

**TWELFTH AMENDMENT  
ELECTION OF PRESIDENT**

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## TWELFTH AMENDMENT—ELECTION OF PRESIDENT

### Amdt12.1 Overview of Twelfth Amendment, Election of President

Ratified in 1804, the Twelfth Amendment superseded Article II, Section 1, Clause 3 of the Constitution. Under Article II as originally ratified, the Electoral College did not vote separately for President and Vice President. Instead, each elector voted for two candidates for President. If one candidate received votes from a majority of the electors, he became President, while the candidate with the second-highest number of votes became Vice President.<sup>1</sup> However, if two candidates received votes from a majority of electors, or if no candidate received a majority, the House of Representatives was to choose the President. Problems arose under the original system in the election of 1800, when Thomas Jefferson and Aaron Burr received the same number of votes in the Electoral College, sending the selection of a President to the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice President.<sup>2</sup>

The Twelfth Amendment was designed to avoid a repetition of the events of 1800 by having the electors vote separately for President and Vice President, with each elector casting one vote for each office. The Constitution's original system at times could result, as it did in the election of 1796, in the selection of a President and Vice President with different political alignments, while the Twelfth Amendment simplified the process for selecting a President and Vice President from the same political party. The Supreme Court has thus stated that the Amendment "both acknowledg[ed] and facilitat[ed] the Electoral College's emergence as a mechanism not for deliberation but for party-line voting."<sup>3</sup>

Since the Twelfth Amendment was ratified, Congress and the states have made other changes to presidential elections. Following the disputed election of 1876, Congress enacted a statute providing that if a state's vote is not certified by the governor under seal, it shall not be counted unless both Houses of Congress concur.<sup>4</sup> In addition, in 1933, the Twentieth Amendment superseded some provisions of the Twelfth Amendment.<sup>5</sup>

### Amdt12.2 Twelfth Amendment Generally

Twelfth Amendment:

*The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—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*

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<sup>1</sup> U.S. CONST. art. II, § 1, cl. 3.

<sup>2</sup> Cunningham, *Election of 1800*, in 1 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 101 (A. Schlesinger ed., 1971).

<sup>3</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2327 (2020).

<sup>4</sup> 3 U.S.C. § 15.

<sup>5</sup> U.S. CONST. amend. XX; *see also* Amendment XX.

## TWELFTH AMENDMENT—ELECTION OF PRESIDENT

Amdt12.2

Twelfth Amendment Generally

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*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. 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 case of the death or other constitutional disability of the President.—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; 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. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.*

The Supreme Court has had few occasions to interpret the Twelfth Amendment. In 1976, in *Buckley v. Valeo*, the Court upheld in part and struck down in part the Federal Election Campaign Act of 1971.<sup>1</sup> With respect to the Twelfth Amendment, the Court held that the Amendment did not authorize Congress to appoint members of the Federal Election Commission without following the requirements of the Appointments Clause.<sup>2</sup>

The Court has twice considered whether the Twelfth Amendment limits measures intended to ensure that electors vote for their parties' nominees. In the 1952 case *Ray v. Blair*, the Court held that the Amendment did not bar a state political party from requiring candidates for presidential elector to pledge to support the national party's nominees for President and Vice President.<sup>3</sup> Similarly, in the 2020 case *Chiafalo v. Washington*, the Court held that the Amendment does not bar a state from penalizing an elector who breaks such a pledge and votes for someone other than the presidential candidate who won the state's popular vote.<sup>4</sup>

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<sup>1</sup> 424 U.S. 1 (1976).

<sup>2</sup> *Id.* at 133–34. For further discussion of *Buckley's* analysis of the Appointments Clause, see ArtII.S2.C2.3.10 Officer and Non-Officer Appointments. *Buckley* also involved a First Amendment challenge to campaign contribution and spending limitations in the Federal Election Campaign Act. See Amdt1.7.11.1 Overview of Campaign Finance.

<sup>3</sup> 343 U.S. 214 (1952).

<sup>4</sup> 140 S. Ct. 2316 (2020).