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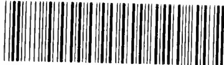

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A STUDY

OF THE

TWELFTH AMENDMENT

OF THE

CONSTITUTION OF THE UNITED STATES.

PRESENTED TO THE FACULTY OF PHILOSOPHY OF THE UNIVERSITY OF PENNSYLVANIA

BY

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The Convention of 1787 had several sources from which it might draw in constructing the executive department of the government. These were, the current political theories, the plans suggested previous to its meeting, the experience under the Confederation and the precedents found in the State constitutions.

As the Confederation dragged on year after year, becoming more hopelessly inadequate on account of the lack of sufficient powers and of an efficient executive, many plans were suggested to remedy the evils so apparent to the most indifferent observer. In each of these the question of the executive was emphasized. One of the first definite plans for a Confederation had been that of Thomas Paine, outlined in "Common Sense."[1] In this, after providing for a Congress, he suggested a President, chosen from the delegates of a Colony which should be selected by lot. In the next Congress the President should be similarly chosen, the Colony which had obtained its turn being omitted from the drawing, till the whole thirteen had had their proper rotation. As early as 1783, Pelatiah Webster pointed out very clearly and succinctly the defects of the Articles of Confederation, and suggested an entirely new plan in which there were to be four great Ministers of State, a financier, a Minister of War, a Minister of State and a Minister of Foreign Affairs, all of whom should be

[1] "Common Sense," pp. 30–31.

required to give a written opinion on all proposed bills.[1] Together with three others, named by Congress, from the New England, Middle and Southern States respectively, they should form the supreme executive body,[2] presided over by one of their number appointed by Congress. They were to superintend all executive business and appoint all executive officers, but how the "great ministers" were themselves to be chosen the plan did not state.

Noah Webster's plan[3] in 1785 made no change in the method of choosing the President, but suggested that he be "ex-officio supreme magistrate, clothed with authority to execute the laws of Congress in the same manner that the governors of the States are to execute the laws of the States."

Madison[4] wrote in his notes on Jefferson's "Draught of a Constitution for Virginia:" "An election by the Legislature is liable to insuperable objections. It not only tends to faction, intrigue and corruption, but leaves the Executive under the influence of an improper obligation to that department. An election by the people at large, ... or by electors, as in the appointment of the Senate in Maryland, or, indeed, by the people, thro' any other channel than their Legislative representatives, seems to be far preferable." Though this was written in regard to the State Executive it exactly expressed his opinion, as afterwards formulated, in regard to the national head. In common with other statesmen of the day[5] he insisted upon the separation of the functions of government,[6] yet such was the difficulty of the subject that in April, 1787, he wrote to Washington that though a National Executive was a necessity, he had scarcely ventured to form his opinion either of its form or authority.[7]

The Continental Congress had been struggling with the question of executive administration since its organization in 1775. The most natural step at first was to appoint committees

[1] "A Dissertation on the Political Union and Constitution of the Thirteen United States of North America," by a citizen of Philadelphia, Pelatiah Webster. First published in 1783; republished in "Political Essays," 1791, p. 214.

[2] Ibid, p. 221.

[3] "Sketches of American Policy," Noah Webster, pp. 30–48.

[4] Madison's Works (Edition of 1865), I, 190.

[5] Hamilton's Works (1851), II, 269–275.

[6] Madison's Works, I, 286.

[7] Ibid, 290.

to carry out the resolves of Congress, but as the field of operations grew wider the action of committees proved increasingly unsatisfactory. Without giving a detailed account of the development of the administrative departments of War, State, Treasury and Navy, it may be said that the steady evolution was from committees of Congress, inefficient and desultory in action, through boards,[1] not always composed of members of Congress, more efficient, but still lacking in unity of action, to single officers[2] with subordinates.[3] After the war was over Congress passed an Act[4] for carrying out Art. IX of the Articles of Confederation, providing for a committee of one delegate from each State to sit between Congresses. The powers of this committee were much limited by the Act, and only one was ever appointed. It was instructed to prepare an ordinance revising the departments, but the order was not carried out. It met in Annapolis, June 4, 1784,[5] and adjourned till June 26th, "to rest;" then it had to adjourn day after day till July 8th, for lack of a quorum. When a sufficient number was finally gotten together no business of importance was transacted. The members quarreled among themselves and animadverted against fate for placing them there in the heat. On August 13th there is the

[1] "Secret Journals of Congress," II, 130.

[2] In 1781.

[3] This development may be traced through the following references to the action of the Continental Congress in regard to the matter:

State Department.—I, 254 (Nov. 29, 1775); II, 113 (April 17, 1777); VII; 11 (Jan. 10, 1781); VII, 219 (Feb. 22, 1782).

War Department.—II, 198 (June 12, 1776; Dec. 1776); III, 235 (July 18, 1777); III, 349 (Oct. 17, 1777); III, 351 (Oct. 17, 1777); III, 418 (Nov. 24, 1777); III, 423 (Nov. 27, 1777); IV, 19 (Jan. 12, 1778); IV, 449 (Oct. 29, 1778); VII, 24 (Feb. 7, 1781); VII, 206 (Jan. 17, 1782), VII, 256 (April 10, 1782); X, 28 (Jan. 27, 1785).

Treasury Department.—I, 173 (July 29, 1775); I, 191 (Sept. 25, 1775); II, 64 (Feb. 17, 1776); II, 274 (July 30, 1776); III, 78 (March 25, 1777); IV, 153 (April 15, 1778); IV, 294 (July 15, 1778); IV, 310 (July 30, 1778); IV, 331 (Aug. 12, 1778); IV, 403-407 (Sept. 26, 1778); VII, 24 (Feb. 7, 1781); VII, 143 (Sept. 7, 1781); VII, 30, (Feb. 20, 1781); VII, 144 (Sept, 11, 1781); IX, 182 (May 28, 1784).

Navy Department.—I, 203 (Oct. 13, 1775); I, 242 (Nov. 25, 1775); I, 269 (Dec. 11, 1775); I, 273 (Dec. 14, 1775); II, 406 (Oct. 28, 1776); II, 418 (Nov. 6, 1776). V, 297 (Oct. 28, 1779); VII, 24 (Feb. 7, 1781); VII, 143 (Sept. 7, 1781).

Washington's opinions of executive power may be found by reference to his writings. (Putnam edition), VIII, 304; IX, 14, 33, 75, 124, 131, 246; XI, 186, 257.

[4] "Journals of Congress," IX, 184, May 29, 1784.

[5] "Journals of Congress," IX, Appendix, p. 1.

plaintive little statement that whereas certain delegates "did on Wednesday, the 11th day of the present month of August, leave the city of Annapolis and set out for their respective homes," the Committee was reduced to an insufficient number to do business, so some of the remaining delegates recommended the Secretary of Congress to remove the papers and records to Philadelphia.[1] Thus, until the next meeting of Congress, the country was left without a government. Such experiences caused the framers of the new Constitution to regard the question of a Chief Magistrate as one of paramount importance.

It is hardly possible to follow the tortuous course of the discussion in the Federal Convention, concerning the election of the Executive, without causing the same confusion in the mind of the reader which seems to have existed in that of the Convention itself. The novel part of the plan evolved was the introduction of an independent, responsible executive, so fatally lacking in the Articles of Confederation. In the Virginia plan[2] introduced into the Convention May 29th by Edmund Randolph, the seventh Article reads: "*Resolved*, That a national Executive be instituted to be chosen by the national legislature for the term of ———," etc. Art. VIII provides for a Council of Revision[3] to consist of the Executive and a convenient number of the judiciary. The plan entered in the debates as that of Pinckney[4] lays down no method of election.

It was seen, as soon as the discussion began in the Committee of the Whole, that there were two directly opposing conceptions of the nature and function of the executive, and it was the struggle between these two which caused the prolonged indecision concerning the method of election. The first view was drastically expressed by Roger Sherman, who said he considered the executive as nothing more than an institution for carrying into effect the will of the legislature; that the person or persons ought to be appointed by and accountable to the legislature only, as it was the depository of the supreme will of society. The chief exponents of the opposite

[1] McMaster: "History of the People of the United States," I, 209–210.

[2] Elliot's "Debates," V, 128.

[3] New York Constitution of 1777, Art. III. Poore's "Charters and Constitutions," II, 1332.

[4] Elliot, V, 131, Appendix, No. 2.

view were Gouverneur Morris, who stated later that one great object of the executive is to control the legislature, and James Wilson, who said he was almost unwilling to declare the mode of choice he wished, for fear it might appear chimerical; stating, however, that, in theory at least, he preferred an election by the people. In favor of this he could cite the experience under some of the State constitutions. When these were first formed there was a reaction against the Colonial executive. The attempt was made to deprive the chief magistracy of the autocratic character of the royal governorship without divesting the office entirely of dignity and efficiency. Connecticut and Rhode Island, retaining their charters, retained the election by the people; and, of the newly constructed plans, New Hampshire, New York and Massachusetts provided for such an election. The other States gave the power to the legislative body.

The question of number next showed the complete divergence of opinion in the Convention. Some were in favor of allowing the legislature to appoint one or more persons as experience might dictate,[1] and unity in the executive was characterized as the "foetus of monarchy."[2] On the other hand, it was argued that only a single magistrate could give the necessary energy, dispatch and responsibility, and that such unity was the best safeguard against tyranny.[3] Having decided that it would be necessary to fix the powers of the executive as a guide to the number, the question of term was introduced. A motion for three years, with re-eligibility, was lost;[4] then Pinckney's motion for seven years was carried.

On June 2d, Wilson brought in, in a modified form, his idea of popular election by the motion "That the executive magistracy shall be elected in the following manner: That the States be divided into —— districts, and that the persons qualified to vote in each district for the members of the first branch of the national legislature elect —— members of their respective districts to be the electors of the executive magistracy; that the said electors of the executive magistracy meet at ——, and they, or any —— of them, so met, shall proceed to elect by ballot, but not out of their own body, —— person– in whom the executive authority of the national government shall be vested."

[1] Elliot, V, 140. Sherman.
[2] Ibid, V, 141. Randolph.
[3] Ibid. Wilson.
[4] Ibid, V, 142. Wilson.

There was a direct model[1] for this method of election in the Constitution of Maryland of 1776.[2] The provision was that the Senate should be chosen every five years by two electors from each county, elected by those qualified to vote for Delegates,[3] which electors should meet at Annapolis; twenty-four were to form a quorum, and they were to elect fifteen Senators, either out of their own body or from the people at large. A plurality only was required to elect, and if there should be a tie, a second vote should be taken; if that failed, the election should be determined by lot.[4] This plan was proposed as a part of the Virginia Constitution of 1776, but was rejected.[5] It seems to have been the outgrowth of the rather aristocratic ideas of the Maryland Whigs of the Revolution,[6] and its success was very marked. The most distinguished men of the State were elected Senators,[7] and this wisdom and impartiality of the College undoubtedly had weight in recommending the system[8] both in Maryland itself and in other States.[9] Madison recommended it to Kentucky,[10] and Hamilton cited it in *The Federalist* as having an unrivalled reputation.[11] Nevertheless, the sentiment in favor of it in the Convention needed cultivating, and Wilson's motion was lost,[12] only Pennsylvania and Maryland voting in the affirmative. The motion was then carried for an election by the national legislature for the term of seven years. A motion for ineligibility after one term was also carried.[13]

The Convention then went back to the undecided question

[1] Elliot, II, 128.

[2] Poore's "Charters and Constitutions," I, 822.

[3] Arts. XIV, XV, XVI.

[4] A brief history of the adoption of this system may be found by tracing the action of the Convention framing the Constitution, in "The Convention of Maryland, 1774, 1775, 1776," by reference to pages 222, 228, 233, 251, 258, 259, 275, 278, 295, 354.

[5] Madison's Works, I, 177. Aug. 23, 1785.

[6] "The Electoral College for Maryland and the Nineteen Van Buren Electors." B. C. Steiner. Am. Histor. Assoc. Reports, 1895, p. 129.

[7] Ramsay's "History of the American Revolution," I, 351, 352.

[8] "Provisional Government of Maryland, 1774-1777." J. A. Silver. Johns Hopkins Un. Studies, XIII, 481, 527.

[9] McMahon's "History of Maryland," (1831), I, 480

[10] Madison's Works, I, 186, 190.

[11] *Federalist*, (Lodge's Ed.), LXIII, 398.

[12] Elliot, V, 144.

[13] Ibid, V, 149.

of number, and it was moved that the blank be filled with "one person." Randolph suggested that there be three members, to be drawn from the different portions of the country.[1] This idea of balancing the sections, Eastern, Middle and Southern, appears repeatedly in the course of the debates. It was urged that the arguments for a plural executive were based on an anticipated unpopularity of the new Constitution rather than on principle;[2] that all thirteen of the States had agreed upon a single executive, and that a plural one would foment uncontrolled, continued and violent animosities. The decision in favor of a single executive was carried by a vote of seven States to three.[3]

After some discussion of the veto power, in which an absolute veto, a suspensive veto and no veto at all were each advocated, a vote was taken on the first and last suggestions, resulting in their unanimous rejection; and the revisionary power, subject to overruling by two-thirds of both branches of the legislature, was decided upon. It is interesting that this power should have been given at all, for, in the States, only Massachusetts had given her Governor a veto.

The matter now seemed settled; there was to be a single executive, chosen by the national legislature for a term of seven years and ineligible thereafter, having a revisionary check on legislation. But the leven of dissatisfaction with such a mode was steadily working and produced no less than seventeen different suggestions before the Convention finally adopted the principle, in part, of Wilson's motion of June 2d. After a vote for the reconsideration of the mode of election, Gerry moved[4] "that the national executive should be elected by the executives of the States, whose proportion of votes should be the same with that allowed to the States in the election of the Senate." Showing the danger of corruption and intrigue in an election by the legislature, he drew the analogy to the principle observed in electing the other branches of the government; the first branch being chosen by the people of the States and the second by the State legislatures, it seemed to him fitting that the executive should be appointed by the State executives. Randolph spoke against the plan, saying that the State executives would neither make a good choice nor feel an

[1] Ibid. Randolph. [2] Ibid, V, 150. [3] Ibid, V, 151. [4] Ibid, V, 174.

interest in supporting the national executive; he made the striking statement: "They will not cherish the great oak which is to reduce them to shrubs."[1] Gerry's motion was negatived by a large majority.

When the Committee of the Whole rose the section outlined above was part of the plan reported,[2] but it was postponed in order to give an opportunity for other schemes to be presented. Patterson introduced his plan,[3] which contemplated merely a revision of the Articles of Confederation and provided for a plural executive, elected by Congress for —— term of years, not re-eligible and removable upon application of a majority of the State executives. Again the Convention went into a Committee of the Whole for the discussion of this plan, and during the debates upon it Hamilton read a sketch of a form of government[4] which he submitted, not for action but to give a correct view of his ideas and to suggest amendments he should probably propose to the plan introduced by Randolph. In Hamilton's plan, as given in the Madison Papers, there was to be a Governor, to serve during good behavior, elected by electors chosen by the people in election districts already provided for the election of Senators. In this we have the first mention of a successor, in case of death or disability; the President of the Senate was to exercise power until a new election. In Hamilton's Works[5] there is a short sketch very much like this, but differing in the essential point of the method of election. This provides that it should be by *electors* chosen by *electors* chosen by the people; or by electors chosen by the respective legislatures. There is also an elaboration of the plan[6] entitled "First draft by Hamilton, 1787." This proposed that the people of each State, with certain property qualifications, should elect a set of men equal in number to the State's representation in Congress, to be called the "first electors." These should meet in their respective States, vote for a president and make two lists of their ballots, which lists should be delivered to two men elected by them as the "second electors," and to Congress. The "second electors" from all the States should then meet at

[1] Ibid, V, 175. [2] Ibid, V, 189. [3] Ibid, V, 192. June 15. [4] Ibid, V, 205. June 18.

[5] Edited by J. C. Hamilton (1851), II, 393.

[6] Ibid, p. 399.

an appointed place and open all the lists. If any one person had a majority of the votes of the first electors he should be President, but if no person had a majority the second electors should vote for one of the three highest. If they could not center a majority on any one person on the first day of their meeting, the one having the greatest number of votes of the first electors should be President. This plan was evidently not presented in the Convention,[1] and as it agrees with the shorter one in providing a double set of electors, it is probable that the draft in the Madison Papers is incorrect.

Patterson's plan having been rejected, the Committee of the Whole rose and the Convention took the Virginia plan into consideration again. July 17th it was agreed without division that there should be a single executive,[2] but the question of the mode of election called forth a speech from Gouverneur Morris, who strongly deprecated the election by the legislature, declaring that it ought to be by the people at large, by the freeholders of the country. He made a motion to that effect, which was lost,[3] only Pennsylvania voting for it. Sherman thought that the sense of the nation would be better expressed by the legislature than by the people at large; Pinckney thought the people would be misled by demagogues; Williamson conceived that there was the same difference between an election by the people and by the legislature as between an appointment by lot and by choice, while Mason ventured the statement[4] that it would be as unnatural to refer the choice to the people as it would be to refer a trial of colors to a blind man. During the discussion of the motion Wilson mentioned the expedient afterwards adopted, suggesting that if a popular election should not result in a decision they might use the plan of Massachusetts of referring the eventual choice to the legislature.

This plan was not confined to Massachusetts, as may be seen by a reference to the State Constitutions. The Vermont Constitution of 1777[5] referred an undecided vote to the joint ballot of the Council and Assembly; the Massachusetts Constitution of 1780[6] contained a similar but more elaborate provision; the

[1] Hamilton's Works (Putnam Edition), I, 334. Note.

[2] Elliott, V, 322.

[3] Ibid, V, 324. [4] Ibid.

[5] Poore's "Charters and Constitutions," II, 1862. Sec. XVII.

[6] Ibid, I, 964-965, Chap II, Sec. I, Art. III.

portion respecting the election of the executive in the New Hampshire Constitution of 1784[1] seems to have been modeled on that of Massachusetts.

As soon as Morris' motion for popular election was rejected, Luther Martin moved that the executive be chosen by electors appointed by the several State legislatures, but this was also lost and the question on the words "to be chosen by the national legislature" passed unanimously in the affirmative. The question of term was postponed, the duties were passed according to the Resolutions and it was voted to strike out the clause "to be ineligible a second time."[2]

That this unanimous vote on the mode of election was not a settlement of the question was mainly due to the feeling of the majority of the Convention that the executive should be re-eligible, which was obviously undesirable, from the standpoint of executive independence, should he be elected by the legislature. One member moved that since ineligibility had been removed, the term be made for good behavior. Four States voted for the motion, as Madison says in a note to his Journal, to alarm those attached to a dependence of the executive on the legislature. An attempt to change the seven year term failed,[3] and the Convention decided to reconsider the vote on the ineligibility clause.

In the debate which followed we see again the wide divergence between the political theories of prominent members. One party urged a strong, independent, re-eligible executive as a check to legislative tyranny and an appointment by the people, or at least by electors chosen by them. The other contended that if he were chosen by the legislature, the only proper mode, he should be ineligible to prevent intrigue. Patterson proposed that the executive should be appointed by electors chosen by the States in a ratio that would allow one elector to the smallest and three to the largest States. Madison spoke in favor of the electoral system, as the best substitute for an election by the people at large, which could not be used, as the Southern States had such a large unenfranchised population. Gerry again tried to bring in the State executives by proposing that the election be by electors chosen by them. A formal motion for reconsidering

[1] Ibid, II, 1287. [2] Eliiot, V, 325. [3] Ibid, V, 327.

the Constitution of the executive having passed unanimously, a motion was made[1] embodying Patterson's suggestion that the executives "be chosen by electors appointed by the States in the following ratio, to wit: one for each State not exceeding two hundred thousand inhabitants; two for each above that number and not exceeding three hundred thousand, and three for each State exceeding three hundred thousand." The question was divided, the parts concerning the choice of electors by the State legislatures being carried, that regarding the ratio, postponed. The Convention refused to adopt a suggestion to make the executive ineligible a second time, and changed the term from seven to six years.

A glance at the State Constitutions will show that the practice had been to give the executive a short term, no State having a longer period than three years, the majority having one.[2] This precedent, together with the desire to make the term short enough for re-eligibility and the dread of anything approaching monarchy, was probably the motive prompting the shortening of the term to the four years it finally reached.

On July 20th, Gerry proposed that there be twenty-five electors in the following ratio: New Hampshire 1, Rhode Island 1, Massachusetts 3, Connecticut 2, New York 2, New Jersey 2, Pennsylvania 3, Delaware 1, Maryland 2, Virginia 3, North Carolina 2, South Carolina 2, Georgia 1. This ratio was objected to as being unjustly rigid, and an amendment was offered that in the future it should be regulated by the respective repre-

[1] Ibid, V, 338. Ellsworth.
[2] Compiled from Poore's "Charters and Constitutions."

STATE	DATE OF CONST.	TERM	LIMITATIONS
New Hamp.	1784	1 yr.	
Vermont	1777	1 yr.	
Massachusetts	1780	1 yr.	
Connecticut	1662	1 yr.	
Rhode Island	1663	1 yr.	
New York	1777	3 yr.	
Pennsylvania	1776	1 yr.	
New Jersey	1776	1 yr.	
Delaware	1776	3 yr.	Ineligible for 3 years.
Maryland	1776	1 yr.	Ineligible for 4 yrs., after 3 successive terms.
Virginia	1776	1 yr.	Ineligible for 4 yrs., after 3 successive terms.
North Carolina	1776	1 yr.	Ineligible 3 years in 6.
South Carolina	1778	2 yr.	Ineligible till 4 years.
Georgia	1777	1 yr.	Ineligible for more than 1 year out of 3.

sentations in the first branch of Congress. There is no record of the disposition of this motion, and Gerry's ratio was carried. Provision was then made that the electors should neither be members of the national Legislature, United States officers, nor eligible to the chief magistracy, and that they should be paid out of the national treasury.

A feeling of uncertainty and discontent centered around this last decision, and soon a reconsideration was carried and a motion was made to reinstate the election by the legislature. Williamson was for going back to the original ground and reconsidering the number also, and he declared himself in favor of a triple executive taken from the three sections of the country. Gerry moved that the legislatures of the States should vote by ballot for the executive in the same proportions that had been proposed for the choice of electors; that in case a majority should not center on the same person the first branch of the legislature should choose two of the four candidates having the greatest number of votes, and out of these the second branch should choose the executive. This motion being out of order no vote was taken on it. The motion to leave the election to the national legislature was then carried,[1] making the third time that the Convention had voted in the affirmative for this method. Nevertheless, the question of ineligibility and term again divided the body. After listening to suggestions of eight, eleven and fifteen years, King ironically proposed twenty—"as the medium life of princes."

Wilson, in an effort to compromise, made the suggestion,[2] afterwards put into a motion, that the election should be made by a small number, not more than fifteen, to be drawn from the national legislature by lot; these should immediately retire and make the choice without separating. No vote was taken on this. Gouverneur Morris again denounced the election by the legislature as the worst possible mode. At this point he made the first mention of the probable influence of party division on the executive, who would necessarily "be more connected with one than with the other." Another compromise to secure independence of the executive was attempted in the motion[3] "that the executive be appointed by the legislature, except when the

[1] Elliot, V, 359. Vote: 7 to 4.
[2] Ibid, V, 360. [3] Ibid, V, 363. Ellsworth.

magistrate last chosen shall have continued in office the whole term for which he was chosen and be re-eligible; in which case the election shall be made by electors appointed by the legislatures of the States for that purpose." This anomalous method was rejected, and Gerry re-introduced his favorite idea of an election by the State executives. It was modified by the proposal that they receive the advice of their councils, or, in case there were no councils, by electors chosen by the legislatures, the executives to vote in a fixed ratio. This also failed to come to a vote.

Madison now took up the question and viewed it from all sides, showing the dangers in the proposed methods, and again declared his preference for direct election by the people, avowing his willingness to make the sacrifice such an election would entail upon the South. He was answered by the statement that a popular election would be impossible, as the small States would have no influence in it. Gouverneur Morris spoke strongly against the rotation which an appointment by the legislature, with ineligibility, would make necessary. He seemed to be the only one having any idea of the influence party would have on the question, and he pointed out the fact that "a change of men is ever followed by a change of measures."

It was suggested that the difficulty in regard to the small States in a popular election might be obviated by each man's voting for three men, two of whom should be from some other State than his own. Morris suggested that two would be a more convenient number, and this was followed by the "favorite son" idea in the proposal[1] that the people of each State choose its best citizen; and, out of the thirteen names thus selected, an executive might be chosen, either by the national legislature or by electors appointed by it. After recapitulating the various schemes which had been proposed, Mason moved that the original report of the Committee of the Whole be reinstated, and the motion was carried. This vote for the fourth time to adopt what seemed to him so objectionable a provision caused Morris to reiterate his arguments against the whole paragraph. Nevertheless, it was referred to the Committee for

[1] Ibid, V, 367.

drafting, and was reported back to the Convention on August 6th, slightly different in form, but the same in substance. In addition, it was provided that the President of the Senate should succeed in case of death or disability.

An effort was now made to provide a Council, which had not met with general favor in the Convention, though the precedents reached back to the earliest Colonial times. In spite of strong opposition, a committee, to which the subject was referred, brought in a report embodying some of the ideas previously submitted by Gouverneur Morris,[1] recommending a Council, to consist of the President of the Senate, the Speaker of the House, the Chief Justice of the Supreme Court and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine and finance. This Council was to be merely advisory. No vote was taken on this part of the report, and on August 31st it was referred to the Committee of Eleven appointed for final drafting.

In the meantime debate was going on in regard to the question of a joint ballot in the election of the executive by the legislature. Such a ballot would virtually give the appointment to the House, and so deprive the small States, as such, of their influence. It was moved[2] to insert "people" in the place of "legislature;" but this was rejected and the joint ballot was finally decided upon. A motion that the legislature vote by States was lost. Again Morris protested against the election by the legislature, dwelling upon the dangers of such a mode and ending by again moving the election by electors chosen by the people of the States. His motion was lost by a vote of five to six. The question of the electoral system was put "as an abstract question" and was lost, the States being equally divided.[3]

Objections were raised to the President of the Senate as the eventual successor, on account of his part in the election of the President. This introduced for the first time the question of a Vice-President; but the desirability of creating such an office was regarded as undetermined when it was referred to the Committee of Eleven on August 31st.

The question of succession in case of death or disability of

[1] Ibid, V, 446. [2] Ibid, V, 472. Carroll. [3] Ibid, V, 474.

the executive was such an important one that not a single State Constitution had neglected it.[1]

When the Committee reported on September 4th, to the surprise of many in the Convention the plan for the executive was entirely different from that referred to it, the electoral system as finally adopted being reported, with the provision, however, that the eventual election should be by the Senate. When a particular explanation and discussion of the change was called for, Morris answered categorically: there was danger of intrigue and faction in an appointment by the legislature, inconvenience in the necessary ineligibility and difficulty in establishing a court of impeachment other than the same body which was to elect the executive; nobody was satisfied with that method; many wanted immediate choice by the people; and, finally, there was the all-embracing reason—the indispensable necessity of making the executive independent of the legislature. The chief objection to the report was made concerning the provision in regard to the Senate, which would have a preponderance of power. Objections were also raised to the number, *five*, from which the Senate had to select in case of a non-election by the electors. Some considered it too large; others suggested as many as thirteen. A motion was made[2] to

[1] New Jersey, 1776. Lieutenant Governor chosen by the Council.
Massachusetts, 1780. Lieutenant Governor chosen by people in same way as Governor.
New Hampshire, 1784. Senior Senator acted in absence of Governor.
New York, 1777. Deputy Governor chosen by people in same way as Governor.
Pennsylvania, 1776. Vice-President chosen by joint ballot of Assembly and Council, from Council.
Rhode Island, 1663. Deputy Governor chosen as the Governor, by people.
South Carolina, 1778. Lieutenant Governor chosen by Assembly.
Vermont, 1777. Lieutenant or Deputy Governor chosen by people in same way as Governor.
Virginia, 1776. President of the Council to act as Lieutenant Governor.
Connecticut, 1667. Deputy Governor chosen as Governor, by people.
Georgia, President of the Executive Council to exercise powers of Governor in his absence.
Maryland, 1776, The first named of the Council to act till he could call Assembly.
North Carolina, 1776. Speaker of the Senate and Speaker of the House of Commons to succeed in turn till new election.
Delaware, 1776. Speaker of the Legislative Council and Speaker of House to succed in turn till new election.

[2] Elliot, V, 512. Rutledge, Sept. 5.

go back to the plan of appointment by the legislature; but the arguments against this had caused such a change of sentiment that the motion was lost by a vote of two to eight. The opposition then centered around the eventual election by the Senate, and Wilson attempted, without success, to substitute the word "legislature."[1] Gerry suggested that six Senators and seven Representatives, chosen by joint ballot of both Houses, form the final electing body. This was not taken up, and on the next day he suggested that, in case of no majority, if the President were again a candidate, the second election should be made by the legislature, instead of the Senate. Sherman was of the opinion that, if the legislature had the eventual appointment, it ought, in justice to the small States, to vote by States. Hamilton was in favor of letting the highest number of ballots, whether a majority or not, elect the President, in order to keep it out of the hands of the Senate, and Madison moved that one-third of the electoral vote should elect.[2] The vote was strongly in favor of referring the eventual election to the Senate; yet, when it was moved[3] that the House, voting by States, should be substituted, the motion was carried by a vote of ten to one. The principle involved seems to have been the anxiety to preserve the weight of the small States. To safeguard this method, it was decided that a quorum for the purpose should consist of a member or members from two-thirds of the States, and that concurrence of a majority of all the States should be necessary to a choice. Unsuccessful attempts were made to lengthen the term and to have all the electors meet at one place.

The most important part of the question being finally settled, the remaining discussion hinged upon the Vice-President and a Council. The former was opposed as being entirely unnecessary and merely an appendage to a valuable mode of election which required two to be chosen at the same time, in order to allow the small States sufficient influence. Mason thought the office an encroachment on the rights of the Senate, and proposed, as a substitute, a Council chosen by the Senate, of six members, two from the Eastern, Middle and Southern sections of the country respectively. They were to rotate—two going out each year. He protested that, in rejecting a Council,

[1] Ibid, V, 513. [2] Ibid, V, 514. [3] Ibid.

they were about to try an experiment on which the most despostic government had never ventured: "Even the Grand Seignior has his Divan." His motion was rejected, although seconded by Franklin and approved by Madison, Wilson, Dickinson and others.

The whole matter being referred to the final Committee, the Article as placed in the Constitution resulted:

"The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows: Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in Congress; but no senator or representative or person holding any office of trust or profit under the United States, shall be appointed an elector.

"The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list 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 shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such a majority and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall, in like manner, choose 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. In every case, after the choice of the President, the the person having the greatest number of votes of the electors

shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President."

In thus reviewing the work of the Federal Convention in regard to the executive, we are struck with the fact that the method finally evolved was a compromise between those who wished a complete independence of the legistative body and those who desired an entire dependence upon it. In the second place we are impressed with the experimental nature of the plan. The method of choosing the electors was thrown back upon the States from sheer inability to decide upon a general mode; the reference to different branches of the legislature for the eventual election of President and Vice-President had no precedent and the lack of a designating principle was the result of a happy thought to avoid a difficulty, rather than the logical outcome of any principle. There is also a striking lack of any conception of the inevitableness of party influence and government, which has proved the most basic fact of our national life. This seems to be at the root of the difficulty in deciding upon some method of election.

Hamilton said in the *Federalist* that the mode of choosing the President was about the only part of the Constitution which had escaped censure. Compared with the criticism of the other parts this seems true, yet there were objections raised to this portion. Gerry, Randolph, Mason and Luther Martin, each made public his reasons for condemning the whole plan, and each mentioned some provision regarding the executive. In the Virginia ratifying Convention Monroe[1] objected to the mode of election on the ground that it gave room for combination and intrigue among the electors and for foreign influence in the separate States. He condemned what he believed to be the tendency to result in a dependence upon the State governments rather than a reference to the people at large, and he felt that the power of Congress to appoint the time of elections would give a chance for undue interference. One member made out an elaborate table to show that the President could be constitutionally elected by the exceedingly small minority of 17 voices

[1] Elliot, III, 220, 488.

out of a possible 156.[1] Mason characterized the method as "an *ignis fatuus* on the American people," thrown out to make them believe they were to do the electing.[2] He suggested that the eligible list in the House be limited to two.

In the North Carolina Convention it was asserted that the power of Congress to determine the time of election would be used by that body, in connection with its power over the army, to control the election. Richard Henry Lee, who was an inveterate enemy of the plan, laid himself open to severe criticism[3] by misstating it, saying that it gave Virginia only one vote.[4] Gerry, in a pamphlet entitled "Observations by a Columbian Patriot,"[5] said that limiting the vote to the proposed proportion was almost tantamount to an exclusion of the voice of the people, and was vesting the choice solely in an "aristocratic junto," which might easily combine in each State to place at the head of the Union the most convenient instrument for despotism.

In answer to these objections the advocates of the proposed methods repeated the arguments given in the Convention. Pamphlets were written and speeches were made to show that there was absolutely no room for combination, intrigue or corruption among the electors. John Dickinson, in the "Letters of Fabius"[6] called attention to the fact that undue influence

[1] Table from Elliot, III, 492.

Number of electors = number of senators and representatives = 91.

Each elector has 2 votes = 182.

Let 4 candidates get 45 votes apiece and 1 get 2 votes.

The election will be thrown into the House and 5 candidates voted on.

Vote by States:

State		Representatives				Majority	
N. H.	has	3	representatives,	giving	a majority of	2	votes.
R. I.	"	1	"	"	"	1	"
Conn.	"	5	"	"	"	3	"
N. J.	"	4	"	"	"	3	"
Del.	"	1	"	"	"	1	"
Ga.	"	3	"	"	"	2	"
N. C.	"	5	"	"	"	3	"

Majority of 7 States = 15 votes.

Minority of States = 50 votes.

Total number of votes = 91 electors + 65 representatives = 156.

Total number of votes for President = 2 electors + 15 representatives = 17.

[2] Elliot, III, 493. [3] *Pennsylvania Gazette*, January 2, 1788.

[4] Elliot, I, 503.

[5] "Pamphlets on the Constitution," 1787-88, P. L. Ford, p. 12.

[6] Ibid, pp. 171-172.

was prevented by entrusting the election to no standing body, a point afterwards emphasized by Hamilton. Pinckney repeated these arguments in the Legislature of South Carolina.[1] In the North Carolina Convention [2] Iredell gave it as his opinion that "in all human probability no better mode of election could have been devised, and Davie declared it impossible for human ingenuity to devise any mode of election better calculated to exclude undue influence and combination. Noah Webster [3] makes a similar statement in one of his pamphlets. A note, written in 1801, on his own copy, is an interesting admission: "This proves how little dependence can be placed on theory. Twelve years' experience, or four elections, demonstrates the contrary."

While comparatively little criticism was made of the mode of election, more fault was found with the re-eligibility and powers given the President.[4] While Wilson was trying to prove, in the Pennsylvania Convention,[5] that he would not be the mere tool of the Senate, as was alleged by the opposition in the Convention and in the press,[6] Patrick Henry was crying, "Away with your President! we shall have a King!" and "strongly and pathetically expatiating on the probability of the President's enslaving America, and the horrid consequences that must result." [7] The objections, especially those of Mason, to the lack of a Council were answered by "A Landholder," [8] with the statement that the States which had such Councils had found them useless, and complained of them as a dead weight.

The Vice-President was attacked as being an "unnecessary if not a dangerous" officer,[9] who gave undue prominence to his State by having a casting vote in the Senate,[10] who had no stated qualifications,[11] who simply presided in the Senate for want of other employment [12] and who might be elected by the electors of a single large State, since a majority vote was not requisite.[13] A very undesirable person might thus be elevated to a place

[1] Elliot. IV, 304. [2] Ibid, IV, 107.

[3] Ford's "Pamphlets," etc., pp. 35, 64–65. [4] Elliot, I, 491, 493.

[5] McMaster and Stone: "Pennsylvania and the Federal Constitution," p. 398.

[6] Ibid, p. 586.

[7] Elliot, III, 60. [8] *Pennsylvania Gazette*, Dec. 26, 1787.

[9] McMaster and Stone: "Pennsylvania and the Federal Constitution," p. 530.

[10] Elliot, III, 486, 489. [11] Ford's "Pamphlets," etc., p. 310.

[12] Elliot, I, 495. [13] Elliot, I, 378.

LIBRARY OF THE UNIVERSITY OF CALIFORNIA

where he might at any time, by the death or disability of the President, become the Chief Magistrate. Some of these points were well taken, but little attempt seems to have been made to answer them beyond a general exposition of the necessity for a settled succession [1] and an explanation that his casting vote in the Senate was just, since otherwise some State must be deprived of its full representation to furnish a presiding officer. Davie,[2] who was a member of the Convention, explained that one of the reasons why the office of Vice-President was introduced was to prevent a deadlock in the Senate on important questions by having some one who would give an impartial vote. Though from some particular State, it was thought that the nature of his office would render the Vice-President impartial. That this does not appear in the debates is doubtless due to the imperfect reports we possess.

None of the State Conventions proposed any Amendments relating to the method of electing the executive; three proposed a change in the term.

When the ratification of the ninth State was laid before Congress, a committee was appointed to report an Act for putting the new Constitution into operation.[3] After much delay, occasioned by the difficulty of deciding where the new Congress should meet, it was resolved [4] that the first Wednesday in March of the following year should be the day for inaugurating the new government; New York was to be the temporary seat.[5]

Little of constitutional import in regard to the Chief Executive can be gathered from the first two elections, because of the personality of Washington. The weakness in the method is to be seen in the intrigues centering around the Vice-Presidency at every election until the designating of votes was introduced by the Twelfth Amendment. From the beginning it was understood that Washington would be called to fill the office of President. It was hinted at in the Convention,[6] the newspapers spoke of it as a matter of course,[7] and no other name

[1] "Ford's Pamphlets," etc., p. 349. [2] Elliot, IV, 42.
[3] Journals of Congress, XIII, 36. July 2, 1788. [4] Ibid, XIII, 105.
[5] Ibid, XIII, 36, 48, 57, 60–69, 73–75, 88, 95, 96, 99, 102–105.
[6] Elliot, V. 154.
[7] *Pennsylvania Gazette*, Sept. 26, 1787, March 5, 1788, July 2, 1788.

was seriously considered, although Franklin, Patrick Henry, Samuel Adams and John Hancock were suggested. To gain his support for ratification in the Massachusetts Convention, Hancock was told that "if Virginia did not unite, which was problematical, he would be considered as the only fair candidate for President,"[1] but he seems to have been the only one to take his candidacy seriously.[2] By the same medium of the press and of private correspondence a Vice-President was called for to represent the other section of the country, and general sentiment centered on John Adams as the most fitting person.

It was inevitable that the provision of the Constitution which implied an equality of claims on the part of the two candidates should be entirely disregarded, and at no election previous to the passage of the Twelfth Amendment were two men voted for as equals. A person unacquainted with the constitutional provision would be unable to infer it from the accounts of the electoral votes. An elector from Maryland[3] writes: "We all gave our votes for General Washington as President and Colonel Harrison, our Chief Justice, Vice-President." A letter from Virginia[4] says that ten of the twelve electors of that State had "chosen unanimously George Washington, President. For Vice-President the honorable John Adams had five votes, Governor Clinton three votes, the honorable Mr. Hancock, one vote and the honorable Mr. Jay one vote." A letter from Boston[5] speaks of the ballots of the electors being "unanimously in favor of his Excellency General Washington for President, and Mr. Adams, Vice-President." Of course these were misstatements, as far as the letter of the Constitution was concerned, for what each elector really did was to write down the names of two men, not designating which he meant for President. These examples, selected from many, are enough to show how far the popular ideas were from conforming to the constitutional provision. This divergence became constantly greater as parties became better organized.

As soon as it was clearly understood who was to be the Vice-Presidential candidate, intriguing began. The element of

[1] Life and Correspondence of Rufus King (Putnam Ed., 1895), I, 319.

[2] Ibid, I, 343.

[3] *Pennsylvania Packet*, Feb. 12, 1789. [4] Ibid, Feb. 14, 1789.

[5] Ibid, Feb. 16, 1789.

uncertainty involved in the clause of the Constitution which prevented the electors from specifying their choice for the two offices respectively was used with effect. In the first election it was employed by Hamilton to prevent the elevation to the Presidency of a man not intended by the people for that office. In succeeding elections it was utilized by him to raise to that station a person not designed for it by his party. The manipulation of this uncertain element, by which a man might be brought into the executive office by clever wirepulling, irrespective of the popular desire, forms the keynote of the history of the first four elections, and gives the struggle centering around the Vice-Presidency, especially in 1796 and 1800, a greater significance than is usually attached to it. Had it not been for the attempts of the Federalists to elect Burr as President in 1801, the Constitution might have undergone amendment, not by enactment, but by the slower process of public opinion. Before the electors assembled in their respective States on the first Wednesday in February, 1789, Hamilton had busied himself seeing to it that no one should receive as many or more votes than Washington, and the popular will thereby defeated. This was the ostensible object of his advice to the electors of several States. The influence he probably had is shown by a letter from Trumbull to Adams, in which he says an express from Hamilton caused the Connecticut electors to throw away two votes "when they were sure they would do no harm." [1] The result of this interference, combined with the desire of the States to honor their "favorite sons" with a complimentary vote, brought down the number cast for Adams to one less than a majority; but, as the Constitution did not require a majority vote for Vice-President, he was declared elected. That the electors divided their second votes among eleven men is significant; in the first place, of the light in which the office of Vice-President was regarded, and, in the second, of the lack of party organization. The change in both respects becomes marked in the succeeding elections.

During Washington's first administration, Congress passed an electoral law regulating the time and manner of voting, and the succession in case of death, resignation or disability of both President and Vice-President. A committee, consisting of

[1] Works of John Adams (1851), VIII, 484.

Rutherford, Sherman and Burr, was appointed in the Senate[1] to draft a bill for this purpose. It passed the Senate and was sent to the House. That body proposed certain amendments, all of which were agreed to except the suggestion that the Secretary of State, instead of the President *pro tempore* of the Senate, be the eventual successor. The House finally receded from this and on February 21, 1792, passed the bill. The most important section, in view of the events of the election of 1801, was that which provided that, in case of removal, death, resignation or disability of both the President and Vice-President, the President *pro tem.* of the Senate should act as President until the disability should be removed or a new President elected. In case there was no President of the Senate, the Speaker of the House for the time being should act.

In the election of 1792 the Presidency was not brought into question, since Washington consented to accept it for a second time. The Vice-Presidency was the more important, however, as its incumbent was the "heir apparent." The two persons who offered themselves to the consideration of the Republicans were Aaron Burr and George Clinton. The merits and demerits of both were discussed by the leaders of the party. Monroe[2] considered Burr impossible, while Jefferson[3] deprecated the effect upon Republicanism which would follow the support of a man who had virtually stolen the Governorship of his State, as Clinton had just done. His conclusion is significant in its bearing upon the political situation: "And for what [is he to be supported]? to draw over the Anti-Federalists, who are not numerous enough to be worth drawing over." Nevertheless, the party decided to give him its support.

Hamilton thought that the appearance of Burr was either a diversion in favor of Clinton[4] or else a plan to divide the Northern vote and so let in Jefferson by the votes of the South.[5] His recent conflicts with Jefferson caused him to consider him "a man of sublimated and paradoxical imagination, cherishing notions incompatible with regular and firm government;"[6] and

[1] Annals of Congress. Second Congress, 1791–1793. Pp. 25, 30, 36.

[2] Writings of Monroe (Putnam Ed.), I, 242–244. June 10, 1792.

[3] Writings of Jefferson (Putnam Ed.), VI, 90. June 21, 1792.

[4] Works, V, 528. Sept. 23, 1792.

[5] Ibid, V, 533. Oct. 10, 1792. V, 537. Oct. 22, 1792.

[6] Ibid, V, 535. Oct. 15, 1792.

he, therefore, determined for once to support Adams. There were hints that "the degradation of Mr. Adams" would not be unfavorably received in certain quarters;[1] but, when the election occurred, the entire Federal vote went for Adams, and all but five of the Republican votes were given to Clinton. Those five[2] seem to have partaken of the complimentary nature of the scattering votes of 1789.

Before the election of 1796, the first real Presidential contest, Hamilton had determined upon his course, which in no way contemplated the succession of Adams to the office of chief magistrate. The Republicans seem to have felt from the beginning that Jefferson was the only one whom they could push with success;[3] and Burr, having taken the leadership of the New York Republicans from Clinton, was named by the caucus of 1796[4] as the candidate for Vice-President. Among the mass of the Federalists, it was taken for granted that Adams would be the candidate for the Presidency, the only question being to get some one for the second place who would cause a diversion of Southern blows. But the leaders of the party had other plans. Jay's prospects having been entirely obscured by the Treaty, early in 1796 Hamilton requested Marshall to make overtures to Patrick Henry to permit his name to be used at the next canvass for the Presidency. Marshall returned his answer through King,[5] who wrote Hamilton that Henry probably would not agree to the arrangement, but that Gen. Thomas Pinckney was about to return home; to his former stock of popularity he would add the good will of those gratified by the Spanish treaty, and he would, if concurred in, receive as great or greater Southern and Western support than any other man. This suggestion pleased Hamilton[6] even better than his own. It must be noted that these suggestions are for a Presidential candidate. That the Congressional caucus, held some time in the summer of 1796,[7] nominated Adams for the Presidency and Pinckney for

[1] Life, etc., of Rufus King, I, 430. Sept. 30, 1792. [2] Jefferson, 4; Burr, 1.

[3] Works of John Adams, VI, 544. Madison's Works, II, 83.

[4] Gibbs' Memoirs, II, 488. "An Examination of the Various Charges against Aaron Burr, and a Development of the Character and Views of His Political Opponents." Phila., 1803. By Aristides (Wm. Van Ness).

[5] Life, etc., of Rufus King, II, 46. May 2, 1796.

[6] Hamilton's Works, 1851, VI, 114. May 4, 1796.

[7] Gibbs' Memoirs, II, 488.

the Vice-Presidency did not interrupt the plan to make use of the lack of a designating principle in the Constitution to bring Pinckney into the first office.

In June, King went to England as Minister, and in the frank and rather gossipy letters written him by Troup and other friends we get a glimpse of the way matters were progressing. November 16th, Troup wrote him[1] that in New York the electors were all good men, who would vote unanimously for Adams and Pinckney. "I am inclined to think," he added, "and such is the inclination of our friends here, that Mr. Adams will not succeed; but we have Mr. Pinckney completely in our power if our Eastern friends do not refuse him some of their votes under the idea that if they vote for him unanimously they may injure Mr. Adams. Upon this subject we are writing to all our Eastern friends and endeavoring to make them accord with us in voting unanimously for Mr. Adams and Mr. Pinckney." Another friend wrote to King from Philadelphia,[2] on Nov. 29th that the election of electors were so far closed as to determine with considerable accuracy the result. The friends of Adams calculated on a majority in his favor, but so small that it would be risking too much to trust entirely to it. He concluded, "It is therefore deemed expedient to recommend to the Federal electors to give a uniform vote for Mr. Pinckney, which, with those that he will obtain to the Southward, detached from Mr. Adams, will give him a decided majority over the other candidates." Later Higginson[3] wrote to Hamilton from Boston: "Your letter of 28th of last month[4] I received, and communicated its contents to some of our electors; a majority of them were at first inclined to throw away their votes from Mr. Pinckney, lest he should rise above Mr. Adams, but your information as to Vermont, with some observations made to them, showing the danger of so doing, decided all but three, who were determined, upon interested and personal motives to waste theirs. Several hours were spent in discussion before they voted; the result was—16 for Adams, 13 for Pinckney, 2 for Governor Johnston and 1 for Mr. Ellsworth." He further gave his opinion that, by the Southern votes, Pinckney would probably come in first, in which case he

[1] Life, etc., of Rufus King, II, 110. Nov. 16, 1796.

[2] Ibid, II, 112. [3] Hamilton's Works, VI, 185–186. Dec. 9, 1796.

[4] Not found in Hamilton's Works.

suggested that Hamilton, Governor Jay and the President should arrange some plan to conciliate and appease Adams or "serious inconveniences" might result. The result of this solicitude for Federal success at the expense of Adams was the defeat of Pinckney, since the New England electors, in a fright, threw away as many as eighteen votes, while the only Southern State which gave Pinckney votes but withheld them from Adams was South Carolina.

While the exact vote was still uncertain Jefferson wrote Madison[1] that a tie between himself and Adams seemed possible, since it was not likely that the Eastern States would suffer themselves to be made tools for bringing in Pinckney over Adams. He also thought of the possibility of no majority among the representatives, in case the election went to the House, a difficulty for which the Constitution provided no remedy and one which finally occurred in 1801. He requested[2] Madison to declare on every occasion, if a contest arose, that his desire was for Adams to be preferred "to prevent the phenomenon of a pseudo-president at so early a date." Fortunately no such contest arose, and Adams became President with three votes more than Jefferson received. A fact which had an important bearing on the next election was the defection of Virginia and North Carolina from Burr, giving him only seven votes out of a possible thirty-one.

Soon after his inauguration Adams wrote a letter, which is so characteristic that it deserves to be quoted:[3] "It is a delicate thing for me to speak of the late election. . . . . Had Mr. Jay or some others been in question, it might have less mortified my vanity, and infinitely less alarmed my apprehension for the public. But to see such a character as Jefferson, and much more such an unknown being as Pinckney, brought over my head, and trampling on the bellies of hundreds of other men infinitely his superiors in talents, services and reputation, filled me with apprehensions for the safety of us all. It demonstrated to me that, if the project succeeded, our Constitution could not have lasted four years. . . . . . That must be a sordid people, indeed, a people destitute of a sense of honor, equity and character, that could submit to be governed and see hundreds of its most meritorious public men

[1] Jefferson's Works (Putnam Ed.), VII, 91. Dec. 17, 1796.

[2] Ibid, VII, 105.

[3] Works of John Adams, VIII, 535; March 30, 1797, To Knox.

governed by a Pinckney under an elective government . . . . I mean by this no disrespect to Mr. Pinckney. I believe him to be a worthy man. I speak only by comparison with others."

By the fall of 1799 the measures of Adams' administration, especially the French Mission, had so exasperated the Hamilton wing of the Federalist party that they were determined to get rid of him, unless pushed to his support by extreme necessity.[1] Again they cast about for a presidential candidate of sufficient strength to supplant him, and Gouverneur Morris wrote to Washington [2] on December 9th, setting forth the dissatisfaction with Adams and urging him to come forward for a third term. As Washington died on December 14th, it is probable that he never saw this letter. They discussed Chief Justice Ellsworth and C. C. Pinckney,[3] but in May, 1800, the result of the New York elections showed that division meant defeat.

In the balanced state of parties it had been seen that Republican success in the New York State elections probably meant national success,[4] that defeat there was certain ruin of national hopes. In this crisis Burr's political sagacity and adroitness were given full play, and to him the victory was ascribed by both friend and foe.[5] By making up a ticket for the Assembly of such men as Clinton, Gates and Brockholst Livingston the Republicans carried the day against the Federal ticket, made up of comparatively unknown men, selected mainly for their pliancy.[6] The New York elections were settled on May 2d. On May 7th Hamilton wrote to Governor Jay suggesting an extra session of the Legislature to change the electoral law, and so deprive the Republicans of the fruits of the victory just gained at the polls. His father-in-law, General Schuyler, wrote a similar letter, on the same day, saying that the plan was suggested by leading Federalists, Marshall among the number, but Jay refused to consider the suggestion. On May 10th Hamilton wrote [7] that he would never again be responsible for Adams by

[1] Life. etc., of King, III, 142. Nov. 6, 1799. III, 173. Jan. 5, 1799.

[2] Sparks: "Life and Writings of Gouverneur Morris," III, 123.

[3] Life, etc., of King, III, 209.

[4] Writings of Jefferson, VII, 432-434. March 4, 1800.

[5] Adams: "Life of Gallatin," pp. 232-240. Adams' Works, X, 125.

[6] Parton: "Life of Aaron Burr," I, 246-252.

[7] Hamilton's Works, VI, 441. To Sedgwick.

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his direct support, even though the consequence should be the election of Jefferson, adding that the only way to prevent a fatal schism in the Federal party was to support Pinckney in good earnest. The next day Sedgwick, Speaker of the House, wrote to King[1] that there had been a meeting of the whole Federal party in Congress, and that they had agreed to support, *bona fide*, Adams and C. C. Pinckney, that is, to give an equal vote to each as the only way to "escape the fangs of Jefferson." Gore also wrote to King that it was possible they might be so alarmed at the elections in New York as to be true to the agreement, but he doubted it. In the meantime Hamilton was denouncing Adams[2] and urging that equal votes be obtained for both candidates in New England, so that by extra Southern votes Pinckney might come in first. He consulted various persons concerning the advisability of a private publication against Adams, and on October 22d the famous "Letter Concerning the Public Conduct and Character of John Adams, Esq., President of the United States" was printed. It was a vehement personal as well as political arraignment of Adams, and its boomerang nature was seen when Burr, immediately obtaining possession of it, made parts of it public, thus compelling the publication of the whole.

In the Republican party the leadership and first place were conceded without question to Jefferson, and it remained only to decide upon the person to be voted for as Vice-President. Gallatin was at this time the leader of the Republicans in Congress, and as a Congressional caucus would nominate, Matthew L. Davis, Burr's closest friend, kept Gallatin informed of Burr's part in the political affairs in New York, ending a series of letters with a direct query as to the Vice-Presidential candidates.[3] He discussed the merits of the three possible candidates, Clinton, Livingston and Burr, and urged that the last named be rewarded for his services. Gallatin endeavored to find out the wishes of the New York Republicans through his father-in-law, Commodore Nicholson, prominent in New York politics. He was informed that Livingston was undesirable, that Clinton declined to run and that unbounded confidence was reposed in

[1] Life, etc., of King, III, 238. May 11, 1800.
[2] Hamilton's Works, VI, 483.
[3] Adams' "Life of Gallatin", pp. 232–240.

Burr, who was considered the only suitable person.[1] Upon receipt of this information a caucus was held, May 11th, Gallatin reported, and it was unanimously agreed to support Burr for Vice-President.[2] Burr, however, had held in mind the Republican votes which he did not get in 1796, and he recalled the fact to those who approached him in regard to his candidacy. There is no proof that he was given pledges for an equal vote with Jefferson, as was stated afterwards,[3] but it is certain that he took care to impress the matter upon the Southern leaders,[4] and there are indications that a tie was contemplated by him. So close was the contest sure to be that in November, 1799, Sedgwick had found consolation[5] in the fact that a "good decision" would be made by the House in case the "Jacobins should be unable to procure for their candidate for the presidency a majority." The tie contemplated by him, however, was probably one between the rival leaders rather than between the two Republican candidates.

The developments of a year caused Madison to anticipate the tie which occurred, and the suspicions that the Republicans entertained of Burr may be seen in Madison's denial of them. November 10, 1800, he wrote to Monroe[6] that he could not apprehend any danger of a surprise that would throw Jefferson out of the first place, nor did he believe that a single Republican vote would abandon him. He thought that the worst that could possibly happen would be a tie between Jefferson and Burr, which would, of course, be satisfactorily arranged in the House. As time went on the likelihood of a tie became greater, and when the South Carolina vote became known, Jefferson[7] wrote to Burr that it was badly managed not to have arranged with certainty what seemed to have been left to hazard, that is, that some one elector should have been instructed to throw away his vote to prevent a tie, as was done in the Federal party. It seems that Burr's friend, Gelston, had assured Madison[8] that such an arrangement had been made in two or three States. Whether he was preventing any further move on the part of

[1] Ibid, p. 242. May 7, 1800. [2] Ibid, p. 243. May 12, 1800.
[3] Gibbs' Memoirs, II, 488. [4] Madison's Works, II, 160, 162.
[5] Life, etc., of King, III, 146, 155. [6] Madison's Works, II, 163.
[7] Writings of Jefferson, VII, 467. Dec. 15, 1800.
[8] Madison's Works, II, 166. Dec. 20, 1800.

Madison or really thought he was telling the truth, cannot be determined. When the full vote became known, it was found that no Republican elector had failed to vote for both candidates, and therefore that the election would devolve upon the House of Representatives. It was part of the gossip of the day that the South Carolina vote had been diverted from Pinckney to Burr by young Mr. Alston, afterwards Governor of the State, whom Burr rewarded for his services with the hand of his daughter Theodosia. [1]

When it became evident that the House would have to make the final choice, the Federalists, who were in the majority in that body, began to indulge in the wildest schemes to prevent an election and then to pass a new law giving the Presidency to the Chief Justice; to let the office devolve upon the President *pro tem* of the Senate or to elect Burr instead of Jefferson. Hillhouse was said to have drafted a bill embodying the first mentioned plan,[2] but it was not brought forward. Gouverneur Morris and the other more farsighted Federalists advised against it,[3] and it was foreseen that no one would be willing to assume the responsibility of such a usurpation. The result was that the last-named scheme was decided upon, and the Federalist Representatives united in the attempt to give Burr the first place, thus making use of the lack of a designating principle in the Constitution to do for their opponents what Hamilton had been trying to do for them. This policy was not definitely decided upon until the Republicans had become very much agitated over the prospect of having both Jefferson and Burr set aside. As soon as Hamilton heard of their intentions he wrote to Wolcott, deprecating the scheme: "There is no doubt but that, upon every virtuous and prudent calculation, Jefferson is to be preferred. He is by far not so dangerous a man, and he has pretensions to character. As to Burr, there is nothing in his favor. . . . . He is truly the Cataline of America." In view of the credit usually given to Hamilton for the defeat of this attempt of the Federalists, it is interesting to see that his letters [4] plead reasons of Federal expediency and the per-

[1] "Life of Gallatin," pp. 244–245. Life, etc., of King, III, 459.

[2] *Aurora.* March 16, 1801.

[3] Life, etc., of Gouverneur Morris, III, 132–133. Dec. 19, 1800.

[4] Hamilton's Works, VI, 419, 495, 497, 499, 500, 502, 517, 520, 521.

sonal unfitness of Burr rather than the political dishonesty of bringing in as President a man whom no one had wished or intended for that place. It is doubtful if he ever saw it in that light, so much had his own efforts been directed towards a similar result.

The day appointed for counting the electoral vote was February 11, 1801, and as the Federalists openly discussed their intentions it behooved the Republicans to decide upon a plan of action adequate to the emergency. They declared that should Burr be elected they would acquiesce, though not cheerfully, since that would be within the letter of the Constitution,[1] but that they would not submit to a law to name a President. Calculations were made to show that should the Federalists pass a law for a new election they might gain the helm again,[2] since in the five New England States, New Jersey and Delaware, both branches of the Legislature were Federal, in New York, Pennsylvania, Maryland and South Carolina, the Senates were Federal, and those four States would refuse to act; therefore the 49 votes of the New England States, New Jersey and Delaware would outweigh the 44 votes of the Southern States which were Republican. Such discussions called forth the letter from Madison to Jefferson, which has been denounced as a "bitter comment on his political honesty," and a shameful recantation of his principles.[3] He wrote: "On the supposition of either event, whether of an interregnum in the Executive, or of a surreptitious intrusion into it, it becomes a question of the first order, what is the course demanded by the crisis? Will it be best to acquiesce in a suspension or usurpation of the Executive authority till the meeting of Congress in December next, or for Congress to be summoned by a joint proclamation or recommendation of the two characters having a majority of votes for President? My present judgment favors the latter expedient. The prerogative of convening the Legislature must reside in one or other of them, and if both concur, must substantially include the requisite will. The intentions of the people must un-

[1] Writings of Jefferson, VII, 469. Dec. 18, 1800. *Aurora*. Feb. 9, 1801. Open letter to John Marshall.

[2] "Life of Gallatin," p. 255.

[3] McMaster: "History of the People of the United States," II, 516-517. J. C. Hamilton: "History of the Republic," VII, 431-432. Von Holst: "Constitutional History of the United States," I, 171.

doubtedly be pursued and if, in reference to the Constitution, the proceeding be not strictly regular, the irregularity will be less in form than any other adequate to the emergency, and will lie in form only, rather than in substance; whereas the other remedies proposed are substantial violations of the will of the people, of the scope of the Constitution and of the public order and interest."

Not even the Federalists denied that it would be a "stretch" if not an open violation of the Constitution to hand over the Presidency to the President *pro tem.* of the Senate or to a person specially designated by law, when there were persons, constitutionally elected, to be chosen from. Nor did either party fail to see that the success of such an effort would endanger the republic. Such a contingency had never been contemplated by the framers of the Constitution and any measure whatever that might be taken to meet it must necessarily be outside the provisions of that document. It seems hardly just, therefore, to accuse Madison, although he was a strict constructionist, of being politically dishonest in his attempt to meet by an extra-constitutional measure a violation of the Constitution so unexpected that no remedy had been provided, in State or in Nation, and to acquiesce in which might mean a virtual dissolution of the Union.

Madison asked further in his letter if it were possible that Adams would sign such a law as the Federalists were discussing. Jefferson so far deserted his attitude of a spectator as to approach Adams on the subject,[1] but found him intractable, as usual. Adams soon after wrote [2] to Gerry that he saw no more danger of a political convulsion if Congress should make a President than if Jefferson or Burr should be declared such. He thought "the people would be as well satisfied" in one case as in the other. Marshall was said to have expressed a similiar opinion.[3]

The Republicans were meeting all over the country and expressing their opinion in quite a different vien. In Philadelphia they formally asserted [4] that in the original nominations

[1] Writings of Jefferson. Anas, I, 313.

[2] Works of John Adams, IX, 98, Feb. 7, 1801.

[3] Writings of Monroe, III, 256, Jan. 18, 1801. *Aurora*, Feb. 9, 1801.

[4] *Aurora*, Jan. 12, 1801.

Jefferson was designed for the Presidency, and in some places it was declared that legislative usurpation would be met by force.[1] The Virginia Legislature, in session at the time, manifested a spirit not to submit to such usurpation and adjourned only on the assurance that Governor Monroe would convene them again should such a plan be attempted at Washington.[2]

As the time approached for the decision by the House it became necessary, in the absence of all precedents, to make some rules by which to conduct the election. The committee appointed, consisting of ten Federalists and six Republicans,[3] reported a set of rules on February 6th. The Republicans were unsuccessful in the attempt to change the provisions that the House should not adjourn till a choice was made and that the balloting be done with closed doors. The report was adopted as presented. By these rules it was decided that when the House returned from the electoral count, after having provided seats for the members and President of the Senate, it should ballot with closed doors, without interruption and without adjournment, till a choice should be made. The method of balloting was, of course, by States, the delegates of each sitting together. Each delegation was to chose tellers if necessary, and the vote of each State was to be prepared, with a duplicate. The votes and the duplicates, deposited by different persons in separate boxes, were to be taken to separate tables and there counted by a committee of one from each State, who should divide the work. If they agreed in a count the result should be reported, if not, a new ballot was to be taken. When either candidate was reported to have a majority, the Speaker should declare it and give official notice to the President and Senate. All questions incidental to the choice were to be decided by States, without debate, a tie vote being considered as negative. While these rules were being debated some of the Federal newspapers, such as the *Boston Centinel*, were advocating the election of Burr and comparing him with Jefferson, much to the disadvantage of the latter. An "Essay by Eumenes," which appeared in the *Washington Federalist*, argued that in case of no election Adams and

[1] *Aurora*, Feb. 9, 1801. Writings of Jefferson, VII, 491, Feb. 15, 1801.

[2] Writings of Monroe, III, 256, Jan. 18, 1801. III, 257, Jan. 27, 1801.

[3] Annals of Congress (6th Congress), 1799–1801, pp. 987, 990, 1006, 1007, 1010.

Jefferson should continue in office for the ensuing four years. After the balloting began the Federalists were urged [1] not to sacrifice their duty shamefully by handing the Constitution over to the hazardous hands of a foe so dangerous as Jefferson.

It is hardly necessary to repeat the story of the balloting. It was begun on February 11th and continued six days, through thirty-six ballots, in thirty-five of which the vote stood: eight States for Jefferson, six for Burr and two divided. After the thirtieth ballot a motion was made to postpone the next ballot till March 3rd, but the motion was unanimously rejected. When it was seen that Burr could not be forced to commit himself and that the Republican members could not be coerced into voting for him for fear of continuing the deadlock after March 3rd, Bayard of Delaware, who practically held the decision in his hands, determined to settle the contest by allowing Jefferson to be elected. Jefferson regarded the method taken as a declaration of war,[2] for instead of actually voting for him some of the Federalists gave in blanks, thus throwing away the votes of Delaware and South Carolina and giving him those of Vermont and Maryland. New Hampshire, Massachusetts, Rhode Island and Connecticut voted for Burr to the end. The main body of the Federalists out of Congress condemned the action of their representatives and felt great relief when the struggle terminated as it did.

As soon as the election was over the *Aurora* [3] voiced a very general sentiment when it expressed the hope that some change would be made in the Constitution which would prevent the repetition of such "disgraceful scenes" as had just taken place. Jefferson's correspondence [4] just before the election suggests the need of an amendment. Later, in a letter to Gallatin, he mentioned [5] an amendment which he said would be proposed to do away with the electors and have a direct vote by the people, the ticket having the plurality of the vote of any State to be considered as receiving thereby the whole vote of the State. This does not mention the designation of votes, and there is no record

[1] *Washington Federalist*, Feb. 12, 1801.
[2] Writings of Jefferson, VII, 494, 497.
[3] *Aurora*, Feb. 20, 1801.
[4] Writings of Jefferson, VII, 474, 488, 490, 491.
[5] Ibid, VII, 94. Sep, 18, 1801.

of its having been offered in Congress, but from this time forward the subject of an amendment was agitated in the State Legislatures [1] as well as in Congress.

As early as 1801 Gallatin discussed [2] the necessity for a designating amendment to avoid embarrassment in the election of a Vice-President in 1804. He had discovered among a large majority of the Republicans a want of confidence in Burr of which he had not been aware when he supported his nomination. He spoke of that nomination as not having been a necessity at the time, and as a capital fault if the Republicans were determined not to support him for the eventual succession. There is the evidence of Bayard, who had the whole matter in his hands,[3] that Burr did not give his definite co-operation to the scheme for his election. Nevertheless he trimmed so close to the wind that although the Republican press teemed with compliments upon his high stand and his unwillingness to take the place not intended for him, distrust deepened among the Republican leaders. He was practically an isolated man from the time Jefferson's administration began.

It is worth while to notice just here the part in executive business which had been taken by Adams and Jefferson while in the office of Vice-President. Although Adams complained of his office as wholly insignificant and the only situation in the world where firmness and patience were useless,[4] he was consulted by Washington in many of the most important measures of the government, in the same manner as were the Heads of Departments. In 1789 the question of executive etiquette [5] was submitted to his judgment. In 1790 his opinion was asked [6] in regard to an important matter of foreign relations. When Washington went on his Southern tour in 1791 he sent instructions [7] to his Secretaries to consult Adams on important matters, and this was done, though informally, at a dinner given by Jefferson. In 1794, Washington sent him the papers relating to the Genet affair,[8] asking his advice in regard to the proper

[1] Writings of Monroe, III, 317. Dec. 7, 1801. To General Assembly of Virginia.

[2] Life of Gallatin, p. 287.

[3] Hamilton's Works, VI, 524. March 8, 1801.

[4] Works of John Adams, IX, 573, Jan. 22, 1791. [5] Ibid, VIII, 489.

[6] Ibid, VIII, 496. [7] Writings of Jefferson, I, 165.

[8] Works of John Adams, VIII, 515.

policy to pursue. These examples are sufficient to show that Adams was given some place in executive councils, whether his influence was very great there or not.

One of the reasons Madison advanced [1] when urging Jefferson to accept the Vice-Presidency in 1796, was the valuable effect his proximity would have upon Adams' councils, especially in regard to foreign affairs. Jefferson replied [2] that, as to duty, the Constitution would know him only as a member of a legislative body, its principle being that of a separation of functions, except in cases specified. A little later he distinctly stated [3] that he would take no part whatever in executive consultations even if it were proposed. That such participation would not be urged upon him was natural, in view of the height to which party spirit had risen. Before his inauguration Adams called upon Jefferson and consulted him about relations with France.[4] This was the only time that such a consultation occurred, for after his inauguration and the meeting of his Cabinet, Adams saw the impossibility of including in his councils the leader of the opposition to his administration.

As early as 1796 the closeness of the race between Adams and Jefferson caused apprehension on the part of the Federalists, and an amendment was offered for the designation of votes by the electors.[5] Similar efforts were made in 1797 [6] and 1798 [7] and again in 1800,[8] but they aroused little interest and the subject was dropped. During the session of 1800,[9] an amendment was proposed for districting the States for electoral purposes. This proposal for districting always appears in close connection with that for the discrimination in electoral votes, but was not acted upon by Congress. In 1802 the New York Legislature recommended the adoption of an amendment including both measures. By these resolutions the States were to be the districting

[1] Madison's Works, II, 108. Dec. 19, 1796.

[2] Writings of Jefferson, VII, 108. Jan. 22, 1797.

[3] Ibid, VII, 120. May 13, 1797.

[4] Ibid. I, 272–273. March 2, 1797.

[5] Annals 8th Cong., 1st session. 1803–1804. p. 205.

[6] 4th Cong., 2d session, p. 1824.

[7] Jefferson's Writings, VII, 193, and 5th Cong., Vol. I, 493.

[8] 6th Cong., Feb. 4, 1800, p. 510.

[9] 6th Cong., March 14, 1800, p. 627.

organs. A curious misunderstanding of this part of the question seems to have been in the mind of Hamilton, who heartily approved of the measure, but in letters[1] on the subject referred to the districting as under the direction of the national Legislature. Such a radical difference is the more inexplicable since Hamilton himself was the author of the New York resolutions[2] and must have been aware of so important a change made in his draft.

A review of the attempts cited show that though the designating amendment was finally passed as a Republican party measure, the earliest advocates of the principle involved were the Federalists. It was recommended first by the Federalist Legislature of New Hampshire, twice by the Federalist Legislature of South Carolina, unanimously in New York, where the Senate was Federalist, and at different times by the Legislatures of Vermont, Massachusetts, Tennessee, Ohio, Kentucky and North Carolina, and the indications are that in so far as it was a party measure at first it was Federalist.

On February 15, 1802, the New York resolutions were presented in the House by the Republicans, and on April 12th in the Senate. The districting portion was dropped and the rest of the question was not taken up again in the House till May 1st, when its consideration was objected to on account of the late period of the session, when members were occupied in preparing to depart and "in packing up their clothes, with which they had packed up many of their ideas." Huger, of South Carolina, who afterwards opposed the amendment, declared himself in favor of the principle, but protested against taking such an important step so hastily. He pointed out that there was scarcely a quorum and that were all the Federalists present they would have more than the third necessary to defeat the measure. The question being taken on the amendment,[3] it was lost in Committee of the Whole, but the House refused to concur in the report and on the third reading it was carried[4] and sent to the Senate.

The lack of argument on the merits of the question, the

[1] Hamilton's Works, VI, 531, to G. Morris ; VI, 536. (To Bayard and not to Morris, as is given in his Works).

[2] Ibid, VII, 836.

[3] 7th Congress, 1st session, p. 1291.

[4] By vote of 47 yeas to 14 nays.

long postponement from February 19th till May 1st, and the haste with which it was pushed through, seem to substantiate Huger's charge that it was a party measure and that the course taken in regard to it was a high-handed method of gaining an end which could not have been gained if an ordinary course had been pursued. From being a Federalist measure it had changed to a Republican one and there was a complete reversal of party action on the subject. This change is further emphasized by what took place in the Senate.[1] There is no record of any debate. On May 3d, the amendment as sent from the House was taken up, put to vote and lost, the vote[2] not being the necessary two-thirds. That it was lost was due to the vote of Gouverneur Morris, and since he represented New York, which had unanimously recommended it, he felt it necessary to explain his conduct. This he did in a letter to the Senate and Assembly of New York[3] in which he gave these reasons: that he was opposed to amendments on the general ground that they lessened respect for the constitutional compact, that it is better to bear the evils we know than to hazard those we are unacquainted with and that the existing mode seemed preferable to the change proposed. That such flimsy excuses should have been offered by a man of Morris' keen mind in the face of the events of 1801 argues a motive other than personal opinion, and this could have been no other than a party motive. In the second session of the Seventh Congress an amendment embodying the designating principle was again introduced,[4] and on February 8th it was urgently called for by Bayard (Del.). It was charged that his urgency was due to the absence of Republican members from the Senate by which the amendment could be defeated, even if carried in the House.

Bayard had formerly expressed his approval of the amendment,[5] but had voted against it with the other Federalists the previous May, and now declared his intention to do so again. But the House refused to take up the amendment and voted to postpone it till the first Monday in November. The new Congress would then be in session and it was hoped that the Republicans would have a two-thirds majority.

[1] Seventh Congress, 1st Session, p. 304. [2] 15 yeas, 8 nays.
[3] "Life and Writings of Gouverneur Morris," Sparks, III, 173.
[4] Seventh Congress, 2d Session, p. 304.
[5] Hamilton's Works, VI, 539.

When the Eighth Congress met, this was a fact. For the first time in the history of Congress the Republicans had a majority large enough to pass a constitutional amendment should it be treated as a party question and the lines be strictly drawn between Republicans and Federalists. The subject was taken up the very first day, not even waiting till the time agreed upon the previous session. The discussion falls under three heads—that in the House on its Resolutions, sent to the Senate but not acted upon by that body, that in the Senate on its own Resolutions, and that in the House on concurrence in the Senate Bill.

October 17, 1803, Dawson (Va.) moved: "That in all future elections of President and Vice-President, the persons shall be particularly designated, by declaring which is voted for as President and which as Vice-President." [1] An amendment was offered to this resolution,[2] that "the person voted for as President having the greatest number of votes shall be President, if such number be a majority of all the electors appointed, and if no person have such a majority, then from the five highest on the list of those voted for as President, the House of Representatives shall immediately choose by ballot one of them as President. And in every case the person voted for as Vice-President having the greatest number of votes shall be the Vice-President. But if there should be two or more who have equal votes, the Senate shall choose one of them for Vice-President." A further amendment was offered to substitute the number two for five in the list to be submitted to the House. A committee of seventeen, one from each State, was appointed to consider the resolutions, and Huger moved that the other resolutions of the New York Legislature, respecting the electoral districting, be referred to the same committee. When the committee reported [3] this part of the subject had been quietly dropped and does not again directly appear in the debates. The number three had been substituted for five on the eligible list. This introduced one of the three points upon which the chief discussion hinged in the first debate in the House. It was argued by the Federalists that no great danger could ensue from allowing a latitude to the House of Representatives since they, as well as the electors,

[1] Eighth Congress, 1st Session (1803–1804), p. 372.

[2] Oct. 19, by Nicholson.

[3] Oct. 24.

were chosen by the people. It was even moved that the list be extended to the whole number voted for.[1]

When the question was put the number five was substituted by a vote of 59 to 47. This was due to the fact there was a division of sentiment in the Republican party itself, the representatives of the small States being so opposed to the reduction that they were willing to sacrifice the amendment rather than allow it to pass with the smaller number. This feeling was due to the fear of a diminution of the influence of the small States which such a reduction in the number would effect. The discriminating principle itself was attacked on this ground by the Federalists, and severely denounced[2] because it would have a tendency to keep the election out of the House, thus destroying one chance which the small States had of influencing the eventual choice. In answer to these arguments, the Republicans opposed political theories. The electors were the organs, it was said,[3] who, acting from a certain and unquestioned knowledge of the choice of the people, and under immediate responsibility to them, selected and announced the particular citizens upon whom the public confidence was bestowed. It was a primary and essential attribute of the government that the will of the people should be done and that the elections should be according to this will. The highest ground was taken in opposition to this democratic, nationalizing tendency by Huger. Although a Federalist, his arguments were a strong defense of State Rights, opposing concrete facts to abstract democratic reasoning. The Republicans wanted to pass an amendment in conformity with what they thought ought to be; he took the ground of strict construction, standing on the Constitution as presented by the Convention. He regarded the amendment as a question between the States, involving the vital principle upon which the Federal compact was formed, namely, the jarring interests and pretensions of the large and small States. Emphasizing the federative principle, he deprecated the abstract view, which, going back to a state of nature, seemed to regard it as a radical error in the Constitution that its provisions were not founded on the broad basis of population and numbers. The

[1] Lost by vote of 29 yeas, 77 nays.

[2] Annals 8th Congress, 1st Session, p. 517. Griswold (N. Y.).

[3] Ibid, p. 423. Clopton (Va.).

rights of man in a state of nature, the origin of the social compact and the "will of the people" as the foundation of all government he brushed aside as irrelevant, since the Union was not composed of a people rising for the first time into political existence, but of independent sovereignties with distinct and complicated interests. It therefore appeared to him that the amendment gave a death blow to the portion of sovereignty reserved to the States, and was a monstrous stride towards that very consolidation of the States of which the Republicans had been accustomed so bitterly to complain.

The other question discussed at this time related to the Vice-Presidency. It was said by the Federalists that it was to prevent intrigue and the absolute power of one party that the office of Vice-President was instituted; that the proposed amendment would make that officer a useless expense; that he would have no other duties than such as devolve upon the Speaker of the House, besides being able from his proximity to the Government to cabal with greater effect for the succession.[1] Huger regarded this question also in the light of the rights of the small States. He urged that the constitutional mode of election created a moral necessity on the part of the electors to bring forward the most prominent characters as well to fill the office of Vice-President as that of President. This was a bold statement in the face of the recognition of political expediency shown in Burr's nomination, however true it might be theoretically. The indiscriminate mode afforded the small States a great degree of influence over the final choice, especially if the large States, to secure the Presidency, threw away their second votes. His estimate of the value of the office exceeded that generally made and is important as an index to the possibilities of the situation under a strong personality. As will be pointed out later, it is in this connection that the amendment has had one of its most marked effects. That the Vice-Presidency was more than a "respectable situation" was shown by John Adams, who had spoken of it in this ironical way. He had been able to do much by positive acts of individual authority, and by his casting vote had exercised a powerful influence in giving permanent form and character to the government. However, it must be

[1] Ibid, p. 540.

said that at that time parties, strictly-speaking, had not been organized and majorities were not formed by men who might, in their private convictions, be on the other side of the question. When this happened the influence of the Vice-President in the Senate decreased.

Finally the resolution, as amended in a few minor points, was agreed to[1] and sent to the Senate for concurrence. Before receiving the House resolution the Senate had taken up the matter.

October 21st, Clinton (N. Y.) introduced a resolution for discrimination of votes in very nearly the wording eventually adopted.[2] The number on the eligible list was left blank, but no provision was made for non-election in the House. The resolution, as first introduced, was significant of the haste with which it was constructed. It contained a palpable absurdity by providing for the case of two persons having a majority, an impossibility under the designating principle.

Realizing that the requisite two-thirds majority would depend upon the careful guarding of every Republican vote, Clinton tried to rush the amendment through, as it would be necessary for him to leave the Senate in a few days.[3] It was brought up on Friday and he proposed to have a second reading on Saturday, so that the third might be had on Monday and final action taken that day. The subject was too keenly interesting to allow the method so nearly successful in 1802 to be effective, and on October 25th, Clinton having gone home, it was postponed till November 23d.[4] While postponement was being discussed, an amendment was proposed which was afterwards carried, that a majority of the votes of the electors be requisite for a choice of Vice-President as well as of President. Another amendment was offered,[5] to which little notice was given, though lost by a majority of only one, viz: "That at the next election of President no person should be eligible who had served more than eight years, and in all future elections no person should be eligible more than four years in any period of eight years."

As in the debates in the House the chief discussion was on the number on the eligible list in relation to the influence of

[1] Ibid, p. 544. Vote: 88 yeas, 31 nays. Oct. 28. [2] Ibid, p. 16.
[3] Ibid, p. 19. [4] Ibid, p. 26. [5] Ibid, p. 19. Butler (S. C.).

the small States and on the Vice-Presidency, though other points were brought out. When the resolutions were again taken up the main interest centered in filling the blank left in regard to the number of persons to be selected from if the choice fell to the House. Five, three, and even two were suggested, and three was finally decided upon. This called forth a storm of remonstrance as a conspiracy against the influence of the smaller States. The danger which seemed to him to threaten South Carolina as one of that group overcame the Republicanism and former favorable attitude of Butler. He felt that the amendment would give the choice of President to the four large States to the perpetual exclusion of the others, and he enunciated it as a reasonable principle [1] that every State should in turn have the choice of the chief magistrate made from among its citizens. If this were carried out at the present day it is an interesting mathematical problem how long each State would have to wait its turn, with forty-five States and a term often of eight years. Butler had been a member of the Convention of 1787 and felt himself to be as one who spoke with authority. He referred to the debates there and ended with the warning, "Beware of the great States! . . . . . . Pass this amendment and no man can live in the small States but under disparaging circumstances, they will have about as many rights left in society as the Helots of Greece." [2]

John Quincy Adams also disapproved of the alteration from five to three [3] and called upon some champion of the small States to vindicate their rights. He afterwards shifted his position and based his opposition on federative grounds, stating that the principles of the Federal compact were attacked rather than the rights of the small States, following the arguments offered in the House by Huger. He finally stated that his vote on the subject would be governed by the number five, since he approved of the other principle involved. It is interesting to note that had he been successful in extending the list, his own election to the Presidency would have been improbable. Had Clay been on the list in 1825, when the election was thrown into the House, Adams would hardly have been elected.[4]

Other Federalists vociferously protested against being

[1] Ibid, p. 23. [2] Ibid, p. 207. [3] Ibid, p. 87.

[4] Burgess, "Middle Period," p. 140.

"bound hand and foot and delivered over to four or five of the large States,"[1] which, they affected to believe, were ready to combine and use force to gain their ends. Not only was the decrease in number regarded as an attack on the rights of the small States, but the whole amendment was condemned as having this effect. It prevented the necessity for throwing away votes on the part of the large States which had enabled the small States to concentrate and put in a Vice-President.[2] Its tendency to keep the election out of the House was again urged as an argument against it. The Republicans answered the first of these objections by saying that it was not the intention of the Constitution that the majority of the people should be driven by an unforseen state of parties to relinquish their will in the election of either officer nor that the principle of majority, in a function confided to the popular will, should be deprived of half of its rights and be laid under the necessity of violating its duty to preserve the other half.[3] In regard to the eventual election by the House, it was pointed out that the controversy was not between the larger and smaller States, but between the people of every State and the House of Representatives, since the election by that body was never intended to be converted into the active rule and thus destroy the line of separation between the executive and legislative power. It was stated that such an election by the House exposed the country to the evils Great Britain had suffered through the rotten borough system[4] and the chance of being governed by a minority was lessened by lessening the number on the eligible list. The number three was more in the spirit of the Constitution, since it placed the choice more certainly in the hands of the people.[5]

The league of the large States, conspiring against the small, which was held up by the opposition as a sure and frightful consequence, was discussed and it was pointed out very clearly[6] that the large States were more jealous of each other than of the small, and it was absurd to think of a combination between Massachusetts and Virginia, for instance, or Massachusetts and New York. The more natural course was indicated later[7] in

[1] Annals 8th Congress, 1st session, p. 87.
[2] Ibid, p. 139.
[3] Ibid, p. 181. Taylor (Va.).
[4] Ibid, p. 100.
[5] Ibid, p. 103. Nicholas (Va.).
[6] Ibid, p. 114. Jackson (Ga.).
[7] Ibid, p. 704. In House by Gregg (Pa.).

the statement that the combinations would be of sections—Eastern, Middle, and Southern; Pennsylvania might join with New Jersey, Delaware and Maryland, but never with Virginia or Massachusetts.[1]

The narrowing of the number was necessary, it was said, to prevent the House from electing a man evidently not intended by the people. As for rotation, the most farsighted statement in regard to party made during the debate was that of Jackson (Ga.), who said he did not consider it a matter of any consequence from what State a President was chosen; while parties existed there would be a champion chosen by each, irrespective of the State of which he was a resident.[2] In sharp contrast with this was the prophecy that the insertion of the number three would cause an opposition of one on each side for President and a third between both for Vice-President.[3]

As usual the truth lies between the two extremes. Butler's alarm, so loudly sounded, concerning the degradation of the citizens of the small States to the place of Helots, should the amendment pass, was going too far. But it is a fact that there has never been a Presidential candidate from one of the very small States and it is unlikely that one will ever be put up. The question arises, however, whether this would not have been so anyway. That he was from a State too small to carry any weight was an argument adduced against the candidacy of Bayard of Delaware in 1876, and it is possible that had Edmunds, of Vermont, been from a larger State his chances for the nomination would have been much greater in 1884. There could be no realization of the prophecy concerning the combination of the large States, as such, for party not State is the controlling factor. In the politics of 1801–1809 the harmony between Pennsylvania and Virginia is not a contradiction but a confirmation of this.

During the debate on postponement the question of the Vice-Presidency had been brought up by a motion to strike out all the portions concerning that office,[4] the advantages of which would be destroyed, it was alleged, should the amendment be

[1] It was argued against the number three that a Western section would grow up and it would then be excluded.

[2] Annals 8th Congress, 1st Session, p. 113.

[3] Ibid, p. 87.

[4] Ibid, p. 21.

adopted. This motion was lost, but the discussion continued at a later date. The charge was made that the eagerness to pass the amendment at this time grew out of a desire to put it into operation before the next election and so prevent a Federal Vice-President from coming in. This was met by the candid avowal of such a purpose[1] on the part of the leading Republicans. After discussing the aim of the Convention in the mode of election, to put a man of worth in both stations, the Federalists argued that if the amendment was carried, character, talents or virtue would not be sought after in the Vice-Presidential candidate. The question would not be asked "Is he honest?" "Is he capable?" but "Can he by his name, by his connections, by his wealth, by his local situation, by his influence or by his intrigues best promote the election of a President?"[2] The office would be sent to market with hardly a chance for an honest purchaser.[3] It would be a sinecure. An ambitious candidate for the Presidency would not promote the election of a man who might prove his rival, but would support one of moderate talents, whose influence would aid his own election.[4] They did not seem to realize that what they were predicting for the future under the amendment, had already happened under the old mode of election. Pinckney had been selected by the Federalists in 1796 as a man who would "cause a diversion of Southern blows"[5] and Burr was supported by the Republicans in 1796 and 1800 for the Vice-Presidency, though the Constitution forbade any such discrimination. He was put forward, unscrupulous as they knew him to be, simply to ensure the election of Jefferson by bringing in the vote of New York. Yet the very fact that he might have become President, as the Federalists attempted to make him in the election of 1801, was some check upon such party measures. The amendment took away this danger, and the predictions of the Federalists have come literally true. To be Vice-President is to be politically "shelved," and men of the first class with political aspirations refuse to take the office. Although four times already in our comparatively short history the Vice-President has become President, it seems to be the

[1] Ibid, pp. 22, 128, 178, 186.

[2] Ibid, p. 144.

[3] Ibid, p. 173, Tracy (Conn.).

[4] Ibid, p. 155. Plumber (N. H.).

[5] Life and Correspondence of Rufus King (Putman), II, 46. Hamiltons' Works, VI, 114.

custom of National Conventions to make the nominations for that office entirely irrespective of the fact that its incumbent may become the chief magistrate. Ignoring this possibility parties sometimes chose a man for the second place who has radically different opinions on vital points from the person selected for President. In 1888 the Democratic nominee was Allen G. Thurman, a man at that time seventy-five years old, and in 1892 Stevenson held some very different views from his chief on the currency question.

That the President and Vice-President should be of different parties "to check and preserve in temper the over-heated zeal of party" was advocated by Hillhouse (Conn.) in a speech that should be noted as a glaring example of the utter inability of the Federalists to realize the revolution that had already taken place in politics and the immense distance that the politicians of 1803 stood from the framers of the Constitution in 1787. He declared the calculation that all the States in the Union would vote for the same persons, or that each of the two parties opposed in politics would have an individual candidate to be visionary. His statement that both candidates could not be chosen from the same State is an error which is still commonly noted. As a matter of fact the provision that the electors shall vote for two men, "one of whom at least shall not be an inhabitant of the same State with themselves," would not prevent the electors from every State except one voting for two men from that State, and thus electing both candidates from it. It is improbable that political expediency will ever demand such a course, the tendency being in the opposite direction, but there is no constitutional obstacle in the way. Hillhouse ended his argument by saying: "For once or twice there may be such an organization of party as will secure for a conspicuous character a majority of votes. But that character cannot live always. The evils of the last election will recur and be greater because the whole field will be to range in. . . . . . . If we cannot destroy party, we ought to place every check upon it."

This brings us face to face with the great result of the amendment in its practical development. The enormous consequence of it has been to make party government constitutional. It has made it imperative that the President and Vice-President be party

representatives and practically impossible that they be chosen at the outset from different parties, unless the election devolves upon the House or Senate. This legalization of party control in the government was a change of the Constitution in one of the most basic principles. The leading idea of the Convention had been to prevent the rule of party. Washington had inaugurated the government by adhering to this idea, and against heavy odds had attempted to keep himself out of and above parties, by combining in his cabinet representatives of the diverging tendencies. But even before he retired from the Presidency this was becoming an impossibility, and he drifted more and more into the the channel of the Federalists. When Adams came in the change to party rule was practically accomplished and a great part of the difficulties he encountered came from the fact that he did not fully realize this. His practice differed so widely from the ever-growing tendency that conflict was inevitable. By the time of the election of 1801 the revolution was complete; parties had become separated into opposing armies, each with its own general and staff of officers. The amendment was simply a legalization of what had become fact. It would have been just as reasonable to advise the armies of two opposing nations to have their generals in common, selecting either this one or that, indiscriminately, to conduct an impending battle, as to urge the impending parties to concentrate their votes upon one man for Vice-President.

Another question which occupied the attention of the Senate was introduced by an amendment, offered by Pickering (Mass.), to insert, "But if within twenty-four hours no election shall have taken place,[1] then the President shall be chosen by law."[2] When asked what was meant by a person "chosen by law," he replied that the States might choose by lot, or by ballots in a box which the President might collect, or a number of names might be put in a box from which the Speaker might draw one. This was defended as having precedent in the Constitution of Kentucky and in the ancient Grecian States, but was ridiculed by the Republicans, who suggested that the question might be settled by the old mode of "grand battaile," or by the champions of both parties, armed with

[1] When the election devolved upon the House.

[2] Annals 8th Congress, 1st session, p. 128.

tomahawks. Seriously speaking, this was taking the election out of the hands of the people and trying to determine an important principle of effective government by a non-effective act. As was said at the time, it was trying to determine an election by holding out a temptation to non-election. The defect having been pointed out, however, several amendments were offered to remedy it.[1] The one which was adopted[2] provided that the Vice-President should succeed as in any other case of disability, if, when the election devolved upon the House, a President should not be chosen before the 4th of March. This made no provision for the non-election of Vice-President also, but no case of the kind has ever arisen, nor is it likely to under the present party system. Amendments to cover such a case were lost.

There was a constitutional question raised by Tracy in regard to instructions which was not directly discussed, but the subject of which was referred to by various speakers.[3] He drew a sharp distinction between the appropriate duties of the States and of Congress in reference to amendments, and he denied the right of the former to give instructions to members of Congress in regard to them. "As well and with as much propriety might Congress make a law attempting to bind the State Legislatures to ratify. In either case, the check, which, for obviously wise purposes, was introduced into the Constitution, is destroyed," was his conclusion. No attempt was made to refute this argument, but it was said that a recommendation through their State Legislatures is the most dignified method of expressing the sentiments of the people of a State on a subject so important as a constitutional amendment, and such expressions should have weight with Congress. The other mode of amendment provided in the Constitution is evidence that the Convention meant the clearly expressed desire of the people to have force. This method has never been formally used, but it is an interesting illustration of extra-constitutional development that its principle of initiation by the States has been repeatedly put into practice. When the State feels the need of an amendment its Legislature passes resolutions formulating the desired measure. Copies are sent to the other States and a reply is usually returned. If it is seen that the requisite three-fourths

[1] Ibid, p. 132. J. Q. Adams. [2] Ibid, p. 136. Taylor (Va.).
[3] Ibid, p. 177.

are not in favor of it the matter is dropped, as it would be useless to take further steps. If the replies are favorable, an attempt is made to push the amendment through Congress. A good example of this is the attempt of Massachusetts to change the Federal representation in 1804.[1] Her resolutions on the matter were answered by all but two States, and as the replies were unanimous in their disapproval, she abandoned the project. On the other hand, the action of Congress in compelling the States to ratify an amendment was mentioned by Tracy as a *reductio ad absurdum*, simply to give point to his remarks. But when we consider the history of the Fourteenth Amendment we find that thing had come to pass which sixty years before had been passed over in silence as a mere rhetorical figure. The ratification of the Fourteenth Amendment was virtually compulsory, since the "check" on Congress had been thrown off by that body and the responsibility for constitutional amendments, instead of being divided between national and State Legislatures, according to Constitutional provisions, was assumed entirely by the former.

When the vote was taken,[1] the question was carried 22 yeas to 10 nays. Immediately Tracy denied that it was constitutionally passed, since two-thirds of those present (22) and not two-thirds of the whole number of Senators (23) had voted in the affirmative. This had been in the mind of Clinton in his effort to rush the amendment through, and Tracy had attempted, in a former speech, to forstall the result, but the President declared the question carried by the necessary majority in conformity with the Constitution and former usage. As thus finally passed by the Senate, the amendment was in the form now in the Constitution. An attempt was made to have it submitted to the President for his approbation, but this was negatived by a large majority.[2]

When the House received the amendment from the Senate[3] objections were immediately raised because the Senate had not acted on the House resolutions and because the vote was not by two-thirds of the whole number of Senators. The first objec-

[1] McMaster, III, 45–47.

[2] December 2. [2] Annals 8th Congress, 1st session, pp 214–215. Ames: "Proposed Amendments."

[3] Ibid, p. 646, Dec. 6.

tion was quickly overruled and precedents were adduced and arguments offered to show that the second was not a true interpretation of the Constitution. The first amendments were passed in 1789[1] with only sixteen out of twenty-six Senators present and less than forty out of fifty-nine Representatives. On May 1, 1802, the House, consisting of a hundred and six members, had passed an amendment by a vote of 47 to 14 and the vote the previous October on the same amendment had been 88 to 31, the whole number of Representatives being 140.[2] This question has come up a great many times since and has never been settled definitely, though in practice two-thirds of those present has been considered a constitutional majority. The clause relating to the Vice-President's assuming the duties of the President in case of a non-election by the House gave rise to a discussion. Some Republican members[3] who had voted for the amendment as it passed the House now joined the Federalists in pointing out the temptation this clause held out to the Vice-President to prevent an election. The motion was made to strike out everything relating to that officer and the arguments advanced in the Senate were repeated—showing that he would no longer be the "heir apparent,"[4] but merely a tool to assist in the election of the President. This motion was lost, and the clause in question was retained as being an incentive to careful selection of vice-presidential candidates and a stimulus to the House to make an election and so retain their constitutional privilege. Such a non-election was contemplated as a possibility in 1860.[5] It was hoped by Southern members of the Democratic party that, though it would be an impossibility for either Douglas, Bell or Breckenridge to receive an electoral majority, the election might be thrown into the House. There Breckenridge might be chosen, or the House failing to make a choice, Lane could become President through the choice as Vice-President by the Senate.

The antecedent of the word "three" in the eligible list was long and tediously discussed. It was argued on the one hand that the word referred to the three highest numbers of votes

[1] Aug. 21, 1789, in House. Sept. 9, 1789, in Senate.

[2] Annals 8th Congress, 1st session, pp. 648, 650.

[3] Elliot (Vt.), Eustis (Mass.)

[4] 8th Congress, 1st session, p. 672.

[1] New York *Tribune*, July 16, 1860.

containing an indefinite number of persons,[1] while others interpreted it to mean the three persons having the highest number of votes. It was on this idea that much of the argument in regard to the small States had been based. The advocates of the amendment were not agreed on the subject, but were willing to grant either interpretation, to please the opposition. The general impression was that it referred to persons rather than to numbers, but no case has arisen to test the question. Should such a case occur it would seem that the word must have reference to numbers. Had Clay and Crawford received an equal number of electoral votes in 1824 it is certain that neither would have been excluded from the House.

Up to this time the designating principle, as such, had hardly been discussed, except as it was incidentally connected with other points. Now it was attacked by the Federalists as destroying the eventual succession of the Vice-President [2] and as equivalent to electing the President for life [3] by tempting him to use his extensive patronage for his re-election. This was only one of the many arguments based on the fear of corruption of officials from the highest to the lowest. The fear of a monarchy; the example of George III. in enlarging his royal prerogative so enormously, and the example then before their eyes of the seizure of power by Napoleon combined to blind them to the impossibility of such an occurrence in this country. Again, the power of the small States was said to be endangered by this principle.[4] The Republicans answered that it was all important that the process of election be pure and simple, that the discrimination in the votes gave a fair expression to public sentiment, and compared with these results, it was of little consequence from what State the President might come.

December 8th the vote was taken on the Senate resolutions and they were concurred in.[5] Speaker Macon claimed the right to vote as a member, thus securing the necessary two-thirds. One of the most interesting things noted in going over the debates is the completeness with which the parties change sides on the question of State Rights. One Federalist made the declaration [6] that the Resolution, by impairing the rights of the

[1] Annals 8th Congress, pp. 671, 722.
[2] Ibid, p. 732.
[3] Vote: 83 yeas, 42 nays.
[4] Ibid, p. 672.
[5] Ibid, p. 748.
[6] Thatcher (Mass.).

small States in choosing the President, destroyed the basis of the Confederacy, and made the Constitution a *nudum pactum*. The most extreme grounds on both sides, however, were taken by the Republican, Campbell (Va.) and the Federalist, Dennis (Md.). Campbell argued for government by simple majorities and anticipated the arguments of Webster on his memorable debate with Hayne. Starting with the words, " We, the people of the United States," he argued that the government was formed by the people of the United States in their capacity as such, by their immediate representatives in the general convention and not by the several States convened in their State capacities.[1] This statement had about as much historical foundation as did the statement of Webster in 1830, that " this government is the independent offspring of the popular will." [2] To this doctrine Dennis replied that in a single State a simple majority ought to prevail, but he denied that to be the theory at the basis of the Union. He declared that the Constitution was not adopted by the people of the United States, but by the people of the several States, as such, voting through the medium of their State Conventions, and so far from having been adopted by the people of the United States, as such, it was doubtful whether it was not adopted by a minority of the people, though ratified by a majority of the States.[3]

Campbell entirely overlooked the Constitution as the supreme of the land and advocated the doctrine that " the will of the people should be supreme." He confounded constitutional with popular majorities. The American principle is that the former shall rule and in many cases they do not at all coincide with the latter. These constitutional majorities differ in different cases. The most striking example of this is in the representation in the Senate, and to a less degree in the House, due to the fact that each State must have at least one representative. Another illustration is in the change from a simple majority to a two-third vote necessary to pass a bill over a veto or to pass an amendment. Apart from the federative principle, this rule of constitutional majorities must be preserved for the protection of the minority. It is an essential principle in the political life of the United States that there be preserved to the minority the nega-

[1] Ibid, p. 718.

[2] Webster's Works (Ed. 1858), III, 333.

[3] Ibid, p. 756.

tive power of acting as a brake; the conservative power by which it keeps itself from being crushed.

Another question involved in the amendment was that of the independence of the electors. The intention of the Convention had been that men of ability and discretion should be chosen for this duty and that they should exercise this discretion in the choice of President. By 1800 they had begun to feel the pressure of party choice as almost irresistible, but the amendment, by making party government constitutional and imperative, completed the process of making them "men of straw." Since its adoption they have been, as a usual thing, men upon whom it was desired to confer some honor, but beyond that they might as well be automata. The desire expressed by Breckenridge during the debates that the choice of President should be made directly by the people has been realized to an extent that would have gratified James Wilson and Gouverneur Morris, but would have caused other prominent members of the Convention of 1787 to be alarmed at what they denominated the "Monster of Democracy."

Jefferson expressed the opinion[1] that the indigation caused by the efforts of the Federalist members of the House to defeat the well known wishes of the country, in the election of 1801, had a greater effect in one week in bringing the great body of the Federalists into sympany with his election than could have been effected by years of mild and impartial administration. Whatever the cause, the prompt ratification of the amendment by the States showed their realization of the necessity for such a measure. As soon as the final vote was taken in Congress the amendment was sent to the Governors of the States. Before the next month brought in the New Year five States had responded. Kentucky had given her assent;[2] Virginia ratified with only one dissenting voice in the House;[3] North Carolina had no opposition in the Senate and but eighteen negative votes in the House of Commons.[4] In Maryland there was some opposition from the Federalists in the House, but none in the Senate in the ratification on December 30th,[5] and Ohio fulfilled by

[1] Jefferson's Writings, VII, 494, 497.

[2] Acts of Kentucky, 12th General Assembly (1803), pp. 109–111.

[3] *National Intelligencer*, Jan. 13, 1804.

[4] Ibid, Jan. 2, 1804.

[5] Ibid, Jan. 11, 1804, and Laws of Maryland, III, ch. LXV (Session Nov. 7, 1803, to Jan. 7, 1804).

prompt ratification[1] the expectation of Governor Tiffin who had recommended the measure in his message.[2] A few days afterwards, January 7, 1804, Pennsylvania followed suit.[3] In Vermont there was some heated discussion growing out of the fact that Mr. Elliot, who had been the organ of the House in submitting to Congress their desire to amend the Constitution, offered a letter assigning his reasons for the vote he had given against the measure. This caused a repetition of the arguments pro and con which had been given in Congress.[4] The constitutional question of the majority by which it had passed was brought up, but to no purpose. On January 27th the Council unanimously adopted the amendment, and the House passed it by a good majority.

The first check to this triumphant progress was received a little before this in Delaware. January 6th the amendment was laid before the Legislature by Governor Hall,[5] with an urgent recommendation. It was rejected and the following resolutions[6] passed instead: "Resolved (etc.), That the amendment to the Constitution of the United States . . . . be and the same hereby is disapproved by the Legislature of this State for the reasons following:

1. Because at all times innovations of the Constitution are dangerous, but more especially when the changes are dictated by party spirit, are designed for temporary purposes and calculated to accomplish personal views.

2. Because as representatives of a small State we are sensible that in the nature of things every change in the Constitution will be in favor of the large States who will never be disposed to allow and will always have the means to prevent a variation favorable to the interests of the small States.

3. Because, in fact, the proposed amendment does reduce the power and weight of the small States, in the case provided by the Constitution for the choice of President by the House of Representatives, by limiting the selection to three instead of five candidates having the greatest number of electoral votes.

[1] Laws of Ohio (1803), Ch. II.

[2] *National Intelligencer*, Jan. 9, 1804.

[3] Laws of Pennsylvania (1802–1805), p. 181, Chap. MMCCCXCII.

[4] *National Intelligencer*, Feb. 10th, Feb. 13th, 1804.

[5] *National Intelligencer*, Jan. 30, 1804.

[6] Journal of the House of Representatives of Delaware, 1804, Jan. 13, p. 27.

4. Because the present mode of election gives to the small States a control and weight in the election of President which are destroyed by the contemplated amendment.

5. Because it is the true and permanent interest of a free people among whom the relations of a majority and a minority must ever be fluctuating, to maintain the just weight and respectability of the minority, by every proper provision, not impeaching the principle that the majority ought to govern; and we consider the present mode of election as calculated to repress the natural intolerance of a majority and to secure some consideration and forebearance in relation to the minority.

6. Because we view the existing provision in the Constitution as among the wisest of its regulations. History furnishes many examples of nations, and particularly of republics, in their delirious devotion to individuals, being ready to sacrifice their liberties and dearest rights to the personal aggrandizement of their idol. The existing regulation furnishes some check to this human infirmity by the occasional power given to a few to negative the will of the majority as to one man, leaving them every other qualified citizen in the country for the range of their selection.

7. Because we are not satisfied that the said amendment has constitutionally passed the two houses of Congress; the Constitution requiring the concurrence of two-thirds of both houses, which in a case of such magnitude and designed precaution must be considered as two-thirds of the entire number composing the two houses; whereas, it appears that the said amendment is not supported by the concurrence of two-thirds of the whole number of either house."

In February, Rhode Island ratified by a unanimous vote in the Senate and a vote of 42 to 18 in the House.[1] In a letter from Senator Butler, of South Carolina, to the Governor of that State, he said that Governor Fenner of Rhode Island was opposed to the amendment, but some Federalists opposing it also, the Republicans said it must be a good thing, so pushed it through. During the same month Governor Clinton laid the amendment before the New York Legislature,[2] and it was agreed to without a division in the Senate and by a large majority in

[1] *National Intelligencer*, March 12, 1804.

[2] *National Intelligencer*, Feb. 13, 1804.

the House.[1] New Jersey, also, in the month of February, sent in her ratification.[2]

The second State to reject the amendment was Massachusetts. Governor Strong, in his presentation, neither recommended nor condemned it, but the answer of the House gave an indication of what its fate would be. They said they would pursue the discussion of the subject "under impressions of the highest respect and veneration for an instrument so valuable as the Constitution of the United States, the deliberate production of our first and long tried patriots, united with our most enlightened and experienced statesmen."[3] It was said during the debates that it was "high time for a 'union of all honest men' to oppose consolidation and appear as champions of the small States." On February 2d, the amendment was rejected in the Senate,[4] and the next day by the House.[5] Connecticut followed the example of Massachusetts and rejected it on May 24th, by a strict party vote.[6]

In Georgia, Governor Milledge called a special session of the Legislature, which met at Louisville on May 4th, and ratified it unanimously.[7] A special session seems to have been called in South Carolina also,[8] and Governor Richardson cited the events of the last election as an argument for ratification. He enclosed two letters from Senator Butler, giving his reasons for voting against the amendment, and urging South Carolina to reject it as a question, not of party politics, but of State rights. In spite of this protest the Legislature ratified it.

In New Hampshire the question had been brought up in January but was postponed until June. When it was again taken up, it passed the Senate and the House,[9] but the Governor vetoed it as if it had been an ordinary bill.[10] The Legislature

[1] Vote: 74 yeas, 14 nays. Laws of New York (1804), Ch. IV, Vol. III, p. 466.

[2] Acts of New Jersey, 28th Assembly, 2d session, 1803, p. 284.

[3] *National Intelligencer*, Feb. 1, 1804.

[4] Vote: 13 yeas, 19 nays.

[5] Vote: 79 yeas, 132 nays.

[6] Vote: 77 yeas, 115 nays. *National Intelligencer*, June 6, 1804. O'Neill: "American Electoral System," p. 95.

[7] Laws of Georgia (1801–1810), No. 131, p. 176.

[8] *National Intelligencer*, May 30, 1804.

[9] Vote: 81 yeas, 73 nays.

[10] McMaster: History of the People of the United States, III, 187. Ames: Proposed Amendments, p. 297.

passed it again, but with the same vote,[5] which was not the two-thirds majority called for by the State Constitution to override the Governor's veto. Though the Republicans of the State considered that the Governor had no part in the ratification of an amendment and that the State had given its voice in favor of this one, New Hampshire was not included in the official list of ratifying States.

The last State to pass upon the question was Tennessee, which, on July 27th, ratified with perfect unanimity in both Houses.[1] Thus of the seventeen States, thirteen, not including New Hampshire, had voted for the amendment, and this being the requisite three-fourths, on September 25, 1804, the Secretary of State issued a proclamation declaring it in force.[2] The election of 1804–1805 was held in accordance with its provisions.

[5] *National Intelligencer*, June 29; July 6, 1804.

[1] Ibid, Aug. 15, 1804.

[2] For copies of the acts of ratification of the States see "Bulletin of the Bureau of Rolls and Library of the Department of State," No. 7 (1894), pp. 408–451.

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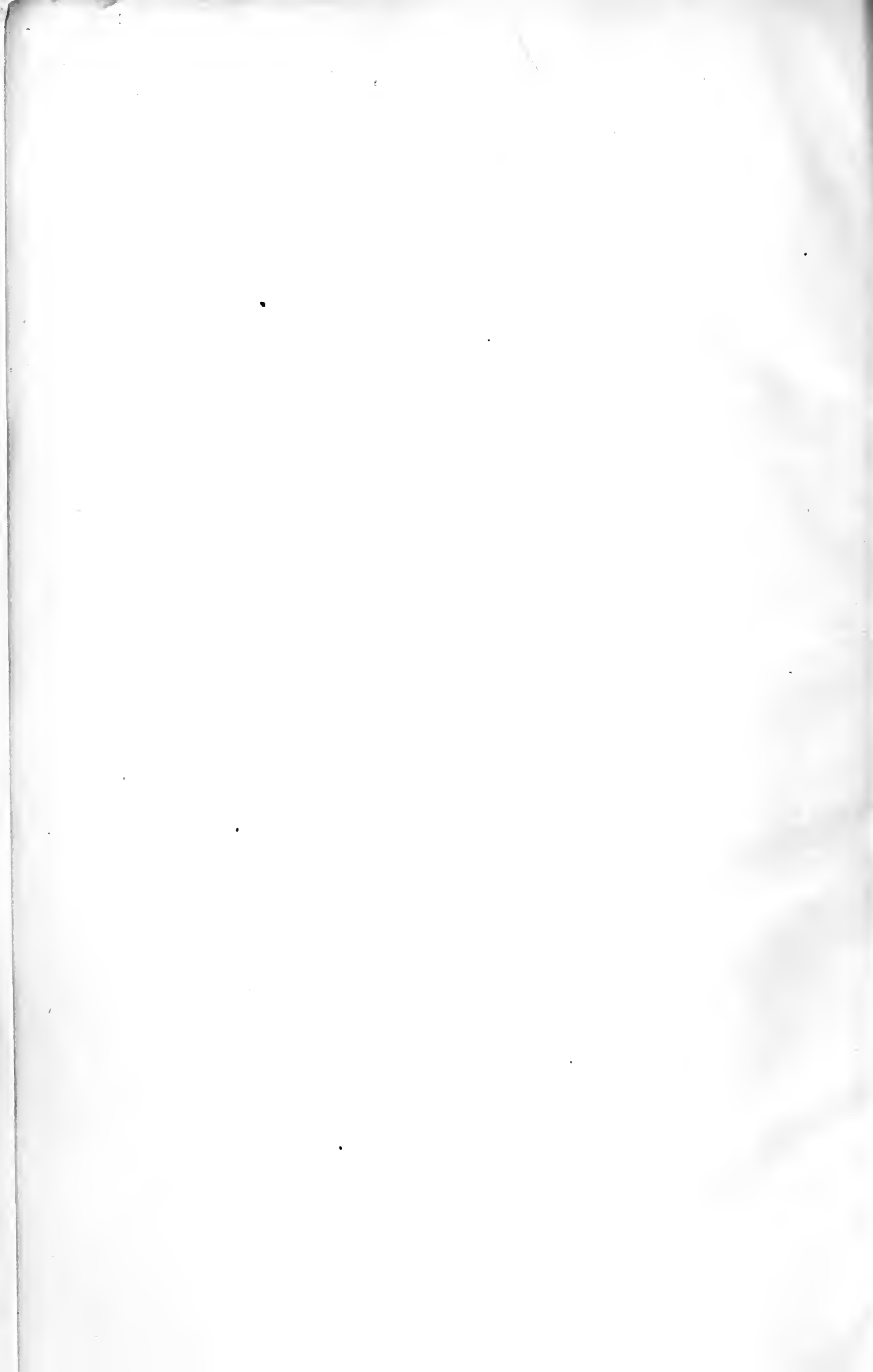

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