The Constitutional Path Out of Electoral Crisis

by Edward Spannaus

A fair reading of the intent of the Framers of the United States Constitution, taken together with the early history of the Electoral College, shows without a doubt, that the Framers of the Constitution carefully designed the procedures for the selection of the President so that the nation would have the capacity and the flexibility to deal with just the type of crisis we now face.

That is the direction in which we must look, to answer the two constitutional questions posed by Lyndon LaRouche at the conclusion of his Nov. 14 address (see page 57).

Let us first look at the Constitutional provisions for the selection of a President, then how those provisions were applied in similar circumstances in the first century of the existence of our Republic, and finally, some scenarios as to how events could unfold this coming December and January.

What the Constitution Says

The procedure for the election of the U.S. President is governed by Article II, Sec. 1 of the U.S. Constitution, and the Twelfth Amendment to the Federal Constitution. Under Article II, each state "shall appoint" presidential Electors, in a manner to be determined by the legislatures of the various states. There is no requirement that they be chosen or bound by a popular vote: the *only* limitation imposed, is that an Elector cannot be a federal office-holder.

Under the provisions of Article II, as modified by the 12th Amendment ratified in 1804, the Electors meet in their respective states, and mark in their ballots their choices for President and Vice President (again, not subject to any constitutional limitation regarding the popular vote, etc.), and the lists are then transmitted to the President of the Senate, where they are unsealed and read on Jan. 6.

If no candidate has a majority of the Electoral votes cast, then the House of Representatives chooses a President among the top three candidates, with each state having one vote.

If a President has not been chosen by inauguration day, then the newly-elected Vice-President shall act as President until a President is chosen. Should neither a President or a Vice-President have been chosen, then, under the terms of the 12th Amendment, "Congress may by law provide for" this case, either "declaring who shall then act as President, or the manner in which one who is to act shall be selected. . . ." until a President or Vice-President shall have been selected.

Before reviewing the crucial historical examples, let us listen to what one of the preeminent experts on the matter, our First Treasury Secretary Alexander Hamilton, has to say about the purpose and operations of these provisions.

Reasons for Indirect Election of the President

Writing in No. 68 of *The Federalist,* Hamilton argued that the procedure set forth in the proposed Constitution would ensure the selection of the most qualified candidate for President. By entrusting the selection of the President, not to any pre-established body such as a state legislature, but to persons chosen specifically for this purpose, this would ensure that the Electors are "acting under circumstances favorable to deliberation," and that they are the "most likely to possess the information and discernment requisite to so complicated an investigation."

Hamilton argued that the process specified "affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications." Hamilton professed to believe that there would be "a constant probability of seeing the station filled by characters pre-eminent for ability and virtue."

Obviously, under the Constitution, the Electors were not intended to be a mere rubber-stamp for someone else's decision.

The Key Precedents

There were three instances in which the election was thrown into the House, for the failure of any candidate to obtain a majority in the electoral college: these were the elections of 1800, 1824, and 1888. The latter need not concern us here; that of 1800 merits the closest examination. Further, the disputed election of 1876 provides an additional mechanism, that of a Congressionally-created Electoral Commission, which is of potential relevance today.

1800: By 1800, the Federalists were deeply divided among themselves, with contending wings led by Hamilton, and by President John Adams. Hamilton regarded Adams as unfit for the Presidency; Adams had labelled Hamilton a leader of "the British faction" in the United States.

Nevertheless, Hamilton was unable to prevent Adams

from being placed on the Federalist ticket, along with Hamilton's choice, Charles Cotesworth Pinckney of South Carolina, a Revolutionary War general, who had later led the fight for ratification of the Constitution in his state.

For the most part, Electors were still selected by the state legislatures; only a handful of states had an election for a general ticket of Electors, and others had district elections. When the votes of the Electors were cast in the states on Dec. 4, the anti-Federalist, Democrat-Republican candidates, Thomas Jefferson and Aaron Burr, each received 73 electoral votes; at that time there was no distinction made between Presidential and Vice-Presidential candidates. The Federalist candidates had 65 (Adams) and 64 (Pinckney). By Dec. 16, the news of the results in the various states, reached Washington. No candidate having won a majority, and it was clear that the matter would be taken up by the House, where the votes of nine states (a majority at the time) were needed to elect a President.

Hamilton was the key player in these events, and the Federalists in Congress were in the position to determine the outcome. His views on the matter are worth examining, because it indicates how he viewed the solemn duties of those who would select the next President.

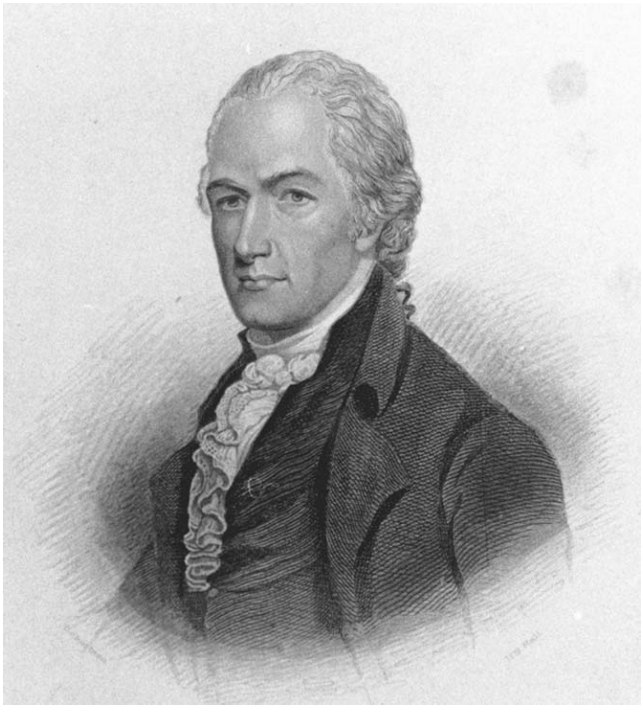
When it became clear that it would have to be either Jefferson or Burr, Hamilton overrode his animosity and distrust of Jefferson, viewing Burr as the greater evil—as corrupt, ambitious, unprincipled, and "truly the Catiline of America." Hamilton was concerned that a number of Federalists in Congress would prefer Burr to Jefferson, and he wrote in a letter to Oliver Wolcott, that nothing "has given me as much pain, as the idea that Mr. Burr might be elevated to the Presidency by means of the Federalists."

Hamilton was also worried that Federalists might support Burr, in order to embarrass Jefferson and the anti-Federalist party. "Alas!" he wrote in the same letter, "when will men consult their reason rather than their passions? Whatever they may imagine, the desire of mortifying the adverse party must be the chief spring of the disposition to prefer Mr. Burr."

To Gouverneur Morris, Hamilton wrote that Jefferson must be preferred to Burr: "I trust the Federalists will not be so mad as to vote for [Burr]. I speak with an intimate and accurate knowledge of character. His elevation can only promote the purposes of the desperate and profligate. If there be a man in the world I ought to hate, it is Jefferson. With Burr I have always been personally well. But the public good must be paramount to every private consideration."

When the House convened in January, there were 34 ballots taken over a period of six days, in which Jefferson repeatedly got the support of eight states, and Burr, four. Finally, Rep. James Bayard, Delaware's sole Congressman and a staunch Federalist, supported Jefferson. In the final vote, Jefferson won the votes of 10 states.

(It was as a result of the 1800 impasse, that the 12th Amendment was adopted, requiring the Electors to mark their choices for President and Vice-President.)



Alexander Hamilton: "The public good must be paramount to every private consideration."

1824: By 1824, only six of the 24 states still selected their Electors in the state legislatures; the others had either general or district elections. In those states with a popular vote, Jackson had 42% of the vote, and John Quincy Adams had 32%. And when the electoral votes were tallied, Jackson had 99, John Quincy Adams 84, William Harris Crawford of Georgia 41, and Henry Clay 37.

Since no candidate had a majority of the 261 electoral votes cast, the selection of the President was given over to the House, where John Quincy Adams obtained the votes of 13 states, Jackson of 7 states, and Crawford of 4 states. Fortunately for the nation, Quincy Adams became President, and the American System of political economy flourished during his administration.

1876: In the hotly-disputed Tilden-Hayes race, four states—Florida, Louisiana, South Carolina, and Oregon—each submitted two sets of Electoral returns to Congress. A few days before the returns were to be submitted to Congress, the Congress passed a law, signed by President Grant, creating a National Electoral Commission. This was a 15-member commission, with 5 members from the House, 5 from the Senate, and 5 Supreme Court justices. The dispute over the four disputed states was submitted to the Commission by Congress. The Commission found massive corruption on all sides, including stuffed ballot boxes, forgery, bribery, and intimidation.

On March 2, 1877, two days before the scheduled inaugu-

ration of a new President, the Commission announced that Hayes had won the Presidency; splitting along straight party lines, it awarded the electoral votes of the four disputed states to Hayes by an 8-7 vote in each case.

The significance of the 1876 precedent, was not that it was a model of reasoned deliberation, but that it indicates the flexibility and open-endedness of the Electoral College procedure under the Constitution. This is a mechanism by which any aspect of the elections can be taken under consideration and investigated.

What May Happen This Time . . .

The Electors meet and cast their votes for President and Vice President in their respective state capitols on Dec. 18. Only in about half of the states, are they bound by state law to cast their Electoral votes in accordance with the popular vote in their states—and the consitutionality of such binding provisions is open to question. Clearly, under the intent of the Constitution—not only the provisions regarding the selection of the President, but more important, its fundamental principle of the General Welfare—the Electors are primarily obligated to vote according to reason and conscience, and not to support any candidate unqualified to fill the office of the President or to govern according to Constitutional principles.

The new Congress is sworn in on Jan. 3. On Jan. 6, the House and Senate meet in joint session to open and tally the electoral votes transmitted by each state. If no candidate for President has a majority of the votes cast, the House then selects a President from among the top three. There is no requirement that any of these must have been on the ballot, or a candidate in the November general elections—only that these are the top three as the electors have voted for them. So the top three could be anyone who received votes from the Electors in the states—not just Bush or Gore.

Another important, but seldom-noticed provision in the statute, is that members of Congress (one Senator and one Representative) can object on the grounds that a vote or votes has not been "regularly given" by Electors. This clearly could include fraud or irregularities, or another factor which has contaminated the vote. Importantly, there is no definition or limitation in the statute, so it is open-ended. In the first instance, such objections are to be taken up immediately by the separate Houses, before any further business is conducted.

This is a very open-ended procedure, which is entirely left to the discretion of the Congress. The courts are not likely to get involved, any more than they did during the impeachment. The only authority binding the Congress, is the authority of the United States Constitution.

If no President has been selected by Jan. 20, then the new Vice-President would become the acting President. If there is no Vice-President selected, then Congress may itself declare who shall become the acting President—with no Constitutional restriction as to who this may be, except the general qualification for President specified in Article II.

In short, it is clear that the Electoral College mechanism, as set forth in the Constitution, and supplemented by legislation and precedent, provides many ways out of the current impasse, in which the country is otherwise presented with a situation in which a corrupt election campaign, has left the nation with two candidates, neither of whom is qualified to be President under these crisis conditions.

Complaints Before OAS: Gore Openly Stole LaRouche's Vote

by Mary Jane Freeman

While the Organization of American States' (OAS) Inter-American Commission on Human Rights (IACHR), and the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), have pronounced against the elections of Peru and other nations, they have failed to intervene in the fraudulent U.S. election process. Complaints and documentation were filed with both, showing the depth and extent of vote fraud occurring during the U.S. primary elections.

The "one man, one vote," premise of our democratic republic has been shredded to pieces in the year 2000 election, and it didn't start in Florida on Nov. 7. In February, LaRouche won the Michigan Democratic Party primary election. Gore henchman and Michigan Democratic Party (MDP) state chair, Mark Brewer, tossed out the election results, and opted for holding "private" party caucuses. Brewer excluded LaRouche and his delegates from the caucuses, and thereby stole LaRouche's vote (see *EIR,* March 24, p. 24). Then, in May, 53,280 Arkansas voters (23%) cast their vote for LaRouche, but again, the Gore-thugs threw out his vote, refusing to seat his six duly-won delegates to the national convention. Though Arkansas is a state whose elections are covered by the 1965 Voting Rights Act, the Democratic National Committee (DNC) argued—successfully—to the U.S. Supreme Court, that the Act *not* be enforced, and that they be allowed to "disregard votes cast for LaRouche."

During the early primaries, there were only three recognized Democratic contenders for the party nomination for President: Al Gore, Bill Bradley, and Lyndon LaRouche. Each was certified to receive Federal matching funds, and qualified as eligible, under the Constitution, to run for President. But there ended the equality. LaRouche was systematically blacked out of the national news, while Gore and Bradley enjoyed almost daily coverage. LaRouche was ex-