly elect a president.

⁶⁸ There is no concern that the Senate will fail to elect a Vice President by January 20th because it is only required to pick between two candidates by voice vote to reach a majority. Therefore, unless there is a significant boycott to prevent a quorum, the Senate likely elect the vice president well before January 20th.

election.⁶⁹ However, in the modern era of partisanship, a single partisan presiding officer may be problematic, especially in the view of the minority party, although the current House Rules extend significant authority to the Speaker. These problems could potentially derail the whole process, and they must be answered before the contingent election can begin.

The Frost Memo also raises a concern regarding quorums.⁷⁰ The 1825 rules required “a member or members from two-thirds of the States” to establish a quorum.⁷¹ The Frost Memo highlights that the literal meaning of this language may only require one or more members from two-thirds of the States to be in attendance.⁷² Theoretically, this would allow the President of the United States to be elected by as few as 34 of the 435 Representatives in the House. The record from 1825 shows no evidence of any problem of missing members.⁷³ While there was no problem of members failing to attend in the past, if the current mix of divided party representation in the House remains, a quorum of as few as one Member per state makes the possibility of a partisan boycott unlikely.⁷⁴

While the Frost Memo raised concerns about the possibility of one party boycotting the proceedings to attempt to prevent the election of a President from the opposing party,⁷⁵ under the literal meaning of the Twelfth Amendment, the House may be able to conduct the contingent election without the opposing party present. Given that opposing party presence is not required, it is unlikely that a boycott will occur, contrary to Frost’s concerns.⁷⁶

⁶⁹ See Josephson, *supra* at 625.

⁷⁰ See Frost, *supra* at 15,690.

⁷¹ See H.R. 1825, *supra*.

⁷² See Frost, *supra*.

⁷³ See Michael Levy, *United States Presidential Election of 1824*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1824>.

⁷⁴ See Frost, *supra*.

⁷⁵ See *id.*

⁷⁶ See *id.*

Once the quorum is established and the proceedings begin, there are significant open questions regarding the voting procedures. The first issue concerns balloting. The Twelfth Amendment requires the House vote “by ballot”, which was previously interpreted to require a secret ballot.⁷⁷ The debate over the procedural rules in the 1825 election reveals great concern among the Representatives regarding balloting.⁷⁸ At the time, Representatives were concerned about the public knowing how Representatives individually cast their votes, and even how the states voted.⁷⁹ One option considered was to allow a voice vote, similar to the method the Senate follows in selecting a Vice President. This proposed amendment to the procedural rules found little support from the Representatives and was quickly abandoned.⁸⁰ The option was raised again in 1838 when Representatives considered amending the rules in the case that there was a future contingent election.⁸¹ Once again, the Representatives swiftly struck down this option as it did not follow the constitutional requirement that Representatives vote “by ballot.”⁸² Beyond the constitutional provision, there were concerns from Representatives about the possibility that their votes may become known by the public through voice voting.

Modern Americans may not understand why there was an interest in secret balloting in the House of Representatives when current proceedings can be viewed live on C-SPAN.⁸³ The 1825 debates about closing the galleries for a secret session indicate the Representatives’ view that secrecy was a protection from corruption, converse to modern perceptions.⁸⁴ In 1825, the

⁷⁷ See U.S. CONST. amend. XII; H.R. 1825, *supra*.

⁷⁸ See Josephson, *supra* at 632.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See Frost, *supra* at 15,691.

⁸² See *id.*; U.S. CONST. amend. XII.

⁸³ See *Our History*, C-SPAN, <https://www.c-span.org/about/history/>.

⁸⁴ See Josephson, *supra*.

Representatives also accepted an interpretation of the Twelfth Amendment that guaranteed a right of each Representative to secrecy in their voting.⁸⁵

During the debates over the procedural rules, Representative Hamilton of South Carolina proposed an amendment to reveal the results of the House votes, while keeping the results within the states secret.⁸⁶ In defense of his amendment, Hamilton acknowledged that the individual “privilege of a secret ballot is secure. This I do not propose to violate.”⁸⁷ Clearly, there was an established interpretation that voting “by ballot” provided a constitutional right to a written, secret ballot.⁸⁸ Ultimately, Hamilton’s proposed amendment did not pass, out of a concern that the individual votes of Representatives from states where there is only one Representative would become publicly known.⁸⁹ The use of secret ballots continues in some practices of the House, such as nominating a Speaker within a party caucus, although it is not used in many House votes.⁹⁰

There is potential for a significant debate over secret ballots in a modern contingent election. History has repeatedly shown that the Twelfth Amendment was interpreted to provide Representatives with a secret ballot, but this practice may not be favored in the modern era.⁹¹ The Frost Memo inferred that there will be a tension between this history and a modern perception of accountability from Representatives in a future contingent election.⁹²

⁸⁵ See Frost, *supra* at 15,691.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See H.R. 1825, *supra*.

⁸⁹ See Frost, *supra*.

⁹⁰ See generally Lexie Schapitl and Kelsey Snell *Jordan is No Longer Nominee for House Speaker After a Secret Vote*, NPR (Oct. 20, 2023) <https://www.npr.org/2023/10/20/1207328228/house-to-vote-for-a-3rd-time-on-jim-jordans-nomination-for-speaker>; H.R. RULES 20, cl. 11 (2021).

⁹¹ See Josephson, *supra* at 624.

⁹² See Frost, *supra* at 15,692.

The final major question that the House must address in its procedural rules for a contingent election concerns the voting measure within each state, whether that be by majority or some other form. The Twelfth Amendment requires a majority of state votes to elect a President, but it is silent on the individual votes required to decide a state vote.⁹³ The House in 1825 required a majority vote both in the states and within the House.⁹⁴ The rules provided that a ballot box be given to the state delegations to vote amongst themselves before casting their state's vote in the House.⁹⁵ The rules specifically required that the states obtain a majority, and if they fail to do so, the word "divided" was to be written on the state's ballot.⁹⁶ No state voted "divided" in 1825, likely because the fourth candidate, Speaker Henry Clay, threw his support to Adams, leading to Adams receiving the required majority.⁹⁷ The Representatives' debates on procedure do not provide significant guidance on the issue of majority voting, and simply followed the requirements from 1801 for this issue.⁹⁸ Of course, the House never had a reason to change to plurality voting or exhaustive voting, as it selected John Quincy Adams on the first ballot.⁹⁹

With so many relevant issues to be addressed in the House's procedural rules for a contingent election, just one 200-year-old example for guidance, and just two weeks for the incoming House to set the rules and elect the next President of the United States, the best time to research, revise, and draft House rules is now.

⁹³ See U.S. CONST. amend. XII.

⁹⁴ See H.R. 1825, *supra*.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See Hogan, *supra*.

⁹⁸ See Neale, *supra* at 3.

⁹⁹ See Levy, *supra*.

PROPOSED RULES

This paper will outline our proposed rules that aim to solve each of the potential problems that were raised through the analysis of past contingent elections and practices. The problems the rules must address include: (1) which committee will draft the rules, (2) if the House should meet in secret to conduct the election, (3) who should preside over these proceedings, (4) what constitutes a quorum, (5) if the Representatives should vote by secret ballots, and (6) if the House should continue to require a majority for a candidate to win in the states and in the House.

a. What committee should draft the rules?

A special committee appointed by the Speaker, as was done in 1825, does not seem practical in the modern era. Current partisanship would likely draw objection over the makeup of the committee. The minority party will likely be concerned with who the Speaker appoints, even if the committee follows normal minority party representation rules.¹⁰⁰ Therefore, an established committee is the best option for creating these rules. As the Frost Memo points out, there are three committees that can claim jurisdiction over drafting the rules, but the House Committee on Rules is best fit for the job.¹⁰¹

The Rules Committee has two areas of jurisdiction, special orders and original jurisdiction.¹⁰² Special orders are special rules of procedure in the House that concern the terms and conditions for debate on matters the House is considering.¹⁰³ Original jurisdiction concerns

¹⁰⁰ See Chad Pergram *The Hitchhiker's Guide to Whether the Jan 6 Committee is 'Legitimate'*, FOX NEWS (June 2, 2022) <https://www.foxnews.com/politics/is-january-6-committee-illegitimate>.

¹⁰¹ See Frost, *supra*.

¹⁰² See H.R. RULES 10, cl. 1, § o (2021).

¹⁰³ See *id.*; HOUSE COMMITTEE ON RULES, <https://rules.house.gov/about> (last visited on Mar. 6, 2024).

areas of standing rules of procedure as well as expedited areas of procedure, such as creating procedures for a contingent election.¹⁰⁴ Beyond these defined areas of jurisdiction, the Rules Committee has authority over any area of rules that the House may face.¹⁰⁵ Therefore, procedural rules on a contingent election in the House fit under the two defined jurisdictions of the Rules Committee and its general authority over rules.

Other than the Rules Committee, the Committee on House Administration and the Judiciary Committee likely have the next best claims of jurisdiction. However, neither of these committees has as strong of a claim as the Rules Committee when it comes to setting procedural rules in the House.

The Committee on House Administration (CHA) has jurisdiction over operations and oversight of federal elections.¹⁰⁶ This authority is drawn from the original House Committee on Elections. The Subcommittee on Elections now fulfills this role as a subcommittee of CHA.¹⁰⁷ Though this committee has a clear and present role in the federal election process, it is not the best fit to establish House procedures in an election within the House.

This committee's role in elections is primarily to ensure that Americans have access to free and fair elections.¹⁰⁸ For example, CHA was pivotal in developing the Help America Vote Act of 2002 which was aimed at reforming laws to make elections more free and fair.¹⁰⁹ CHA also has a role in administrative tasks and procedures within the House, but it does not have a

¹⁰⁴ See HOUSE COMMITTEE ON RULES, <https://rules.house.gov/about> (last visited on Mar. 6, 2024).

¹⁰⁵ See *id.*

¹⁰⁶ See H.R. RULES 10, cl. 1 § k (2021).

¹⁰⁷ See COMMITTEE ON HOUSE ADMINISTRATION SUBCOMMITTEE ON ELECTIONS, <https://cha.house.gov/elections> (last visited on Mar. 6, 2024).

¹⁰⁸ See *id.*

¹⁰⁹ See COMMITTEE ON HOUSE ADMINISTRATION, <https://cha.house.gov/history-and-jurisdiction> (last visited on Mar. 6, 2024).

role in House voting or elections unlike the Rules Committee.¹¹⁰ Therefore, the CHA may have some authority in oversight of federal elections which impacts individual American voters, but it does not have a similar degree of authority within the House in crafting voting procedures.

Similarly, the House Judiciary Committee does not have a strong claim of jurisdiction over contingent elections. The Judiciary Committee has jurisdiction over all constitutional questions.¹¹¹ However, this committee is primarily focused on the judicial branch and legislation that relates to judicial proceedings.¹¹² Though a contingent election involves constitutional questions under the Twelfth Amendment, the primary role of the committee would be drafting rules to govern a contingent election. While there is some overlap in these areas, the Judiciary Committee does not have clear authority over House procedures in contrast to the Rules Committee. Therefore, we submit that the Rules Committee is the best fit to draft these procedures that govern the contingent election in the House.

b. Should the House meet in a closed session?

The Frost Memo noted the issue of closed proceedings in passing, highlighting that it may not be as contentious an issue as others in crafting these procedural rules.¹¹³ After the House met in a closed session in 1825 to elect President John Quincy Adams, it has only met in closed sessions six other times. Over this 200-year period the House has met in closed sessions to discuss: relations with the Indian tribes in 1825, trade with Great Britain in 1830, implementing the Panama Canal Act in 1979, involvement in Cuba and other communist countries in the

¹¹⁰ See *id.*

¹¹¹ See H.R. RULES 10, cl. 1 §1 (2021).

¹¹² See HOUSE JUDICIARY COMMITTEE, <https://judiciary.house.gov/about> (last visited Mar. 6, 2024).

¹¹³ See Frost, *supra* at 15,691.

Americas in 1980, US paramilitary operations in Nicaragua in 1983, and electronic surveillance of terror suspects in 2008.¹¹⁴ The clear theme connecting all these instances is national security.

In the modern era where the House sessions are televised on C-SPAN, the idea of a closed session to conduct basic nonconfidential business seems counterintuitive. Especially following the 2020 election, where one major candidate leveled widely-believed accusations of election fraud, a closed session of Congress to elect the President amidst concerns over fraud in American elections seems implausible.¹¹⁵ A contingent election is an electoral anomaly unfamiliar to most Americans who thus may have concerns regarding legitimacy of the election. To ensure public trust in the process and confidence in the outcome, we submit it will be important for the proceedings to be open to the public at least via live media and with a small gallery in attendance.¹¹⁶

c. Who should preside over the election?

In 1825, the Speaker was the obvious choice for a presiding officer in the contingent election. In the modern era, the Speaker is still the clear person with authority to preside over a contingent election in the House, but there are many problems that may arise if one is not chosen quickly.¹¹⁷ These problems, along with the time pressure may lead some members of the House to question whether the Speaker should preside. While some may prefer dual presiding officers

¹¹⁴ See MILDRED AMER, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW, (Congressional Research Services 2008) <https://sgp.fas.org/crs/secretcy/RS20145.pdf>.

¹¹⁵ See Jennifer Agiesta and Ariel Edwards-Levy, *CNN Poll: Percentage of Republicans Who Think Biden's 2020 Win was Illegitimate Ticks Back Up Near 70%*, CNN (Aug. 3, 2023) <https://www.cnn.com/2023/08/03/politics/cnn-poll-republicans-think-2020-election-illegitimate/index.html>.

¹¹⁶ We propose that each Representative may have one guest in attendance to avoid over-crowding in the gallery, and to limit the potential for an event like January 6th, 2021, from occurring if there are too many people in the House chamber.

¹¹⁷ See H.R. RULES 1 (2021).

from each party, the guidance from 1825 and current House procedures do not allow dual presiding officers.¹¹⁸ Though a new House would have the authority to change these procedures, the fact that dual presiding officers does not currently exist suggest that it is less likely that the House would adopt this practice for contingent elections.¹¹⁹ Therefore, we submit the procedural rules must specifically state that the Speaker will preside over the election to answer this question, as well as the question of electing a Speaker before the President.

In the event that the House fails to elect a President by January 20th, the line of succession begins.¹²⁰ In that situation, the Vice President elected by the Senate becomes the Acting President and the House Speaker becomes the Acting Vice President.¹²¹ The Presidential Succession Act, and related constitutional law, prevents someone in office from holding two positions, thus the Speaker must resign their role while acting as Vice President.¹²² In this scenario, the House (following current House procedure) will place a temporary Speaker in the position of presiding officer and continue balloting for the President “without delay.”¹²³ Therefore, we submit that it is important the rules specifically mention this procedure to avoid

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See 3 USC § 19.

¹²¹ There is little concern that a power-hungry Speaker will purposely delay a contingent election to make themselves the Vice President. First, the House will have to elect a President eventually, as it cannot conduct any other business until a President is elected. Therefore, the Speaker’s time as Acting Vice President would be limited, and the gears of government would grind to a halt if the House did not eventually choose a President. Second, the Acting Vice President during this period would have very limited authority compared to the Speaker presiding over a contingent election. As then-Vice President John Adams said, the Vice Presidency can be, “the most insignificant Office that ever the Invention of Man contrived or his Imagination conceived.” John Adams, Letter to Abigail Adams (December 19, 1793). <https://founders.archives.gov/documents/Adams/04-09-02-0278>.

¹²² See *id.*; U.S. CONST. art. I § 6, cl. 2.

¹²³ See Amber Phillips, *The House Can’t Function Without a Speaker*, THE WASHINGTON POST (Oct. 4, 2023) <https://www.washingtonpost.com/politics/2023/10/04/house-cant-function-without-speaker/>; U.S. CONST. amend. XII.

any questions of electing a Speaker before the contingent election can continue, and to specifically declare the Speaker as the presiding officer.

d. What constitutes a quorum?

The procedural rules from 1825 merely copy the language of the Twelfth Amendment, which does not set a clear rule for establishing a quorum.¹²⁴ Both require “a member or members from two-thirds of the States” which can ambiguously allow the election to proceed with less than a majority of members present.¹²⁵ This is inconsistent with modern House quorum requirements and may not have been the intent in 1825.¹²⁶ There may have been concern in 1825 about people traveling by horse to the Capitol during the winter to vote in a contingent election.¹²⁷ Thus, the procedures and the Twelfth Amendment were more lenient, given the available technology. In the modern era, there is less of a concern over the ability of the Representatives to travel to Washington in January.

The 118th Congress’s House rules require a majority of members present to establish a quorum in most instances, and only allows changes to this requirement in special scenarios.¹²⁸ However, even in these special scenarios at least one-third of members are required to establish a quorum.¹²⁹ The literal reading of the 1825 rules and the Twelfth Amendment clearly do not align with the current practices in the House. Since the Constitution only provides that two-thirds of

¹²⁴ See U.S. CONST. amend. XII; H.R. 1825, *supra*.

¹²⁵ See U.S. CONST. amend. XII; H.R. 1825, *supra*.

¹²⁶ See Josephson, *supra* at 637.

¹²⁷ See Neale, *supra*.

¹²⁸ See H.R. RULES 20 (2021).

¹²⁹ See *id.*

members must be present, a new rule must not violate this requirement, but can establish additional requirements.¹³⁰

The current House rules reflects a preference for at least a majority presence to establish a quorum in most cases.¹³¹ Therefore, the procedural rules in a contingent election should require the presence of a majority of members from two-thirds of the states, which will satisfy the Twelfth Amendment, while also drawing closer to modern practices of requiring a majority to establish a quorum.

One concern with a high quorum requirement is the potential of a partisan boycott halting the election.¹³² However, requiring the majority of members from two-thirds of the states will decrease that threat. Though this quorum requirement is higher than that of 1825, there is still a chance for one party to meet this requirement without the other present.¹³³ Therefore, our proposed rule strikes a balance between requiring many Representatives to be present, while disincentivizing partisan boycotts.

e. Should the Representatives and states vote by secret ballot?

Ballot secrecy was a topic of debate in 1825 and is an issue where modern governance may not align with the 200-year-old guiding example.¹³⁴ This issue interacts with both the interpretation of “ballot” from the Constitution and the issue of secrecy in the proceedings.¹³⁵

¹³⁰ See Josephson, *supra*.

¹³¹ See H.R. RULES 20 (2021).

¹³² See Neale, *supra*.

¹³³ See [Appendix Chart 1](#).

¹³⁴ See Hinds, *supra*.

¹³⁵ The Supreme Court has not weighed in on the interpretation of “ballot” in the Twelfth Amendment, leaving it to the House to decide the constitutional meaning of this requirement.

There is modern practice of secret ballots in the House, although it is not common. The party caucuses in the House have used secret ballots in the nomination process for selecting their nominee for Speaker, although the actual Speaker votes were standard voice votes.¹³⁶ Therefore, there was still public scrutiny within the process when it went to the entire House. Generally, the House does not use secret ballots when voting, and the current House rules do not require that any ballots be secret.¹³⁷ The Frost Memo highlights that there may be support for secret ballots in the House because the public votes by secret ballot.¹³⁸

However, we submit these Representatives are not voting for the President in their individual capacities. Rather, they are voting as officials elected to represent their constituent district. They are in a categorically different circumstance than the individual voter and their vote is designed to represent many people. Therefore, as Representatives, they should be held democratically accountable for their actions, and no action is more significant than casting a vote for President on behalf of represented constituents. This aspect of accountability was not as much present in 1825, as there were no television cameras broadcasting the process to the entire world. Instead, there was a limited section of the public that had immediate access to this process, which included corrupt individuals.¹³⁹

Part of the reason that Representatives in 1825 were interested in secrecy was to prevent corrupt individuals from influencing how Representatives voted.¹⁴⁰ This concern is not equally

¹³⁶ See Schapitl, *supra*.

¹³⁷ See H.R. RULES 17, cl. 10 (2021).

¹³⁸ See Frost, *supra*.

¹³⁹ See Josephson, *supra* at 632; Neale, *supra*.

¹⁴⁰ See Josephson, *supra* at 632; Neale, *supra*.

present in the modern era. Allowing public scrutiny throughout voting in a contingent election, we submit, will likely cast a light on the process and discourage backdoor corrupt deals.

Overall, there is a limited modern precedent for secret ballots. Although the House interpreted “ballot” to require secret ballots in the past, the Constitution only requires voting by “ballot”.¹⁴¹ With such a vague requirement, and the likely need for increased public scrutiny over the process, given the current rates of distrust in government and elections, we submit that eliminating secret ballots can be beneficial.¹⁴² This suggested break from the 1825 stance on balloting is consistent with current House practices, and possibly necessary in the public’s view.

f. Is a majority required for a candidate to win?

The Frost Memo points to the question of majority voting as the biggest issue that a House must decide in establishing the procedures for a contingent election.¹⁴³ The 1825 procedures provided that the Representatives will continue to ballot until a President is selected by a majority of the states.¹⁴⁴ Similarly, a majority of votes within the state delegation was required to establish the state’s vote, and if a majority was not reached, “divided” was written on the ballot.¹⁴⁵ Although the House used majority voting in the 1825 election, modern American elections use a variety of different voting systems that could be used in a contingent election.

Forty-eight states in the US award all their elector votes to the candidate who wins the plurality of votes in the state.¹⁴⁶ The remaining two, Nebraska and Maine, do this on the

¹⁴¹ See U.S. CONST. amend. XII.

¹⁴² See Agiesta, *supra*.

¹⁴³ See Frost, *supra* at 15,692.

¹⁴⁴ See H.R. 1825, *supra*.

¹⁴⁵ See *id.*

¹⁴⁶ See ASHER HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 124, vol. 1 (1907).

congressional district level.¹⁴⁷ The Frost Memo highlights that some people may argue that this method should also be employed within the states in a contingent election to avoid gridlock and ensure that a President is elected by January 20th.¹⁴⁸ While it may be in the public's interest for the House to elect a President by January 20th, we submit there is insufficient support for plurality voting in House practice.

The House used plurality voting only twice in U.S. history during votes of such significance.¹⁴⁹ The remainder of the time, a majority was always required. Both instances of plurality voting occurred in the 19th century when Speaker votes failed to reach a majority.¹⁵⁰

In 1849, the House adopted plurality voting when it failed to elect a Speaker after many ballots, and that process was repeated in 1856.¹⁵¹ The Speaker race was notably contentious and took 59 ballots before the House eventually switched from majority to plurality voting on the 60th ballot to elect a Speaker.¹⁵² Notably, the House returned to majority voting on the next Speaker election, and it was not until another contentious election arose in 1856 that this process

¹⁴⁷ See JEFFERY JENKINS AND CHARLES STEWART, *FIGHTING FOR THE SPEAKERSHIP*, 151 (Princeton University Press 2013).

¹⁴⁸ See Frost, *supra*.

¹⁴⁹ See Jenkins, *supra*.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² The Speaker race in 1849 was exceptionally contentious because of the issue of slavery. Though Democrats were primarily in favor of expanding slavery in western states and Whigs were not, there was not as clear of a partisan view on a Speaker that was for or against this expansion. There were also eight Representatives in the new "Free Soil Party" which was designed to combat slavery and eventually formed into the modern Republican Party. Such division made it impossible for either major party to reach a majority of the 234 Representatives. The option of plurality voting was raised early in the process but was repeatedly denied by wide margins of the House. It was only after weeks of failed ballots and several changes in nominees from both parties that plurality voting was eventually adopted by a slim margin. The process was replicated in 1856 after just four days and 27 ballots.

was repeated.¹⁵³ However, majority voting was used the remainder of the time, including in the 2023 contentious Speaker race that lasted several days.¹⁵⁴

Another possible alternative to majority voting is exhaustive voting, or two-round voting. In these systems, the candidate with the least votes is eliminated and the voting restarts so that there would be only two candidates left for Representatives to choose between.¹⁵⁵ However, this option of voting is never used in the House, nor at the federal level, or even within the national conventions of the two major parties.¹⁵⁶ Therefore, although this system would still require a candidate to receive a majority of votes to win, it has no precedent that would suggest it is feasible in a contingent election. Tellingly, John Quincy Adams received the second-highest electoral college vote totals and yet prevailed in the contingent election process, because the fourth-highest candidate, Henry Clay, threw his support to Adams.

The plain language of the Twelfth Amendment requires that “a majority of all the states shall be necessary to a choice.”¹⁵⁷ Although these options may accelerate the process, especially if there are three candidates that the Representatives must choose from, it is unconstitutional to require anything less than majority voting on the House level, and within the states it would constitute a significant break in modern House practice. Therefore, we submit the House should continue to require a candidate to win a majority of votes within each state and in the whole House to win.

¹⁵³ See [Footnote 152](#).

¹⁵⁴ See Hutzler, *supra*.

¹⁵⁵ See BALLOTPEDIA, https://ballotpedia.org/Ballot_exhaustion (last viewed Mar. 6, 2024).

¹⁵⁶ See CALL OF THE 2024 REPUBLICAN NATIONAL CONVENTION, RNC (2023) https://prod-static.gop.com/media/documents/2024_Call_of_the_Convention_as_adopted_11.20.23_1700517775.pdf?gclid=1*ozw22t*_gclid_au*ODExNDE2OTcyLjE3MDg2MTYyMTc.&ga=2.230190805.812226912.1708616217-618868106.1708616217; CALL OF THE 2024 DEMOCRATIC NATIONAL CONVENTION, Democratic Party of the US (2022) <https://democrats.org/wp-content/uploads/2023/03/2024-Call-for-Convention.pdf>.

¹⁵⁷ See U.S. CONST. amend. XII.

CONCLUSION

If the Electoral College fails to pick a President, placing the election in the House, the process will be undeniably contentious. In navigating this potentially fragile point in American history, the House must take action now by developing model rules that will prevent erosion of the legitimacy of the presidency. Since the only past example of the House choosing the President under the Twelfth Amendment occurred 200 years ago, there are many questions that the House must address in the modern era when crafting procedural rules for a contingent election. This paper has provided suggested answers to those questions based on history and current House procedures. Notably, we suggest that the House Committee on Rules is best fit to draft these procedures, the House should meet in an open session with the Speaker presiding, a quorum for these purposes is established when a majority of the members from two-thirds of the states are present, the voting should not be done by secret ballot, and a majority is required to choose a President within each State and within the House.

The potential issues that may arise during this process are real, and could substantially impact presidential legitimacy, as well as partisan tensions throughout the country. Therefore, it is essential that the House consider these procedures before the next presidential election to establish a precedent of adopted procedural rules in the modern era. While adoption will not be binding on the new House, it should diminish the length of debates over these rules since they were recently approved by many of the same Representatives. It is also beneficial to consider these rules now when there is time for research and investigation into the issue, unlike the three days the House will have to create these rules between taking office and beginning a contingent election. This will help avoid the delays that would come with extensive debates in the new House, allowing the voting process to begin immediately. In a time of great tension, the threats to

America's democratic republic will be high, but the solutions provided in these procedures may help the House navigate this treacherous event. At a minimum, this paper should be entered into the congressional record for accelerated consideration by the incoming House.

APPENDIX

Proposed Model Rules

**MODEL RULES
TO BE OBSERVED IN THE HOUSE OF REPRESENTATIVES
IN THE
CHOICE OF A PRESIDENT OF THE UNITED STATES**

WHOSE TERM OF SERVICE IS TO COMMENCE ON THE TWENTIETH DAY OF JANUARY 2025, IF THE CHOICE SHALL CONSTITUTIONALLY DEVOLVE UPON THE HOUSE.

1. APPLICATION

In the event of its appearing, after certification of the votes given by the Electors of the several States for President, that no person has a majority of the votes of the whole number of Electors appointed, the same shall be entered on the journals of this House.

2. PRESIDING OFFICER

The Speaker of the United States House of Representatives shall preside over these proceedings for electing the President of the United States in the House.

3. COMMITTEE JURISDICTION ON PROCEDURES

The House Committee on Rules shall convene immediately after certification of the votes to review and propose rules of procedure to the whole House.

4. ESTABLISHING A QUORUM

The roll of the House shall then be called, by States, and, on its appearing that a majority of members from two-thirds of the States are present, the House shall immediately proceed, by ballot, to choose a President, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, provided that each such person has received at least one elector vote; and, in case

no person shall receive the votes of a majority of all the States on the first ballot, the House shall continue to ballot for a President, without interruption by other business, until a President be chosen.

5. PUBLIC PROCEEDING

These sessions of the House shall remain open to media coverage. Each Representative may invite one guest from their state to observe the proceedings in the gallery and shall be responsible if their guest's behavior violates current rules for gallery decorum.

6. OTHER BUSINESS

From the commencement of the balloting until an election is made, no proposition to adjourn shall be received, unless on the motion of one State, seconded by another State; and the question shall be decided by States. The same rule shall be observed in regard to any motion to change the usual hour for the meeting of the House.

7. MODE OF BALLOTING

In balloting, the following mode shall be observed, to wit:

The Representatives of each State shall be arranged and seated together, beginning with the seats at the right hand of the Speaker's chair, with the members from the State of Maine; thence, proceeding with the members from the States, in the order the States are usually named for receiving petitions, around the Hall of the House, until all are seated.

A ballot box shall be provided for each State.

The Representatives of each State shall, in the first instance, ballot among themselves, in order to ascertain the vote of their State; and they may, if necessary, appoint tellers of their ballots.

A ballot shall be provided for each Representative within the State, with the Representative's name fixed at the top, and the candidates to choose from listed below. The result of this vote within the State shall be open to the public.

After the vote of each State is ascertained, a State ballot shall be made out: and in case any one of the persons, from whom the choice is to be made, shall receive a

majority of the votes given, the name of that person shall be written on the State ballot and in case no candidate receives a majority of votes from the Representatives within a State, then the word "divided" shall be written.

After the delegation from each State shall have ascertained the vote of their State, the Clerk shall name the States in the order they are usually named for receiving petitions; and as the name of each is called, the Sergeant-at-arms shall present a ballot box to each delegation, where a Representative will deposit the State's ballot, in the presence, and subject to the examination, of all the members from said State then present.

When the votes of the States are thus all taken in, the Sergeant-at-arms shall carry said ballot box to the Speaker's rostrum.

The Speaker shall then tell off the State ballots, announcing each to the House.

8. DECLARATION OF WINNER

If a candidate shall receive votes from the majority of States, the Speaker shall announce that said person is elected President of the United States.

If no candidate receives a majority of the votes, the same balloting process shall begin again in the States.

9. ADDRESSING QUESTIONS

All questions arising after the balloting commences, requiring the decision of the House, which shall be decided by the House voting per capita, to be incidental to the power of choosing a President, shall be decided by States without debate; and in case of an equal division of the votes of States, the question shall be lost.

10. ANNOUNCING THE PRESIDENT

The result shall be immediately communicated to the Senate by message, and to inform the President of the United States, and the President-elect, of said election.

11. INCAPACITATION OF THE SPEAKER

In the event that the Speaker becomes incapacitated, or the House fails to elect a President by January 20th, thus presidential succession, the House procedure for

establishing a temporary Speaker shall be followed and voting shall continue without delay.

1825 House Rules with Modern Rule Overlay

RULES

TO BE OBSERVED BY THE HOUSE OF REPRESENTATIVES

IN THE

Choice of a President of the United States,

WHOSE TERM OF SERVICE IS TO COMMENCE ON THE FOURTH DAY OF MARCH, 1825, IF THE CHOICE SHALL CONSTITUTIONALLY DEVOLVE UPON THE HOUSE.

1. APPLICATION¹⁵⁸

✚ In the event of its appearing, on opening all the certificates, and counting the votes given by the Electors of the several States for President, that no person has a majority of the votes of the whole number of Electors appointed, the same shall be entered on the journals of this House.

2. PRESIDING OFFICER

The Speaker of the United States House of Representatives shall preside over these proceedings for electing the President of the United States in the House.

3. COMMITTEE JURISDICTION ON PROCEDURES

Commented [VG1]: The Speaker of the House presided over the 1825 election and the 1801 election, though it was never specifically outlined in the procedural rules.

¹⁵⁸ See the LEGEND on [page 38](#) for explanation of the color coding and strike through.

The House Committee on Rules shall convene immediately after certification of the votes to review and propose rules of procedure to the whole House.

4. ESTABLISHING A QUORUM

~~II.~~ The roll of the House shall then be called, by States, and, on its appearing that a ~~member or members~~ majority of members from two-thirds of the States are present, the House shall immediately proceed, by ballot, to choose a President, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President provided that each such person has received at least one elector vote; and, in ~~case neither of those persons~~ no person shall receive the votes of a majority of all the States on the first ballot, the House shall continue to ballot for a President, without interruption by other business, until a President be chosen.

5. PUBLIC PROCEEDING

~~III. The doors of the Hall shall be closed during the balloting, except against Members of the Senate, Stenographers, and the Officers of the House:~~

These sessions of the House shall remain open to media coverage. Each Representative may invite one guest from their state to observe the proceedings in the gallery and shall be responsible if their guest's behavior violates current rules for gallery decorum.

6. OTHER BUSINESS

~~IV.~~ From the commencement of the balloting until an election is made, no proposition to adjourn shall be received, unless on the motion of one State, seconded by another State; and the question shall be decided by States. The same rule shall be observed in regard to any motion to change the usual hour for the meeting of the House.

7. MODE OF BALLOTING

~~V.~~ In balloting, the following mode shall be observed, to wit:

The Representatives of each State shall be arranged and seated together, beginning with the seats at the right hand of the Speaker's chair, with the members from the State of Maine; thence, proceeding with the members from the States, in the order

Commented [VG2]: Though the Rules Committee did not establish the rules in the 1825 election, a committee chosen by the Speaker seems less practical in the modern era. The Rules Committee has the strongest claim for jurisdiction between the three that could claim jurisdiction; Committee on House Administration, Judiciary Committee, or the Committee on Rules.

Commented [VG3]: Though a plurality vote, among other options, would avoid this problem and would immediately establish a functioning government after the first ballot, the history of the House strongly favors majority voting.

Commented [VG4]: Since 1825, the House has only had six closed sessions, all of which were on matters of national security. Given the current state of partisan politics, and skepticism of voting systems, it would be impracticable to have a closed session of the House elect the President in 2025. This rule also balances these interests against the interest of safety following the events of January 6, 2021.

the States are usually named for receiving petitions, around the Hall of the House, until all are seated.

A ballot box shall be provided for each State.

The Representatives of each State shall, in the first instance, ballot among themselves, in order to ascertain the vote of their State; and they may, if necessary, appoint tellers of their ballots.

~~After the vote of each State is ascertained, duplicates thereof shall be made out: and in case any one of the persons, from whom the choice is to be made, shall receive a majority of the votes given, on any one balloting by the Representatives of a State, the name of that person shall be written on each of the duplicates; and in case the votes, so given, shall be divided, so that neither of said persons shall have a majority of the whole number of votes given by such State, on any one balloting, then the word "divided" shall be written on each duplicate.~~

A ballot shall be provided for each Representative within the State, with the Representative's name fixed at the top, and the candidates to choose from listed below. The result of this vote within the State shall be open to the public.

After the vote of each State is ascertained, a State ballot made out: and in case any one of the persons, from whom the choice is to be made, shall receive a majority of the votes given, the name of that person shall be written on the State ballot and in case no candidate receives a majority of votes from the Representatives within a State, then the word "divided" shall be written.

After the delegation from each State shall have ascertained the vote of their State, the Clerk shall name the States in the order they are usually named for receiving petitions; and as the name of each is called, the Sergeant-at-arms shall present ~~to the delegation of each, two ballot boxes, in each of which shall be deposited, by some Representative of the State, one of the duplicates made as aforesaid of the vote of said State,~~ a ballot box to each delegation, where a Representative will deposit the State's ballot, in the presence, and subject to the examination, of all the members from said State then present; ~~and where there is more than one Representative from a State, the duplicates shall not both be deposited by the same person.~~

Commented [VG5]: Representatives during the 1825 election were very concerned with the possibility of their individual votes becoming known, however, modern politics would likely favor public scrutiny of the votes. For example, the DNC specifically prohibits secret balloting when voting to nominate a candidate for President, highlighting the current practice.

Commented [VG6]: If the vote of each Representative is not secret, then it seems superfluous to have two state ballots which was designed to insure the secret ballots were accurate.

When the votes of the States are thus all taken in, the Sergeant-at-arms shall carry ~~one of said ballot boxes to one table, and the other to a separate and distinct table, said ballot box to the Speaker's rostrum.~~

~~One person from each State represented in the balloting, shall be appointed by its Representatives, to tell off said ballots; but in case the Representatives fail to appoint a teller, the Speaker shall appoint.~~

~~The said tellers shall divide themselves into two sets, as nearly equal in number as can be, and one of the said sets of tellers shall proceed to count the votes in one of said boxes, and the other set the votes in the other box.~~

~~When the votes are counted by the different sets of tellers, the result shall be reported to the House; and if the reports agree, the same shall be accepted as the true votes of the States; but, if the reports disagree, the States shall proceed, in the same manner as before, to a new ballot.~~

~~The Speaker shall then tell off the State ballots, announcing each to the House.~~

8. DECLARATION OF WINNER

~~If a candidate shall receive votes from the majority of States, the Speaker shall announce that said person is elected President of the United States.~~

~~If no candidate receives a majority of the votes, the same balloting process shall begin again in the States.~~

9. ADDRESSING QUESTIONS

~~VI. All questions arising after the balloting commences, requiring the decision of the House, which shall be decided by the House voting per capita, to be incidental to the power of choosing a President, shall be decided by States without debate; and in case of an equal division of the votes of States, the question shall be lost.~~

~~VII. When either of the persons, from whom the choice is to be made, shall have received a majority of all the States, the Speaker shall declare the same, and that that person is elected President of the United States.~~

~~VIII. The result shall be immediately communicated to the Senate by message; and a committee of three persons shall be appointed to inform the President of the United States, and the President elect, of said election.~~

Commented [VG7]: Plurality voting would avoid this problem, but the history of House procedures, and the procedures of each party committee to select their nominee supports rebaloting until there is a majority.

10. ANNOUNCING THE PRESIDENT

The result shall be immediately communicated to the Senate by message, and to inform the President of the United States, and the President-elect, of said election.

11. INCAPACITATION OF THE SPEAKER

In the event that the Speaker becomes incapacitated, or the House fails to elect a President by January 20th, thus initiating presidential succession, the House procedure for establishing a temporary Speaker shall be followed and voting shall continue without delay.

LEGEND:

Our proposed additions

~~Deleted sections from the 1825 rules~~

Online Source to 1825 Rules:

<https://www.loc.gov/resource/rbpe.22900600/?sp=1&st=text>

Chart 1

118th Congress Seats by Party							
State	Republicans	Democrats	Independent	Vacancies	Total Seats	Majority	Seats Up
Alabama	6	1	0	0	7	Republican	5
Alaska	0	1	0	0	1	Democrat	1
Arizona	6	3	0	0	9	Republican	3
Arkansas	4	0	0	0	4	Republican	4
California	11	40	0	1	52	Democrat	29
Colorado	3	5	0	0	8	Democrat	2
Connecticut	0	5	0	0	5	Democrat	5
Delaware	0	1	0	0	1	Democrat	1
Florida	20	8	0	0	28	Republican	12
Georgia	9	5	0	0	14	Republican	4
Hawaii	0	2	0	0	2	Democrat	2
Idaho	2	0	0	0	2	Republican	2
Illinois	3	14	0	0	17	Democrat	11

Indiana	7	2	0	0	9	Republican	5
Iowa	4	0	0	0	4	Republican	4
Kansas	3	1	0	0	4	Republican	2
Kentucky	5	1	0	0	6	Republican	4
Louisiana	5	1	0	0	6	Republican	4
Maine	0	2	0	0	2	Democrat	2
Maryland	1	7	0	0	8	Democrat	6
Massachusetts	0	9	0	0	9	Democrat	9
Michigan	6	7	0	0	13	Democrat	1
Minnesota	4	4	0	0	8	Even	Even
Mississippi	3	1	0	0	4	Republican	2
Missouri	6	2	0	0	8	Republican	4
Montana	2	0	0	0	2	Republican	2
Nebraska	3	0	0	0	3	Republican	3
Nevada	1	3	0	0	4	Democrat	2
New Hampshire	0	2	0	0	2	Democrat	2
New Jersey	3	9	0	0	12	Democrat	6
New Mexico	0	3	0	0	3	Democrat	3
New York	10	14	0	2	26	Democrat	4
North Carolina	7	7	0	0	14	Even	Even
North Dakota	1	0	0	0	1	Republican	1
Ohio	9	5	0	1	15	Republican	4
Oklahoma	5	0	0	0	5	Republican	5
Oregon	2	4	0	0	6	Democrat	2
Pennsylvania	8	9	0	0	17	Democrat	1
Rhode Island	0	2	0	0	2	Democrat	2
South Carolina	6	1	0	0	7	Republican	5
South Dakota	1	0	0	0	1	Republican	1
Tennessee	8	1	0	0	9	Republican	7
Texas	25	13	0	0	38	Republican	12
Utah	4	0	0	0	4	Republican	4
Vermont	0	1	0	0	1	Democrat	1
Virginia	5	6	0	0	11	Democrat	1
Washington	2	8	0	0	10	Democrat	6
West Virginia	2	0	0	0	2	Republican	2
Wisconsin	6	2	0	0	8	Republican	4
Wyoming	1	0	0	0	1	Republican	1
Totals	219	212	0	4	435	R +4	

Total Democrat Majorities		22					
Total Republicans Majorities		26					
Total Evenly Divided		2					

Data Source: https://ballotpedia.org/United_States_House_of_Representatives