Chapter 3
Curbing Contingent Elections

Abstract Contingent U.S. presidential elections are those in which the Electoral College fails to elect a President and (or) a Vice President, and Congress is to elect either executive or both. Contingent elections of a Vice President may emerge independently of whether a President is elected in the Electoral College. This is possible due to the principle of voting separately for President and for Vice President in the Electoral College. This chapter considers all types of contingent elections, including those in which even Congress fails to elect either executive or both by Inauguration Day. This chapter offers an analysis of whether the Presidential Succession Act can govern contingent elections in which neither executive is elected by Inauguration Day. It also discusses whether the existing constitutional provisions and federal statutes allow one to avoid election stalemates and shows that this depends on how some phrases from the Twelfth and the Twentieth Amendments are construed.

Keywords Contingent elections · Electoral ties · Failure to qualify · President-elect · President pro tempore · Presidential Succession Act · Twelfth Amendment · Twentieth Amendment · Twenty Fifth Amendment · Vice President-Elect

Contingent U.S. presidential elections are those in which the Electoral College fails to elect a President and/or a Vice President. This happens when either none of the participating presidential candidates and/or none of the participating vice-presidential candidates receives a majority of all the electoral votes that are in play in the election.

Contingent elections in electing a President may emerge in three situations depending on (a) how the Electoral College votes in December of the election year, (b) whether Congress rejects any electoral votes cast, and (c) how many recipients of the electoral votes as President can (if elected) take the oath on Inauguration Day.

Situation 1. Only two recipients of the electoral votes as President with the same number of electoral votes received meet the requirement formulated in (c).

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Situation 2. At least three recipients of the electoral votes as President meet the requirement formulated in (c), and none of the recipients received a majority of all the electoral votes that are in play in the election.

Situation 3. Only one recipient of the electoral votes as President meets the requirement formulated in (c), and this recipient received less than a majority of all the electoral votes that are in play in the election.

Contingent elections of a Vice President may emerge independently of whether a President becomes elected in the Electoral College. This is possible due to the principle of separately voting for President and for Vice President in the Electoral College. Indeed, none of the participating vice-presidential candidates may receive a majority of all the electoral votes that are in play in the election while one of the participating presidential candidates does receive such a majority.

There are four possible election outcomes in the Electoral College: (a) both a President and a Vice President are elected, (b) only a President is elected, (c) only a Vice President is elected, and (d) neither a President nor a Vice President is elected. The last three out of the four possible election outcomes are those of contingent elections.

In all these three cases, the election is thrown into Congress. If the election of only one of the two executives is thrown into Congress, they say that the election is thrown into Congress partly. Otherwise, when the election of both a President and a Vice President is thrown into Congress, they say that the election is thrown into Congress completely.

Chapter 3 concerns all the types of contingent elections, including those in which even Congress fails to elect either executive or both by Inauguration Day. This chapter offers an analysis of whether the Presidential Succession Act can govern contingent elections in which neither a President nor a Vice President is elected by Inauguration Day. It also discusses whether the existing constitutional provisions and federal statutes allow one to avoid election stalemates and shows that this depends on how some phrases from the Twelfth and the Twentieth Amendments are construed.

3.1 Determining the Election Winner in Contingent Elections

The Twelfth Amendment determines the rules for completing contingent elections thrown into Congress, both partly and completely. If Congress is to elect a President, this duty is vested in the House of Representatives. If Congress is to elect a Vice President, the Senate is to do this.

Electing a President in the House of Representatives. The Twelfth Amendment directs that the House of Representatives is to chose a President from among no more than the top three electoral vote recipients voted for as President in the Electoral College. This requirement leaves unclear how to select no more than three

from among more than three electoral vote recipients eligible to be considered in electing a President in the House of Representatives.

Example 3.1 Let five persons voted for as President in the Electoral College receive 134, 134, 134, 134, and 2 electoral votes, respectively, as a result of counting electoral votes in Congress. There is no mechanism for selecting no more than three persons from among these four with 132 electoral votes each [1, 18].

Electing a Vice President in the Senate. The Twelfth Amendment directs that the Senate is to choose a Vice President from among the top two electoral vote recipients voted for as Vice President in the Electoral College. As in the case of electing a President in the House of Representatives, this requirement leaves unclear how to select two from among more than two electoral vote recipients eligible to be considered in electing a Vice President in the Senate.

Example 3.2 Let five running-mates of persons considered in Example 3.1 receive the same number of electoral votes as Vice President in the Electoral College as did the above persons, i.e. 134, 134, 134, 134, and 2 electoral votes, respectively. There is no mechanism for selecting two persons from among these four with 132 electoral votes each [1, 18].

The voting for President in the House of Representatives is arranged according to the principle "one state, one vote." Only the states elect a President in the House of Representatives, and D.C. does not participate in this election. Each state delegation is given one vote, regardless of the state's size. Thus, the states of California and Wyoming are equal in electing a President in the House of Representatives, which is part of the 1787 Great Compromise.

For a state delegation consisting of one member, the vote of the state coincides with that of this member. However, for more-than-one-member delegations, each delegation must ascertain its vote before each ballot, and the number of ballots in electing a President in the House of Representatives is, generally, not limited.

The ascertainment procedure implies that a state delegation should decide how it will vote in the next ballot, and each state delegation may change its vote as many times as the number of times the balloting procedure is held. According to the 1825 rules for electing a President in the House of Representatives (see Sect. 2.5), the ascertainment of the vote of each state is to be held via a balloting procedure within the state delegation.

It may happen that none of those eligible to be considered by the House of Representatives in electing a President there receives a majority of votes within a state delegation as a result of the ascertaining procedure. Then the state is considered divided, and the vote of this state cannot be counted in the next ballot. However, the divided state participates in electing a President, and its "divided" status does not affect the quorum needed to hold the next ballot.

As mentioned in the description of Puzzle 3 (see Sect. 2.2), it seems unclear how many persons are to be considered by the House of Representatives in electing a President there. (It depends on whether the phrase "… not exceeding three…" from the amendment should be attributed to the word "persons," or to the word "numbers.") In any case, a quorum of at least two-thirds of all the states is needed to start

the procedure of balloting for President in the House of Representatives. A person is elected President in the House of Representatives if this person is a recipient of votes from a majority of the whole number of state delegations there (currently, from at least 26 state delegations).

Electing a Vice President in the Senate is held according to the principle "one state, two votes," and unlike in the House of Representatives, all the Senators vote as individuals. A quorum of at least two-thirds of the whole number of Senators is necessary to hold the voting procedure, and the voting should not necessarily be by ballot. A "… majority of the whole number …" (apparently the votes of all the appointed Senators; see Sect. 2.2 for more details) should favor the same person to elect this person Vice President in the Senate. Unlike in electing a President in the House of Representatives, there are no special rules for electing a Vice President in the Senate.

What happens if the House of Representatives fails to elect a President by Inauguration Day, whereas the Senate elects a Vice President?

According to the Twentieth Amendment, in this case, the Vice President-elect becomes the acting President until the next President is elected. According to the Twenty Fifth Amendment, this acting President "…shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress …" [19].

The following two situations may emerge in this case:

1. The House of Representatives finally elects a President from among persons for whom the balloting procedure was held though it happens after Inauguration Day but before the next elected or selected President is sworn in.
2. The next President is elected only as a result of the next presidential election.

In case 1, once the President has been elected before the next presidential election results in electing a new President, the acting President (who is the elected Vice President) becomes the next Vice President. Though there are no provisions either in the Constitution or in the federal statutes regarding the fate of the acting Vice President, one may assume that once the elected Vice President takes the office, the authority of the acting Vice President is terminated.

What happens if the House of Representatives elects a President, whereas the Senate fails to elect a Vice President by Inauguration Day?

The Twenty Fifth Amendment requires that the elected President "…shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress …" As before, there are no constitutional provisions or federal statutes that address what happens to the acting Vice President once the next Vice President has been elected. However, one may assume that once the elected Vice President takes the office, the authority of the acting Vice President is terminated.

3.2 When Both the Electoral College and Congress Fail

If by Inauguration Day (a) the Electoral College fails to elect both a President and a Vice President, (b) the House of Representatives fails to elect a President, and (c) the Senate fails to elect a Vice President, an election stalemate may occur. That is, depending on how the language of the Twentieth and the Twelfth Amendments is construed, the contingent election may or may not be completed.

In the course of the 2008 election campaign, several constitutional scholars and journalists entertained the hypothetical scenario that the election would be so close that a 269–269 tie in the Electoral College would be a possibility. They went further and offered their vision of what would happen if the contingent election of both a President and a Vice President resulted in the failure to elect a President and a Vice President in the House of Representatives and in the Senate, respectively, by Inauguration Day in 2009. From their point of view, the Presidential Succession Act of 1947 [34] would then govern the completion of the election [35].

But this might not have been the case had such a hypothetical scenario occurred.

The 1947 Presidential Succession Act was adopted by Congress under the authority given to it by the Twentieth Amendment. However, the language employed in the text of the amendment can be construed in a manner that puts the above viewpoint of the constitutional scholars and journalists into question.

Before describing specifically how this language could be understood, it is helpful to imagine what would have happened if the use of any particular understanding of the amendment language had led to an election stalemate in the 2008 election. This would mean that at least under this particular understanding, the above hypothetical scenario, offered by the constitutional scholars and journalists, might have been impossible. Moreover, assume that the Supreme Court considers this particular understanding of the amendment language to be correct. An election stalemate might then occur in any contingent election in which both the Electoral College and Congress fail to elect both a President and a Vice President by Inauguration Day.

The Presidential Succession Act covers five situations in which there is no one to "discharge the Powers and Duties" of the office of President [1, 4, 19]. The "failure to qualify" is one such situation for which the Twentieth Amendment gives Congress the authority to act. That is, Congress has the constitutional power to provide by law "… for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected … ."

It is the widespread belief that the Presidential Succession Act covers this case. However, as mentioned earlier, whether or not it does depends on how the language employed in the cited part of the Twentieth Amendment is construed. That is, it depends on whether one should perceive that the above phrase in the amendment means (a) persons who have been voted for as President and as Vice President in the Electoral College, but have not reached the statuses of President-elect and Vice President-elect (as the above-mentioned scholars and journalists suggested in 2008), or (b) persons who have been chosen (elected) a President and a Vice

President by either the Electoral College or by Congress but have failed to qualify, or c) persons of both kinds who have been voted for as President and as Vice President in the Electoral College.

To analyze what case (cases) of these three is (are) addressed by the Twentieth Amendment, one should turn to the dictionaries that define the verb "to qualify."

The dictionary [36] offers the following two definitions: (a) "To be successful in one stage of the competition and as a result to proceed to the next stage," and (b) "to have the abilities required to do or to have something." In other dictionaries, one can find the same or similar definitions such as (a) to reach the later stages of a selection process or contest by competing successfully in earlier rounds, and (b) to be or to become qualified.

First, assume that the verb "to qualify" in the above phrase should be construed only in the sense of definition (a). Consider a person who was voted for, for instance, as President in the Electoral College, but neither the Electoral College nor the House of Representatives elected her/him President. According to definition (a), this person is not qualified as President-elect since she/he did not reach the status of President-elect.

Consider now a person who has been elected either by the Electoral College or by the House of Representatives but has failed to meet the constitutional eligibility requirements of the office of President. This person has successfully reached the status of President-elect, and as a result of this success, can proceed in this status to the "later stages of the selection process." Specifically, this person can proceed to the next stage of the selection process, associated with the verification of whether she/he meets the constitutional eligibility requirements of the office of President. If, however, this person does not meet these requirements, she/he does not "have the abilities" to be President. So while this person is qualified as President-elect in the sense of definition (a), she/he does not have the abilities required to become President, i.e., cannot qualify as President-elect in the sense of definition (b).

The assumption that reaching the status of President-elect and meeting the constitutional eligibility requirements by a person who has reached this status are two different stages of the selection process (or the competition) associated with electing a President seems to follow from the phrase from the Twentieth Amendment

> … If **a** President shall not have been chosen before the time fixed for the beginning of his term, or if **the** President elect shall have failed to qualify … .

Indeed, this phrase seems to make it clear that not meeting the constitutional eligibility requirements of the office of President does not preclude a person from being voted for as President in the Electoral College and in the House of Representatives. Nor does it preclude this person from reaching the status of President-elect by being chosen (elected) President either in the Electoral College or in the House of Representatives. Certainly, the same assumption on the two different stages of the selection process (competition) associated with electing a Vice President follows from this very phrase.

Also, it seems clear that taking the oath on Inauguration Day can formally be considered as the final stage of the process of electing a President, and it seems clear that this final stage can be reached by a President-elect only. Thus, in conformity to a person who has reached the status of President-elect, the verb "to qualify" can only be construed in the sense of definition (b). Indeed, except for tragic circumstances or unexpected decisions, a person who has the status of President-elect cannot reach this final stage only if this person fails to meet the constitutional eligibility requirements of the office of President. This means that this person can fail to qualify only in the sense of definition (b) of the verb "to qualify."

Thus, two different interpretations of the verb "to qualify," employed in the Twentieth Amendment, seem possible. Each interpretation may lead to a particular understanding of the phrase "… wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected … ." So different situations may emerge as a result of voting for both President and Vice President in the Electoral College and in Congress.

It is clear that only the Supreme Court can make the final determination on how to interpret the verb "to qualify" in the phrase "… wherein neither a President elect nor a Vice President elect shall have qualified … . " So in the absence of this determination, it seems interesting to analyze logically possible versions of the interpretation of this verb in this phrase that the Court may make, along with the consequences of the Court decision. However, the author would like to emphasize that the reasoning to follow aims to draw the reader's attention to the lack of clarity in a particular part of the Twentieth Amendment rather than to offer any judgment on how to interpret the language employed in the amendment.

Version 1. The Supreme Court finds that only definition (a) is to be attributed to the verb "to qualify" in the phrase "…wherein neither a President elect nor a Vice President elect shall have qualified …" Thus, the Supreme Court finds the Presidential Succession Act applicable only when neither the Electoral College nor Congress has chosen a President and a Vice President by Inauguration Day. This, particularly, suggests that the Twentieth Amendment covers only the situation in which no person voted for as President and as Vice President in the Electoral College is elected either there or in Congress, i.e., no person reaches the status of President-elect or Vice President-elect. Indeed, only a person voted for as President in the Electoral College but not elected President (either in the Electoral College or in Congress) can fail to qualify as a President-elect in the sense of definition (a) of the verb "to qualify." This is the case, since to fail to qualify in the sense of definition (b), the person should have reached the status of President-elect first.

If this is the case in a particular presidential election, the Presidential Succession Act governs the situation. One of the officers on the list of potential successors will then become President and will nominate a Vice President, whose nomination is to be approved by Congress, as the Twenty Fifth Amendment directs.

What happens, however, if the President-elect and the Vice President-elect have been chosen but have failed to meet the constitutional eligibility requirements?

In this case, the Twelfth Amendment is the only part of the Constitution that may govern the completion of the election. The amendment determines that in this case, "the Vice President" will be the new President. The Supreme Court then should decide whether "the Vice President" that is mentioned in the Twelfth Amendment is the newly elected Vice President or the sitting one (see Sect. 2.2 for more details).

If the Supreme Court decides that this is the newly elected Vice President, an election stalemate seems inevitable, since there are no constitutional provisions or federal statutes to determine who should act as the next President in this case. The election cannot be completed, which means a potential constitutional crisis [1, 18].

If, however, the Supreme Court decides that "the Vice President" mentioned in the Twelfth Amendment means the sitting Vice President, this sitting Vice President will be sworn in on January 20 of the year following the election year, and an election stalemate will be avoided.

Thus, under interpretation (a) of the verb "to qualify," the situation in which both a President and a Vice President have been chosen by either the Electoral College or by Congress but both have failed to meet the constitutional eligibility requirements does not seem to be covered by the Twentieth Amendment.

Version 2. The Supreme Court finds that only definition (b) is to be attributed to the verb "to qualify" in the phrase "…wherein neither a President elect nor a Vice President elect shall have qualified …" Thus, the Supreme Court finds the Presidential Succession Act inapplicable under definition (a) of the verb "to qualify, " i.e., the act is inapplicable when neither the Electoral College nor Congress has chosen a President and a Vice President by Inauguration Day.

If in a particular presidential election, both a President and a Vice President have been chosen by either the Electoral College or by Congress but both have failed to meet the constitutional eligibility requirements, the Presidential Succession Act governs the situation. One of the officers on the list of potential successors will then become President and will nominate a Vice President, whose nomination is to be approved by Congress, as the Twenty Fifth Amendment directs.

What happens, however, when neither the Electoral College nor Congress has elected a President and a Vice President by Inauguration Day?

Similar to how this was described in Version 1, only the Twelfth Amendment may then govern the completion of the election, which means that only the sitting Vice President may then act as President in the next presidential term [37]. However, as mentioned earlier, even this outcome may take place only if the Supreme Court clarifies that the phrase "the Vice President" from the Twelfth Amendment means the sitting Vice President. If the Supreme Court decides that this is a newly elected Vice President, an election stalemate is inevitable.

Thus, under interpretation (b) of the verb "to qualify," the situation in which both a President and a Vice President have not been chosen by either the Electoral College or by Congress does not seem to be covered by the Twentieth Amendment.

Attributing definition (b) to the verb "to qualify" used in the Presidential Succession Act looks like "the lesser of two evils" in a presidential election in which "neither a President elect nor a Vice President elect shall have qualified."

Indeed, let neither the Electoral College nor Congress have chosen a President and a Vice President by Inauguration Day. Further, let definition (b) of the verb "to qualify" from the Twentieth Amendment be used according to the Supreme Court determination. Then Congress still may eventually produce either the President-elect or the Vice President-elect or both before the next election (though after Inauguration Day).

In contrast, let the Supreme Court determine that the verb "to qualify" (in the phrase under consideration) should be attributed definition (a). Then if both the President-elect and the Vice President-elect have been chosen, but have been disqualified, only the sitting Vice President (if she/he is the one mentioned in the Twelfth Amendment) can act as President to avoid an election stalemate.

Version 3. The Supreme Court determines that the phrase "…wherein neither a President elect nor a Vice President elect shall have qualified …" is intended to cover and covers both definitions (a) and (b) of the verb "to qualify."

Then, it seems reasonable to analyze what could be the basis for this determination. Particularly, one should analyze whether it is possible to substantiate that the Twentieth Amendment does give Congress the authority to provide by law for both options to understand the verb "to qualify" in one and the same phrase from the text of the amendment.

Consider the phrase from the Twentieth Amendment "… If **a** President shall not have been chosen before the time fixed for the beginning of his term, or if **the** President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified … ." This phrase appears to be present in the amendment to cover both situations with respect to the status of President-elect. So this phrase may constitute the above-mentioned basis for the Court determination. Under this assumption, it seems natural to assume that the intent to use the phrase "… for the case wherein neither a President elect nor a Vice President elect shall have qualified …" in the amendment may have been to cover the same two **situations with respect to both the status of President-elect and the status of Vice President-elect concurrently**.

Thus, the question is: can the phrase "… for the case wherein neither a President elect nor a Vice President elect shall have qualified …" be understood as addressing both situations? That is, can this phrase in the question be considered as covering the following two events:

(1) "… If **a** President shall not have been chosen before the time fixed for the beginning of his term, or if **the** President elect shall have failed to qualify …,"

and

(2) if **a** Vice President shall not have been chosen before the time fixed for the beginning of his term, or if **the** Vice President-elect shall have failed to qualify,

then Congress may by law provide for this case "… declaring who shall then act as President, or a manner in which one who is to act should be selected …?"

The sense of the phrase "… If **a** President shall not have been chosen before the time fixed for the beginning of his term, or if **the** President elect shall have failed to qualify … " seems to be equivalent to the phrase "… if a President shall not have qualified … ." So had the phrase "wherein neither **a President** nor **a Vice President** shall have qualified" been used in the text of the Twentieth Amendment instead of the phrase "… for the case wherein neither a **President elect** nor **a Vice President-elect** shall have qualified …," both events (described by the pair of phrases (1) and (2)) would have been covered.

Indeed, consider the phrase of the same type "… until **a** President shall have qualified; …," which is directly employed in the text of the Twentieth Amendment. If a President shall not have been qualified, this means that either a President has not been chosen before Inauguration Day, or the President-elect has failed to qualify. The presence of this phrase in the text of the Twentieth Amendment seems to suggest that the Supreme Court may decide that the phrase "…wherein neither a President elect nor a Vice President elect shall have qualified …" can be considered to be equivalent to the above two phrases (1) and (2).

Moreover, it seems that the phrase "… until a President shall have qualified …" from the Twentieth Amendment implies "until a person to be sworn in as President shall have qualified." So the pair of phrases (1) and (2) may mean "for the case wherein neither a person to be sworn in as President nor a person to be sworn in as Vice President shall have qualified." Thus, under options (a) and (b) to interpret the verb "to qualify," six possible election outcomes would be covered. That is, if

1) both a President and a Vice President have been chosen (elected) by either the Electoral College or by Congress, but only the President-elect has failed to qualify, the Vice President elect will be sworn in on Inauguration Day as the next President—as the Twentieth Amendment directs—and this new President will nominate a Vice President, as the Twenty Fifth Amendment directs,
2) both a President and a Vice President have been chosen (elected) by either the Electoral College or by Congress, but only the Vice President-elect has failed to qualify, the President-elect will be sworn in on Inauguration Day as the next President—as the Twelfth Amendment directs—and this new President will nominate a Vice President, as the Twenty Fifth Amendment directs,
3) both a President and a Vice President have been chosen (elected) by either the Electoral College or by Congress, but both have failed to qualify, the Presidential Succession Act will govern the completion of the election, and the Speaker of the House of Representatives, or the President pro tempore of the Senate, who is next after the Speaker on the list of potential successors, or one of the other officers next on this list will be sworn in as the next President, and this new President will nominate a Vice President, as the Twenty Fifth Amendment directs,
4) neither a President nor a Vice President have been chosen (elected) by either the Electoral College or by Congress, the Presidential Succession Act will govern the completion of the election, and the Speaker of the House of Representatives, or the President pro tempore of the Senate, who is next after the Speaker on the list of

potential successors, or one of the other officers next on this list will be sworn in as the next President, and this new President will nominate a Vice President, as the Twenty Fifth Amendment directs,

5) a President has been chosen (elected) by either the Electoral College or by the House of Representatives but has failed to qualify, whereas a Vice President has not been elected. Then the Presidential Succession Act will govern the completion of the election, and the Speaker of the House of Representatives, or the President pro tempore of the Senate, who is next after the Speaker on the list of potential successors, or one of the other officers next on this list will be sworn in as the next President, and this new President will nominate a Vice President, as the Twenty Fifth Amendment directs, and
6) a Vice President has been chosen (elected) by either the Electoral College or by the Senate but has failed to qualify, whereas a President has not been elected. Then the Presidential Succession Act will govern the completion of the election, and the Speaker of the House of Representatives, or the President pro tempore of the Senate, who is next after the Speaker on the list of potential successors, or one of the other officers next on this list will be sworn in as the next President, and this new President will nominate a Vice President, as the Twenty Fifth Amendment directs.

Since, generally, the Supreme Court can make any specific determination about the interpretation of the verb "to qualify" in the phrase "…wherein neither a President elect nor a Vice President elect shall have qualified … ," including the above three, it seems interesting to guess how the Court may approach this issue, for instance, in the case of a tie in the Electoral College, when the election of both a President and a Vice President is thrown into Congress, which fails to elect either executive or both by Inauguration Day.

The language employed in the text of the Twentieth Amendment seems to limit the number of definitions of the verb "to qualify" covered by the amendment to either definition (a) or definition (b), and it seems unclear to which one. So one needs to analyze which of the above two definitions this phrase is likely to cover. Also, it seems helpful to develop examples of hypothetical scenarios of what may happen in the election process in either case.

One may assume that the presence of the phrase "… until a President shall have qualified …" in the text of the Twentieth Amendment, along with the phrase "… wherein neither a President elect nor a Vice President elect shall have qualified …," seems to suggest that the wording "shall have qualified" **should have the same meaning in both phrases**. That is, it should be understood with respect to the persons reaching the corresponding constitutional statuses.

In the first of these two phrases, this status is that of President, i.e., that of a person (i) who has been chosen a President either by the Electoral College or by the House of Representatives, (ii) whose constitutional qualifications to be President have been verified and confirmed, and (iii) who has been sworn in as President, by taking the oath on Inauguration Day.

In the second phrase, these statuses are those of President-elect and Vice President-elect, and they are reached by two persons only if they have been chosen (elected) a President and a Vice President either by the Electoral College or by Congress.

Under this logic, definition (a) of the verb "to qualify" seems to be meant in the phrase "… neither a President elect nor a Vice President elect shall have qualified … ." As shown earlier, if this is the case, the amendment covers the situation in which no person reaches the status of President-elect or Vice President-elect.

However, one may argue that the wording "shall have qualified" should not necessarily have the same meaning with respect to the statuses of President-elect and Vice President-elect as it has with respect to the status of President. That is, with respect to the status of President this wording in the phrase "… until a President shall have qualified …" should have the meaning of reaching the status of President by a person voted for as President in the Electoral College. In contrast, in the phrase "… neither a President elect nor a Vice President elect shall have qualified …," it should have the meaning of meeting the constitutional eligibility requirements by persons who have already reached the statuses of President-elect and Vice President-elect having been chosen (elected) either by the Electoral College or by Congress..

Thus, one may argue that the phrase

A) "… and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified"

from the Twentieth Amendment should be viewed as complementary to the phrase

B) "… If **a** President shall not have been chosen before the time fixed for the beginning of his term, or if **the** President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified …"

from the same amendment. If this is the case, phrase A covers the situation in which both **the** President-elect and **the** Vice President-elect were chosen either in the Electoral College or in Congress but both failed to qualify.

One may also refer to the fact that in both phrases, the proposed measures are those to cover the period of time up to the same moment at which "a President shall have qualified" (in phrase B) and "a President or Vice President shall have qualified" (in phrase A). This moment is the one at which there is a person who can be sworn in as President on Inauguration Day. Such a similarity may also suggest that the definition (b) of the verb "to qualify" (to have the abilities required to do or to have something) is what was meant by the amendment sponsors.

The authors of [38], a textbook for law schools, say that "… Congress now made the same provision for succession in the event of disability or disqualification of **the**

President-elect and Vice President-elect as in the case of President and Vice President. …" The author of [39] states that "… Section 3 of the Twentieth Amendment empowers Congress to provide for the situation when neither **the** President-elect nor Vice President-elect qualifies. …" The use of the article "**the"** in "**the** President-elect and Vice President-elect" makes it appear that both books support case (b) of possible definitions of the verb "to qualify," i.e., the definition in the sense of meeting the constitutional eligibility requirements.

Also, as mentioned earlier, the phrase "… **the** President elect shall have failed to qualify…" from the amendment suggests that, constitutionally, the failure of the President-elect to qualify is a possible election outcome. Thus, the phrase "…neither **a** President elect nor **a** Vice President elect shall have qualified …" may address the situation in which both a President and a Vice President have been chosen by either body but have failed to qualify, which corresponds to definition (b) of the verb "to qualify." Indeed, the use of the article "**a"** in the phrase "neither **a** President elect nor **a** Vice President elect shall have qualified" may suggest that a President-elect and a Vice President-elect can be chosen by either of the two bodies—the Electoral College and Congress—and in both cases, after having been chosen, they may fail to have qualified.

This logic seems to rebuff the one suggesting that the article "**the**" rather than the article "**a**" would have been used in the wording "neither **a** President elect nor **a** Vice President elect shall have qualified" if definition (b) were attributed to the verb "to qualify." The latter option to understand the wording "shall have qualified" in the phrase "… If **a** President shall not have been chosen before the time fixed for the beginning of his term, or if **the** President elect shall have failed to qualify…" seems to be how this phrase should be understood.

What would happen if the Supreme Court determined that only one definition of the verb "to qualify" can be applied in the phrase "… and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President…" [19]?

Besides the situation corresponding to the other definition that would then not be covered by this particular definition, there would still be other situations uncovered by the Presidential Succession Act.

Indeed, let, for instance, a President have been chosen either by the Electoral College or by the House of Representatives, and let this President-elect have failed to qualify. Further, let a Vice President have not been chosen by Inauguration Day by the Electoral College or by the Senate. The Twentieth Amendment does not then authorize Congress to address such a situation by law, and the Presidential Succession Act cannot govern this situation. As mentioned earlier, only the Twelfth Amendment may then govern the situation unless either (i) the Senate finally elects a Vice President by Inauguration Day, and the elected Vice President meets all the constitutional eligibility requirements of the office of President, i.e., qualifies for the office, or (ii) a President or a Vice President qualify in the next election. A similar problem arises when a Vice President has been chosen either by the Electoral College or by the Senate, but has failed to qualify, whereas a President has not been

chosen by Inauguration Day, i.e., both the Electoral College and the House of Representatives have failed to elect a President.

Thus, the fuzzy language employed in both the Twelfth and the Twentieth Amendments may cause uncertainty in an election by making unclear how this election can be completed. This uncertainty may force the Supreme Court to intervene in the course of the election process, which American society will not appreciate [1].

Once again, the author would like to emphasize that all the reasoning presented in this section aims only at drawing attention to this fuzzy language rather than at offering the author's judgment on particular possible interpretations of the text of both amendments.

3.3 The Presidential Succession Act and Contingent Elections

The Presidential Succession Act is a federal statute, which was adopted under the authority given to Congress by the Twentieth Amendment (see Sect. 2.6). The act covers five situations in a presidential election—removal from office, death, resignation, inability, and failure to qualify—in which there is no one to "… discharge the Powers and Duties of the Office of President…" [1, 4, 19]. Any of the last four from among the above five situations may occur in the course of an election in which either a President-elect or a Vice President-elect or both have been chosen. If, for instance, it was found that both elected persons do not meet the constitutional eligibility requirements to hold the office of President, the act may govern the completion of the election. However, in the firth situation, this is the case only if the Supreme Court establishes that either the verb "to qualify" is to be construed in sense (b) (see Sect. 3.2), i.e., "to have abilities required to do or to have something," or if the Court decides that both definitions, cited in Sect. 3.2, are to be covered by the act.

The act determines the list of officers who are eligible to fill the office of President and the order in which they can fill the office. The officer who finally fills the office, after taking the oath as an acting President should nominate the acting Vice President who is to be confirmed by Congress [40].

This list includes the Speaker of the House of Representatives, the President pro tempore of the Senate, the Secretary of State, the Secretary of the Treasure, the Secretary of Defense, the Attorney General, the Secretary of Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Secretary of Energy, the Secretary of Education, the Secretary of Veteran Affairs, and the Secretary of Homeland Security [4, 34]. (The President pro tempore of the Senate is a Senator who acts as President of the Senate when the President of the Senate—i.e., the sitting Vice President—is absent

and cannot preside over a particular session of the Senate. Traditionally, the President pro tempore of the Senate is the Senator from a majority party in the Senate who has been a Senator for the longest period of time. Generally, the President pro tempore of the Senate is elected by the Senate.)

The act requires that in order to become the acting President, the Speaker of the House of Representatives shall resign both as the Speaker and as a Representative, and the President pro tempore of the Senate shall resign both as the President pro tempore and as the Senator. The same is true for all the other officers on the above list—they are considered resigned from their positions in the presidential administration as a result of taking the oath of the office of President [4].

What happens to an individual who fills the office of President as a result of the application of the Presidential Succession Act if either a President or a Vice President has become available, i.e., elected in Congress before the expiration of the term for which the individual was appointed the acting President though after Inauguration Day?

As egregious as it may seem, this person must resign as the acting President, and there is nothing in the act that determines her/his further status in the government. Since the person had to resign from the office that allowed him to become eligible to fill the office of President according to the act, this person has no formal privilege to serve in the government.

Moreover, the duration of acting as President by any individual from the above list who has taken the oath of the office of President is uncertain. Indeed, any so called prior-entitled officer who becomes "able to act" and is qualified to fill the office of President can unseat the Acting President. (A prior-entitled officer is the one whose position in the above list of eligible officers is higher than that of the officer who became the Acting President.)

Filling the office of President is a must for the Speaker of the House of Representatives (provided this position is not vacant, and the act is applied) unless she/he fails to qualify for the office of President. The same is true for the President pro tempore of the Senate if the Speaker does not fill the office of President.

Can election stalemates emerge as a result of executing the Presidential Succession Act?

Yes, they can. Besides election stalemates associated with the ambiguity of the language employed in the Twentieth Amendment, there could be stalemates associated with executing the Presidential Succession Act.

Let us consider a contingent election, and let us assume that the Presidential Succession Act is applicable to govern this election. The act states that it can be applied only to "… such officers as are eligible to the office of President under the Constitution…." [4]. However, the requirements that must be met by American citizens to be eligible to any of the offices listed in the act and the requirements to be met to be eligible to the office of President are different. For instance, any officer from the list mentioned earlier in this section, including Secretary of State, may not be a natural born citizen. Hypothetically, at the time at which the act is to be applied, some officers from the list who could qualify as an Acting President may turn out to be either under impeachment or disabled. The other officers from the list

may, however, turn out to be ineligible to the office of President. If this were to happen, a stalemate would occur.

Thus, until Congress and the Supreme Court clarify fuzzy election rules determining the voting behavior of electors and the voting procedures in Congress, election stalemates may have a chance to occur in presidential elections, no matter how remote or even implausible they may currently seem.

The author understands that the reasoning presented in Chapter 3 may not be in line with the opinions of constitutional scholars on matters associated with the text of the Twelfth Amendment, considered there, and may even irritate the scholars. However, one should bear in mind that this reasoning is presented in the framework of the analysis of logically possible interpretations of the amendment's text, no matter how strange or even egregious these interpretations may seem. It is important to stress that only Supreme Court decisions on these interpretations or new constitutional amendments addressing the corresponding matters, rather than the opinions of even respected and prominent constitutional scholars can clarify fuzzy election rules embedded in the amendment. The fact that these rules have never before been exposed and analyzed from the angle proposed by the author does not mean that they are not fuzzy. Rather, it reflects the customary practice of considering presidential election problems only when some weird or extreme election outcomes are looming or happening (as in the 2000 presidential election of recent memory). In any case, the availability of this reasoning to all interested voters makes one hope that they, the voters, may request to clarify these fuzzy rules before the application of these rules becomes inevitable in the course of a particular presidential election.